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Stalling a Norm's Trajectory?: Revisiting U.N. Security Council Resolution 1973 on Libya and its Ramifications for the Principle of the Responsibility to Protect

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**STALLING A NORM'S TRAJECTORY?: REVISITING U.N.
SECURITY COUNCIL RESOLUTION 1973 ON LIBYA AND ITS
RAMIFICATIONS FOR THE PRINCIPLE OF THE
RESPONSIBILITY TO PROTECT**

TIYANJANA MALUWA*

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INTRODUCTION

The year 2021 marked a decade since the adoption of Resolution 1973 by the United Nations Security Council (Security Council).¹ The Security Council adopted the resolution on March 17, 2011, one month after the start of protests against Libyan ruler Colonel Muammar Gaddafi in the city of Benghazi, demanding an end to his regime.² The rebellion was part of a wave of pro-democracy uprisings, known as the Arab spring³, which began in Tunisia in late 2010. Gaddafi responded by unleashing brutal violence on the protestors and declaring that he would crush them like in Tiananmen Square.⁴ He also announced he would hunt down and clear the country of the protestors, which he referred to as “cockroaches.”⁵ The Security Council acted as the protests spread to the capital of Tripoli and other parts of the country, while Gaddafi’s loyal forces launched airstrikes against rebel-held cities and locations.⁶ Resolution 1973 authorized UN member states that had notified the UN Secretary-General and the Secretary-General of the League of Arab States (LAS), to “take all necessary measures

1. See generally S.C. Res. 1973 (Mar. 17, 2011).

2. Spencer Zifcak, *The Responsibility to Protect after Libya and Syria*, 13 MELB. J. INT’L L. 59, 60-63 (2012). See also Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT’L L. 355, 378 (2012).

3. The term “Arab Spring” was commonly used by scholars of Arab affairs and media analysts and commentators to describe a series of anti-government protests, uprisings, and armed rebellions that spread across parts of North Africa and the Middle East beginning in late 2010. These uprisings, sometimes also referred to as the “Arab Awakening” and the “Arab Revolutions”, toppled entrenched rulers in four countries: Tunisia, Libya, Egypt, and Yemen. In other countries, including Algeria, Iraq, Lebanon, Morocco, Saudi Arabia, Syria, and Oman, however, the uprisings were suppressed, subsided or never materialized. See generally THE ARAB SPRING: CHANGE AND RESISTANCE IN THE MIDDLE EAST (Mark L. Haas & David W. Lesch eds., 2012).

4. See Zifcak, *supra* note 2, at 60; Ian Black, *Gaddafi urges violent show-down and tells Libya “I’ll die like a martyr”*, THE GUARDIAN (Feb. 22, 2011), <https://www.theguardian.com/world/2011/feb/22/muammar-gaddafi-urges-violent-showdown>.

5. Zifcak, *supra* note 2; see also Kareem Fahim & David D. Kirkpatrick, *Qaddafi’s Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES (Feb. 22, 2011), <http://www.nytimes.com/2011/02/23/world/africa/23libya.html?pagewanted=all>.

6. Zifcak, *supra* note 2, at 65.

[to] protect civilians and civilian populated areas under threat of [at-
tack].”⁷ It also established a no-fly zone over the airspace of Libya,
which the LAS had asked for five days prior to its adoption.⁸ Member
states were asked to cooperate closely with each other and with the
LAS Secretary-General. The member states were also required to in-
form the UN Secretary-General and the LAS Secretary-General of all
necessary measures taken by them to implement the no-fly zone.⁹

Less than two days after the adoption of Resolution 1973, military
forces from France, the United Kingdom and, later, Canada, the Unit-
ed States, and other allies from the North Atlantic Treaty Organization
(NATO) launched aerial bombing raids against Gaddafi’s military and
intelligence forces and resources.¹⁰ On March 31, 2011, NATO as-
sumed formal command of this operation, which it ended on October
31, 2011.¹¹ By then, the Gaddafi regime had fallen and forces belong-
ing to the National Transitional Council (NTC), established by anti-
Gaddafi political groups as an alternative government, had captured
and killed him near the city of Sirte on October 20, 2011.¹² Since the
adoption of Resolution 1973, Libya has not been the peaceful and
united democratic state, for which the protesters took to the streets and
rebels took up arms. A democratically elected post-Gaddafi govern-
ment is yet to be established.¹³

This Article aims to offer retrospective reflections on Resolution
1973. Specifically, the focus is on the repercussions from the imple-
mentation of the Resolution on the normative trajectory of the princi-
ple of the Responsibility to Protect (R2P). The R2P was unanimously

7. S.C. Res. 1973, *supra* note 1, ¶ 4.

8. Richard Leiby & Muhammad Mansour, *Arab League asks UN for no-fly zone
over Libya*, THE WASH. POST (Mar. 12, 2011), https://www.washingtonpost.com/world/arab-league-asks-un-for-no-fly-zone-over-libya/2011/03/12/ABoie0R_story.html.

9. S.C. Res. 1973, *supra* note 1, ¶¶ 10-11.

10. Paul R. Williams & Colleen Popken, *Security Council Resolution 1973 on
Libya: A Moment of Legal and Moral Clarity*, 44 CASE W. RES. J. INT’L L. 225, 228
(2011).

11. *See id.*

12. *Id.* at 242.

13. A presidential election that was supposed to be organized by the UN-
sponsored Government of National Unity was postponed two days prior to its
scheduled date of December 24, 2021. As at this writing (June 2022), no new date
has been set due to disagreements among the major Libyan political parties and fac-
tions.

adopted at the World Summit held at the UN General Assembly in September 2005.¹⁴ The central question is whether, and to what extent, the implementation of Resolution 1973 killed or merely stalled the trajectory of the R2P norm. NATO's intervention in Libya has been the subject of much discussion in literature concerning legal and international relations over the years. The aim of this Article is neither to rehearse the wide-ranging views advanced in these writings nor to critique them generally. This discussion engages with only some of the viewpoints, as they are relevant to the specific questions posed above, while endeavoring to advance the debate further. Most of these commentaries appeared in the first few years following the adoption of the Resolution and the NATO intervention. Debates over this issue continue today. The debates have been re-ignited by new questions regarding the failure of the international community to invoke R2P with respect to the situations in Syria and Myanmar.¹⁵ These brief reflections on Resolution 1973 and its ramifications are relevant given these ongoing crises and other potential crises yet to arise.

Part I of this Article introduces the three pillars of R2P which provides the justification for the adoption of Resolution 1973 with the related principle of Protection of Civilians (PoC). It further addresses the context in which the Resolution was adopted. Then, Part II examines the main points of disagreement surrounding the implementation of the resolution: (1) the issue of its legality and legitimacy; (2) the African Union's (AU) response to the Security Council's decision; and (3) NATO's intervention in Libya. Next, Part III addresses the core question of whether ramifications result from the implementation of the Resolution for the trajectory of R2P. In this Part, this Article will first discuss the positions of some of the key members of the Security Council on the adoption of Resolution 1973 and their historical

14. G.A. Res. 60/1, ¶¶ 138-39 (Sept. 16, 2005).

15. See, e.g., Zifcak, *supra* note 2; See, Kenneth Watkin, *Humanitarian Intervention and the Responsibility to Protect: Where it Stands in 2020*, 26 SW. J. INT'L L. 213, 233 (2020). See generally David Berman & Christopher Michaelsen, *Intervention in Libya: Another Nail in the Coffin for the Responsibility-to-Protect?*, 14 INT'L COMM. L. REV. 337 (2012); Jennifer Welsh, *The Responsibility to Protect After Libya and Syria*, 145(4) DAEDALUS 75 (2016) [hereinafter *The Responsibility to Protect*]; Nathalie Tocci, *On Power and Norms: Libya, Syria, and the Responsibility to Protect*, 8 GLOBAL RESP. PROTECT 51 (2016); YASMINE NAHLAWI, *THE RESPONSIBILITY TO PROTECT IN LIBYA AND SYRIA: MASS ATROCITIES, HUMAN PROTECTION, AND INTERNATIONAL LAW* (2019).

disposition towards the principle of R2P at its adoption in 2005 and afterwards. Next, this Article will address some issues identified as impediments to facilitate a clearer understanding of R2P. It will also discuss the purported death of the R2P norm and Resolution 1973's declared objective of protecting civilians and the PoC norm. This Article concludes that, although stalled, R2P remains alive and relevant.

I. THE RESPONSIBILITY TO PROTECT AND THE ADOPTION OF RESOLUTION 1973 (2011)

The principle of the R2P has been the subject of much discussion since its adoption. An ongoing scholarly debate exists as to whether the R2P has achieved the status of a norm. Similarly, scholars have discussed the effect this norm has on the behavior of states. These debates cover a range of issues, including the nature of the norm, whether it is legal or merely moral or political, its content and scope, and what it entails. The wide-ranging views advanced in the copious literature on R2P cannot adequately be recounted here, but the main tenets of the principle may be briefly summarized as follows.¹⁶

The R2P principle stands on three mutually reinforcing pillars. The first pillar states that each state has a responsibility to protect its population from mass atrocity crimes, including genocide, war crimes, crimes against humanity and ethnic cleansing.¹⁷ The second pillar stipulates that the international community should encourage and assist states failing in its first pillar obligations.¹⁸ The final pillar provides that if a state is manifestly failing to protect its populations, the international community must be prepared to take collective action in

16. See generally Watkin, *supra* note 15; Ramesh Thakur, *Review Article: The Responsibility to Protect at 15*, 92 INT'L AFF. 415 (2016) (reviewing the major literature on various aspects of R2P covering the first fifteen years since the adoption of the principle). See also Jennifer M. Welsh, *Norm Robustness and the Responsibility to Protect*, 4 J. GLOB. SEC. STUD. 53 (2019) [hereinafter *Norm Robustness*]; THE RESPONSIBILITY TO PROTECT: PERSPECTIVES ON THE CONCEPT'S MEANING, PROPER APPLICATION AND VALUE (Sonja Grover ed., 2017); ALEX BELLAMY & EDWARD C. LUCK, *THE RESPONSIBILITY TO PROTECT: FROM PROMISE TO PRACTICE* (2019); P.M. BUTCHARD, *THE RESPONSIBILITY TO PROTECT AND THE FAILURES OF THE UNITED NATIONS SECURITY COUNCIL* (2020); *CONSTRUCTING THE RESPONSIBILITY TO PROTECT* (Charles T. Hunt & Phil Orchard eds., 2020).

17. Welsh, *The Responsibility to Protect*, *supra* note 15, at 76.

18. *Id.*

a timely and decisive manner. The third pillar is invoked on a case-by-case basis and in accordance with the UN Charter.¹⁹

It is important to underscore that UN member states adopted the R2P principle at the World Summit as a political commitment. In doing so, they were not establishing new legal obligations but confirming a diffuse set of pre-existing legal principles and rules of international law. These are contained in the UN Charter, the Convention on the Prevention and Punishment of the Crime of Genocide of 1948²⁰, the four Geneva Conventions of 1949²¹ and their additional protocols²² establishing international legal standards for humanitarian treatment in war, various international human rights treaties, and the Rome Statute of the International Criminal Court (ICC) of 1998.²³

UN member states have reiterated their political commitment to R2P through the adoption of subsequent resolutions in various UN bodies. From January 2006 to date, the Security Council has adopted 86 resolutions,²⁴ and issued 14 presidential statements.²⁵ The resolu-

19. Williams & Popken, *supra* note 10, at 227.

20. Convention on the Prevention and Punishment on the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S 277.

21. The four Geneva Conventions are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II); Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III); and Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV). *See generally The Geneva Conventions and Their Commentaries*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>.

22. Two additional protocols were adopted on June 8, 1977, as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflict (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of Non-International Armed Conflict (Protocol II). *See id.* A third additional protocol was adopted on December 8, 2005: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III). *See id.*

23. Welsh, *The Responsibility to Protect*, *supra* note 15, at 77.

24. The first and most recent resolutions, respectively, are S.C. Res. 1653 (Jan. 27, 2006) (on the situation in the Democratic Republic of the Congo and in Burundi) and S.C. Res. 2625 (Mar. 15, 2022) (on the situation in South Sudan).

25. The first and most recent statements by the President of the Security Council, both on the general theme of the maintenance of international peace and

tions and statements contain references to the responsibility (of the concerned member states) to protect, with several of these recalling in generic language that the government of the concerned state “[bears] the primary responsibility to protect [populations] from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁶ In practically all these resolutions, the references to R2P are couched in preambular provisions. The notable exceptions incorporating references to R2P in the operative provisions are two general, non-country specific resolutions adopted in April and August 2014, through these resolutions, the Security Council “*calls upon* States to recommit to prevent and fight against genocide and other serious crimes under international law, and *reaffirms* paragraphs 138 and 139 of the 2005 World Summit Outcome [Document] on the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.”²⁷ Some of these resolutions authorized peacekeeping missions,²⁸

security, are, respectively, S.C. Pres. Statement 2011/18 (Sept. 22, 2011); S.C. Pres. Statement 2018/1 (Jan. 18, 2018).

26. See, e.g., among the most recent resolutions, S.C. Res. 2556 (Dec. 18, 2020); S.C. Res. 2567 (Mar. 12, 2021); S.C. Res. 2577 (May 28, 2021); S.C. Res. 2605 (Nov. 12, 2021); and S.C. Res. 2612 (Dec. 20, 2021).

27. S.C. Res. 2150 (April 16, 2014) (on the prevention of genocide and other serious crimes under international law) and S.C. Res. 2171 (Aug. 21, 2014) (on the prevention of armed conflicts).

28. There is no common definition of peacekeeping, and the term is not used in the Charter. In fact, the Charter does not expressly provide for what are now commonly called peacekeeping missions, namely operations involving contingents from different countries as United Nations forces or observers designed to maintain peace in civil wars or provide humanitarian assistance to civilians caught up in conflicts. Traditionally, peacekeeping involves the deployment of military personnel as monitors or observers under restricted rules of engagement (i.e., not involving the use of force, except in highly circumscribed situations such as self-defense) once a cease-fire has been negotiated between warring parties. See Muna Ndulo, *United Nations Peacekeeping Operations and Security and Reconstruction*, 44 AKRON L. REV. 769, 772-774 (2011). See also JOHN DUGARD, MAX DU PLESSIS, TIYANJANA MALUWA & DIRE TLADI, *DUGARD'S INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE* 723-726 (5th ed., 2018). In his report in 1992, U.N. Secretary-General Boutros Boutros-Ghali described peacekeeping as “[the] deployment of a United Nations presence in the field, hitherto with the consent of all parties concerned, normally involving United Nations military and/or police personnel and frequently civilians as well.” See U.N. Secretary-General, *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping*, ¶ 20, U.N. Doc. A/47/277/S/24111, (June 17, 1992).

in countries such as South Sudan²⁹ and Mali.³⁰ Since 2009, the General Assembly has held annual informal interactive dialogues on R2P. On its part, since 2008 the Human Rights Council (HRC) has adopted 58 resolutions referring to the responsibility to protect or the prevention of genocide in country-specific situations.³¹ On July 17, 2020, the HRC adopted the first stand-alone thematic resolution on R2P.³²

Facially, the widespread acceptance by states of R2P is beyond question, even by those that had initially opposed it. But this acceptance is not absolute. Among the five permanent members of the Security Council (P5), China and Russia (P2) remain hesitant about supporting the third pillar.³³ They have signified their opposition on several occasions. For example, both China and Russia abstained on the vote on Resolution 1973 and subsequently vetoed draft resolutions seeking to authorize intervention in Syria and Myanmar.³⁴ The disjuncture between expressions of commitment to the principle reflected in the various resolutions and the actual invocation of the principle in specific situations reflects continuing disagreement. This disagreement is unrelated to the content of the principle, but related to the questions of its *appropriateness* and *manner* of its implementation.

The Security Council adopted Resolution 1973 to follow up on its earlier decisions contained in Resolution 1970. Resolution 1970, which the Security Council adopted on February 26, 2011, had condemned the use of lethal force by the Libyan government against protestors and imposed an arms embargo, a travel ban, and an assets freeze in connection with the situation in Libya.³⁵ In part, Resolution 1973 was adopted to strengthen the measures set out in the previous

29. S.C. Res. 1996 (July 8, 2011).

30. S.C. Res. 2085 (Dec. 20, 2012).

31. The first Human Rights Council resolution containing a reference to R2P was Resolution 7/25 (Prevention of Genocide), Human Rights Council Res. 7/25, A/HRC/RES/7/25, at 3 (Mar. 28, 2008). The fifty-eighth, and most recent, is Resolution 46/29 (South Sudan), Human Rights Council Res. 46/29, U.N. DOC. A/HRC/RES/46/29, at 2 (Mar. 24, 2021).

32. Human Rights Council Res. 44/14, U.N. DOC. A/HRC/RES/44/14 (July 17, 2020).

33. Williams & Popken, *supra* note 10, at 230.

34. Welsh, *Norm Robustness*, *supra* note 16, at 57.

35. *See generally* S.C. Res. 1970 (Feb. 26, 2011).

resolution.³⁶ For example, one measure strengthened the demand for an immediate end of the violence and called for steps to fulfil the legitimate demands of the population, which the Libyan authorities were not respecting.³⁷ Thus, the two resolutions signified the Security Council's new approach to civilian protection, bringing together the two evolving norms of R2P and PoC in the same peace operation. However, they also raised several questions including: the role of politics in Security Council decision-making; the ability of powerful members to manipulate the process to advance their national interest; and recalibrating their geopolitical power under the guise of promoting the common good.³⁸

Resolution 1970 was adopted unanimously by the fifteen members of the Security Council. By contrast, Resolution 1973 was adopted with the affirmative votes of ten members. The ten members of the Security Council included three permanent members (France, United Kingdom, and United States (P3)); and seven non-permanent members—which included Bosnia-Herzegovina, Colombia, Lebanon, and Portugal, in addition to three African states (Gabon, Nigeria, and South Africa (A3)).³⁹ These countries believed that the resolution was necessary to prevent Gaddafi's forces from carrying out further attacks against the Libyan opposition forces.⁴⁰ Accordingly, they considered the resolution an appropriate response to the Gaddafi regime's disregard of Resolution 1970.⁴¹ Significantly, while no member voted against the resolution, five abstained, namely Brazil, China, Germany,

36. S.C. Res. 1973, *supra* note 1.

37. *Id.* ¶ 1.

38. See Tom Keating, *The UN Security Council on Libya: Legitimation or Dissimulation?*, in LIBYA, THE RESPONSIBILITY TO PROTECT AND THE FUTURE OF HUMANITARIAN INTERVENTION 162, 163 (A. Hehir & R. Murray eds., 2013). See also KARIN WESTER, INTERVENTION IN LIBYA: THE RESPONSIBILITY TO PROTECT IN NORTH AFRICA 124, 126, 131 (2020).

39. U.N. SCOR, 66th Sess., 6498th mtg. at 3, U.N. DOC. S/PV.6498 (Mar. 17, 2011).

40. See, e.g., *Id.* (statement by the representative of France: “We do not have much time left. [Every] hour and day that goes by means a further clampdown and repression for the freedom-loving civilian population, in particular the people of Benghazi.”).

41. See S.C. Res. 1973, *supra* note 1, at 1, pmbl., 2nd consideration (“*Deploring* the failure of the Libyan authorities to comply with resolution 1970 (2011).”).

India, and Russia.⁴² It is particularly notable that neither China nor Russia vetoed the resolution.⁴³ These members abstained for a variety of reasons, including fears of a protracted military conflict that could involve the broader region, and the massive loss of civilian life.⁴⁴ Other concerns related to the uncertainty of enforcing the no-fly zone include the need to protect Libya's unity and territorial integrity.⁴⁵ Another concern was the lack of unanimity among the members regarding the appropriateness of invoking the principle of R2P in this situation, even if indirectly. Resolution 1973 referred to R2P only in the preamble to the resolution, by "*reiterating* the responsibility of the Libyan authorities to protect the Libyan population and *reaffirming* that parties to armed conflict bear the primary responsibility to take all necessary steps to ensure the protection of civilians."⁴⁶

The positions of each of the abstaining members may be broadly summarized as follows. First, while acknowledging the need to strengthen the international sanctions imposed by the previous resolution, Germany was concerned that the implementation of Resolution 1973 would result in the large-scale loss of life and a "protracted military conflict."⁴⁷ Second, Brazil argued that the resolution provided for measures that exceeded the minimum needed to protect the civilian population.⁴⁸ It believed that humanitarian intervention would exacerbate the situation in Libya, "causing more harm than good [to] civil-

42. See generally U.N. SCOR, 66th Sess., 6498th mtg., *supra* note 39.

43. See generally *id.*

44. *Id.* at 5-6, (statement by the representative of Germany: "If the steps proposed turn out to be ineffective, we see the danger of being drawn into a protracted military conflict that would affect the wider region. We should not enter into a military confrontation on the optimistic assumption that quick results with few casualties will be achieved."; and statement by the representative of Brazil: "We are concerned that such measures may have the unintended effect of exacerbating tensions on the ground and causing more harm than good to the very same civilians we are committed to protecting.").

45. See, e.g., *id.* at 6 (statement by the representative of India: "It is of course very important that there be full respect for the sovereignty, unity and territorial integrity of Libya.").

46. S.C. Res. 1973, *supra* note 1, at 1, pmbl., 4th consideration. See also S.C. Res. 1970, *supra* note 35, at 2, pmbl., 9th consideration ("Recalling the Libyan authorities' responsibility to protect its population.").

47. U.N. SCOR, 66th Sess., 6498th mtg., *supra* note 39, at 5-6.

48. *Id.* at 6.

ians.”⁴⁹ Third, China, India, and Russia preferred more political dialogue and processes to secure a ceasefire and resolve the conflict peacefully.⁵⁰ For example, Russia warned against “unpredicted consequences” and expressed concerns about who would enforce the no-fly zone and how it would be done.⁵¹ Similarly, India raised the issue of who would implement the resolution, how that would be accomplished, and its unintended consequences if any.⁵² India also called for full respect for the sovereignty, unity, and territorial integrity of Libya.⁵³ Additionally, China preferred that all peaceful means be exhausted before authorizing force.⁵⁴ It “has always emphasized that, in its relevant actions, the Security Council should follow the UN Charter and the norms governing international law, respect the sovereignty, independence, unity and territorial integrity of Libya and resolve the current crisis peacefully.”⁵⁵ Nevertheless, China’s position remains consistent with the guiding principles it traditionally invoked with UN peacekeeping operations. Specifically, its adherence to the principles of state sovereignty, non-interference in the domestic affairs of states, and the resolution of conflicts— including internal armed conflicts through diplomatic and peaceful means.

Rather than casting a negative vote, which would have been a veto in the case of China and Russia, the members that abstained from voting on Resolution 1973 did so to balance two considerations. First, as major or rising economic powers, some members of the Security Council made calculations based on their respective economic and trade activities or interests in Libya’s energy industry.⁵⁶ This makes

49. *Id.*

50. *Id.* at 6, 8, 10.

51. *Id.* at 8; *see also* Press Release, 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, U.N. Press Release SC/10200 (Mar. 17, 2011).

52. U.N. SCOR, 66th Sess., 6498th mtg., *supra* note 39, at 6.

53. *Id.* at 6.

54. *Id.* at 10.

55. *Id.*

56. *See* U.S. Energy Info. Admin., *Libya is a major energy exporter, especially to Europe*, TODAY IN ENERGY (Mar. 21, 2011), <https://www.eia.gov/todayinenergy/detail.php?id=590#> (reporting that between January and November 2010, Germany and China accounted for 10% and 11%, respectively, of Libya’s oil exports by des-

them more inclined to avoid direct confrontation with the Libyan government, unlike the A3 countries.⁵⁷ The representative of India spoke to this: “[the] financial measures that are proposed in the resolution could impact directly or through indirect routes the ongoing trade and investment activities of a number of Member States, thereby affecting the economic interests of the Libyan people and others dependent on these trade and economic ties.”⁵⁸ Second, once the international community—including the relevant regional organizations such as the AU and LAS—agreed there was a need to intervene on humanitarian grounds, it would have been unconscionable to vote against the resolution. Given the circumstances, abstention was the diplomatically preferable option.⁵⁹

In adopting and implementing Resolution 1973, one question to consider is whether the Security Council contributed to the advancement of R2P. Although the Security Council has subsequently referred to the responsibility to protect in the context of certain peacekeeping operations,⁶⁰ Resolution 1973 authorized military action without explicitly referencing the responsibility to protect doctrine in the relevant operative provisions.⁶¹ The Security Council made a passing reference to the doctrine in the preamble to the resolution.⁶² Despite this, commentators have argued that the desire to implement the responsi-

tionation, and that 3% of China’s imports in 2010 were from Libya). The NATO partners were just as driven in their support for the anti-Gaddafi NTC rebels by the spoils of war and scramble for assets. See Christopher Davidson, *Why Was Muammar Qadhafi Really Removed?*, 24 MIDDLE. E. POL’Y 91, 110-111 (2017) (discussing the respective interests of the British, French, and Italian governments, commercial firms in the oil and energy industry, and the revelation that “on a follow-up trip to Libya in September 2011, [President] Sarkozy had urged the NTC to honor the promised ‘reservation’ of part of its oil and gas industry for French firms.”).

57. See Davidson, *supra* note 56, at 110-111.

58. U.N. SCOR, 66th Sess., 6498th mtg., *supra* note 39, at 6.

59. See Alex Bellamy & Paul Williams, *The New Politics of Protection? Côte d’Ivoire, Libya and the Responsibility to Protect*, 87 INT’L AFF. 825, 841 (2011) (arguing that once the LAS had called for a no-fly zone, the Security Council dynamics changed, making opposition to enforcement more difficult; and further, bringing the United States on board added to the feasibility of the military action, and pushed the remaining skeptical members towards abstention).

60. See S.C. Res. 1996, *supra* note 29; S.C. Res. 2085, *supra* note 30.

61. See S.C. Res. 1973, *supra* note 1.

62. *Id.*

bility to protect doctrine provided the underlying rationale for Resolution 1973.⁶³ Following its adoption, UN Secretary-General Ban Ki-moon emphasized the historic dimension of the resolution as it “affirms, clearly and unequivocally, the international community’s determination to fulfil[] its responsibility to protect civilians from violence perpetrated upon them by their own Government.”⁶⁴

II. THE LIBYAN CONFLICT: THE SECURITY COUNCIL’S ACTION AND THE AU’S RESPONSE

A. *Resolution 1973 and NATO Intervention: Justifiability, Legality, and Legitimacy*

The NATO intervention in Libya became the subject of debate almost as soon as it started and has remained so since. The debate has revolved around issues of the justifiability of the resolution and the legality and legitimacy of NATO’s intervention. Although Resolution 1973 did not explicitly mention the organization who initiated the bombing,⁶⁵ it soon became apparent that the P3 had anticipated NATO’s involvement in its implementation.⁶⁶ But the P3’s disregard of efforts to mediate among Libyan protagonists in order to resolve the conflict peacefully, and secure a democratic transition, as well as the marginalization of the AU, contrasts with NATO’s implied involvement in the implementation of Resolution 1973.⁶⁷

63. See, e.g., Williams & Popken, *supra* note 10, at 227, n. 7. See also Pierre Thielbörger, *The Status and Future of International Law after the Libya Intervention*, 4 GOETTINGEN J. INT’L L. 11, 23-26 (2012) (noting the Security Council’s ambivalence in invoking the doctrine); Bellamy & Williams, *supra* note 50, at 828; Sarah da Mota, *The Libyan Spring and NATO: An Opportune Responsibility*, 10 HUM. SEC. PERSP. J. 91, 105, 110 (2014); Peter Hilpold, *Intervening in the Name of Humanity: R2P and the Power of Ideas*, 17 J. CONFLICT & SEC. L. 49 (2012).

64. Press Release, Security Council, Secretary-General Says Security Council Action on Libya Affirms International Community’s Determination to Protect Civilians from Own Government’s Violence, U.N. Press Release SG/SM 13454-SC /10201-AFR/2144 (Mar. 18, 2011).

65. Patrick Terry, *The Libya Intervention (2011): Neither Lawful, nor Successful*, 48 COMP. & INT’L L. J. S. AFR. 162, 162 (2015).

66. *Id.* at 165-66.

67. See Sandy Africa & Rantia Pretorius, *South Africa, the African Union and the Responsibility to Protect: The Case of Libya*, 12 AFR. HUM. RTS. L. J. 394, 411-12 (2012); Alex de Waal, *African Roles in the Libyan Conflict of 2011*, 89 INT’L

When the AU Peace and Security Council first discussed the Libyan conflict at its meeting on February 23, 2011, it did not recommend intervention on humanitarian grounds.⁶⁸ It appeared that the crisis offered the AU a justification to invoke Article 4(h) of the Constitutive Act.⁶⁹ This provides for the “right [of the Union] to intervene in a [M]ember [S]tate pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.”⁷⁰ The AU Peace and Security Council strongly condemned the indiscriminate and excessive use of force and lethal weapons, which not only violated human rights and international humanitarian law, but also contributed to the loss of human life.⁷¹ Yet, the Security Council did not decide that these violations amounted to any of the crimes enumerated in Article 4(h).⁷² One commentator has suggested that Gaddafi’s government had not, at that point, committed any of these crimes.⁷³ It is reasonable to conclude that the AU Peace and Security Council made the same assumption. The AU decided not to invoke its right to intervene and embarked on an unsuccessful search for a peaceful solution to the crisis.⁷⁴

Another potential political consideration behind the decision by the AU Peace and Security Council was the possibility that the AU would find itself and the LAS on opposite sides of the Libyan crisis. For most of his rule, and particularly his last two decades, Gaddafi pivoted away from the LAS, which Libya joined in 1953, in favor of

AFF. 365 (2013); Geir Ulfstein & Hege Christiansen, *The Legality of the NATO Bombing in Libya*, 62 INT’L & COMP. L. Q. 159, 165, 167 (2013).

68. Africa & Pretorius, *supra* note 67, at 408.

69. *Id.* at 403.

70. Article 4 of the Constitutive Act of the African Union lists sixteen principles on which the organization is based. Art. 4(h) is unique insofar as it purports to establish a norm—the right of intervention—whose existence is currently not universally accepted and remains contested in international law. *See infra* note 128.

71. African Union Peace and Sec. Council, *Communiqué of the 261st Meeting of the Peace and Security Council*, PSC/PR/COMM(CCLXI) (Feb. 23, 2011) [hereinafter *Communiqué of the 261st Meeting*].

72. Ademola Abbas, *The African Union’s Response to the Libyan Crisis: A Plea for Objectivity*, 7 AFR. J. LEGAL STUD. 123, 128 (2014).

73. *Id.* at 132-33.

74. *Id.* at 133.

the AU.⁷⁵ Despite his grievances against the organization and being shunned by most of his fellow Arab leaders, Gaddafi maintained Libya as a member of the LAS.⁷⁶ When the conflict broke out, the AU and LAS were both concerned that the conflict might engulf the broader region and had a shared interest in a speedy resolution of the problem.⁷⁷ The AU Peace and Security Council let the LAS take the lead in coordinating with the Security Council, acknowledging the latter as geopolitically closer to the problem.⁷⁸ Furthermore, it is reasonable to assume that the AU recognized the likelihood of the LAS opposing any intervention not authorized by the UN. However, crucially, both organizations agreed there should be no external military occupation of any form in any part of Libya, which was reflected in Resolution 1973.⁷⁹

Another reason why the AU did not side-step the Security Council to intervene in Libya is the policy known as the “Ezulwini Consensus,” adopted by the AU Executive Council at an extraordinary session on March 8, 2005.⁸⁰ This policy addressed various issues including UN Security Council reform.⁸¹ The “Ezulwini Consensus” was endorsed by the AU Assembly as a common policy position three years later and addressed the issue of collective security and the use of

75. See Orla Ryan, *Libya's Gaddafi Tells Africa to Unite or Die*, REUTERS (Jun. 30, 2007), <https://www.reuters.com/article/uk-africa-summit-gaddafi/libyas-gaddafi-tells-africa-to-unite-or-die-idUKMOO06837920070701>.

76. Martin Asser, *The Muammar Gaddafi Story*, BBC NEWS (Oct. 21, 2011), <https://www.bbc.com/news/world-africa-12688033>; Nations Online, *Arab League: League of Arab States*, ONE WORLD – NATIONS ONLINE, https://www.nationsonline.org/oneworld/arab_league.htm (Libya became a member of the LAS on Mar. 28, 1953. However, the LAS suspended Libya on Feb. 22, 2011, following the start of the conflict. On Aug. 27, 2011, having been recognized by many LAS members as Libya's legitimate government, the LAS restored Libya's membership when it voted to accredit a representative of the NTC.).

77. African Union Peace and Sec. Council, *Communiqué of the 265th Meeting of the Peace and Security Council*, PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011) [hereinafter *Communiqué of the 265th Meeting*].

78. S.C. Res. 1973, *supra* note 1, ¶ 8.

79. *Id.* ¶ 4.

80. African Union Executive Council, Seventh Ordinary Session, Decision on the Report of the High Level Panel on the Reform of the United Nations [Doc. Ext /EX/CL/2 (VII)], Ext/EX.CL.Dec.1-3 (VII) (Mar. 8, 2005).

81. *Id.*

force.⁸² Under this common policy, the AU reaffirmed the primacy of the Security Council in matters of collective security, including the responsibility to protect, and the legality of the use of force.⁸³ A critical aspect of the policy is that the AU agreed that intervention by regional organizations should take place only with the approval of the Security Council.⁸⁴ All while recognizing that in some situations—and in circumstances requiring urgent action—the Security Council could grant its approval *ex post facto*.⁸⁵ In sum, the AU member states accepted the obligation incumbent upon the AU to seek the authorization of the Security Council before invoking its right to intervene pursuant to Article 4(h).⁸⁶

In terms of its own policy, the AU could not have usurped the role of the Security Council by unilaterally intervening in Libya.⁸⁷ This is true even if it had wished to do so and had the requisite political will and the resources—both of which were a challenge—to carry out such a decision.⁸⁸ The AU Peace and Security Council acted properly by not invoking Article 4(h). To do so without Security Council authorization is a violation of Article 53 of the Charter, a challenge to the Security Council’s primacy, and a contradiction of the “Ezulwini Consensus.”⁸⁹ By contrast, the authority of the Security Council to authorize intervention in Libya was beyond question. The Security Council acted wholly within its authority under the Charter and Chapter VII

82. African Union Assembly, Tenth Ordinary Session, Decision on the Reform of the United Nations Security Council, Assembly of the African Union, Assembly /AU/Dec. 184 (X) (Feb. 2, 2008).

83. Africa & Pretorius, *supra* note 67, at 406.

84. Vassilis Pergantis, *Strange Bedfellows: Exploring the Relationship Between R2P and Art. 4(h) of the African Union Constitutive Act with Regard to Military Intervention*, 6 GLOBAL RESP. PROTECT 295, 314, n. 83 (2014).

85. *Id.*

86. *Id.*

87. *See* Abbas, *supra* note 72, at 132-33.

88. *Id.*

89. U.N. Charter, art. 53 establishes the framework for cooperation between the United Nations and regional organizations with respect to enforcement action to deal with threats to peace and security. Article 53 states in part: “[But] no enforcement action shall be taken under regional arrangements or by regional agencies without authorization of the Security [Council].” Therefore, regional organizations have an obligation to seek authorization from the Security Council before undertaking any intervention involving forcible measures.

powers. The responsibility for overstepping the intended objective of Resolution 1973 in carrying out the enforcement action—and arguably rendering the action unlawful—specifically lies with the P3 states and their NATO allies, and not with the Security Council.⁹⁰

Based on the foregoing, one can categorically conclude the adoption of Resolution 1973 by the Security Council was entirely legal and justifiable. The AU, as a regional body, readily accepted this as a legal and political fact.⁹¹ The legality and legitimacy of NATO's action, however, is not beyond question. As discussed further in the next section, Resolution 1973 was tainted by what initially seems to have been a hidden agenda for regime change. That was not what the Resolution authorized. Subsequently, this was the focus of criticism by some African states, including South Africa, which had supported Resolution 1973.⁹²

If Libya was the crucible in which the international community hoped to test the principle of R2P, the outcome was far from a success. The NATO intervention has had catastrophic consequences for the ability of the Security Council to achieve consensus, especially among the P5, on how to address subsequent internal conflicts and humanitarian crises. The reluctance of four of the five members of the BRICS group of states⁹³ Brazil, China, India, and Russia, which all happened to be members of the Security Council at the time—to support Resolution 1973, foreshadowed a suspicion towards humanitarian intervention advocated by Western powers. This has led to normative

90. See, e.g., Terry, *supra* note 65.

91. Notwithstanding the allegations of marginalization of the African Union by the Security Council with respect to the former's mediation efforts in Libya and the disappointment expressed by African leaders discussed in Part II(B) *infra*, the AU did not formally challenge or contest the decision of the Security Council at the United Nations.

92. U.N. SCOR, 66th Sess., 6627th mtg. at 11, U.N. Doc. S/PV.6627 (Oct. 4, 2011).

93. BRICS: Sources of Information, LIBRARY OF CONGRESS, <https://guides.loc.gov/brics/introduction>. See also generally OLIVER STUENKEL, THE BRICS AND THE FUTURE OF GLOBAL ORDER (2nd ed., 2020). (Brazil, Russia, India, and China founded the group as an informal association of major emerging national economies in 2006. Initially called BRIC, the group changed its acronym to BRICS when South Africa joined in 2010. Among other things, the group aims to enhance coordination and influence of the members' positions in the U.N. and international system.)

resistance and has become a barrier to the application of R2P elsewhere.

*B. The AU's Response to the Security Council's Decision
 and NATO Action in Libya*

When the AU Peace and Security Council first met to discuss the Libyan uprising, it did not invoke Article 4(h) of the AU Constitutive Act.⁹⁴ Rather, it focused on the repression of demonstrations by the Libyan authorities and Gaddafi's threats against the opposition.⁹⁵ The AU Peace and Security Council met again on March 10, 2011, at the level of heads of state and government, and forged a four-point plan as the AU's response to the crisis: first, the immediate cessation of all hostilities; second, the cooperation of the competent Libyan authorities to facilitate the timely delivery of humanitarian assistance to the needy populations; third, the protection of foreign nationals, including the African migrants living in Libya; and fourth, the adoption and implementation of the political reforms necessary for the elimination of the causes of the crisis.⁹⁶ In addition to adopting what became known as the "AU roadmap," the AU Peace and Security Council expressed deep concern that the situation in Libya posed a serious threat to peace and security in both the country and region.⁹⁷ The AU Peace and Security Council also condemned the indiscriminate use of force and lethal weapons, deplored the loss of human life, and reaffirmed the AU's strong commitment to the respect of the unity and territorial integrity of Libya, and rejected any foreign military intervention, whatever the form.⁹⁸

The AU established a High-Level Ad Hoc Committee on the situation in Libya with a three-fold mandate: first, to engage with all the parties and continuously assess the evolution of the situation on the ground; second, to facilitate an inclusive dialogue among the Libyan parties on appropriate reforms; and third, to engage the AU's partners, namely the LAS, Organization of the Islamic Conference (now Organ-

94. See African Union Peace and Security Council, *Communiqué of the 265th Meeting*, *supra* note 77.

95. *Id.* ¶ 2.

96. *Id.* ¶ 7.

97. *Id.* ¶ 3.

98. *Id.* ¶¶ 5-6.

ization of Islamic Cooperation), European Union, and UN to facilitate coordination of efforts and seek their support for the early resolution of the crisis.⁹⁹

The AU's response to the crisis was doomed to fail. To begin with, the AU failed to persuade any of the Libyan parties to the conflict—including Gaddafi, and the three NATO powers in the Security Council—to accept its mediation efforts.¹⁰⁰ Additionally, the AU was responding to the initiatives of the Security Council throughout the crisis, while also trying to reconcile the opposing postures of some of its leading members.¹⁰¹ Disagreements within the AU, especially among the leading regional powers, Nigeria and South Africa, simply exacerbated already fragile political loyalties.¹⁰² It also weakened the AU's negotiating hand with other external players, including the P3, who were the most invested in the success of the NATO operation.¹⁰³

In both the Security Council and General Assembly, the debate on Libya was partly about the different understandings of the authorization given to UN member states under Resolution 1973 to use “all measures necessary.” In the Security Council, the A3 accused the P3 of deliberately misinterpreting the resolution to carry out a pre-determined NATO agenda of regime change in Libya. At the start of its military operation in March 2011, NATO had claimed they were “not engaged in Libya to decide the future of the Libyan people.¹⁰⁴ That is up to the Libyans themselves.”¹⁰⁵ Three months later, in a change of tone and tune, NATO proclaimed that the regime was crumbling and that it was time for Gaddafi to go, given there was no

99. *Id.* ¶ 8. See African Union Peace and Sec. Council, *Report of the Chairperson of the Commission on the Activities of the AU High-Level Ad Hoc Committee on the Situation in Libya*, ¶¶ 5-6, PSCPR/2(CCLXXV) (Apr. 26, 2011), <https://www.reliefweb.int/report/libya/report-chairperson-commission-activities-au-high-level-ad-hoc-committee-situation-libya>.

100. De Waal, *supra* note 67, at 379.

101. *Id.* at 365-66.

102. *Id.* at 367-68.

103. *Id.* at 374.

104. NATO, *Joint Press Briefing on Libya*, NORTH ATLANTIC TREATY ORGANIZATION (Mar. 31, 2011), https://www.nato.int/cps/en/natolive/news_71907.htm.

105. *Id.*; Ulfstein & Christiansen, *supra* note 67, at 165, 167.

future for him or his regime in Libya.¹⁰⁶ To the A3 and other African states, this turn of events merely confirmed their earlier fears of NATO's hidden agenda of regime change.

Alex de Waal and Tom Keating are among many scholars who have commented on NATO's pursuit of regime change in Libya. They have separately argued that the actions of the P3 indicated that their disavowal of regime change "was an exercise in dissimulation."¹⁰⁷ Similarly, Dire Tladi has argued that the implementation of Resolution 1973 led to the collapse of the Muammar Gaddafi regime.¹⁰⁸ Further suggesting that the resolution appeared to authorize regime change through the use of force for the purpose of protecting civilians.¹⁰⁹ This view is more tenable than the contrary position advanced by other writers. For example, Mehrdad Payandeh has essentially argued that NATO's intervention was carried out in accordance with international law.¹¹⁰ While Resolution 1973 did not explicitly authorize regime change, it also did not firmly rule it out.¹¹¹ Notably, he describes what he considers is the most important argument against the assumption that Resolution 1973 excluded regime change through the intervening states in the following terms:

This argument is based on the distinction between means and goals in a Security Council authorization. While Resolution 1973 specifies the goal of authorization—that is, the protection of civilians and civilian populated areas—it does not elaborate on the admissible means that may be employed in order to implement and achieve this goal. This distinction allows for the argument that while regime change may not have been a legitimate *goal* to be pursued on the basis of Resolution 1973, it might have been a legitimate *means* to

106. Imed Lamloum, *Time's up, says NATO – as Zuma meets Gaddafi in Libya*, MAIL & GUARDIAN (May 30, 2011), <https://mg.co.za/article/2011-05-30-game-over-for-gaddafi-as-zuma-arrives-in-libya/>.

107. De Waal, *supra* note 67, at 368; *see generally*, Keating, *supra* note 38.

108. Dire Tladi, *Security Council, the Use of Force and Regime Change: Libya and Côte d'Ivoire*, 37 S. AFR. Y. B. INT'L L. 22, 38-39 (2012) (also discussing S. C. Res. 1975 adopted on Mar. 30, 2011, which authorized intervention in Côte d'Ivoire).

109. *Id.* at 38.

110. *See* Payandeh, *supra* note 2, at 390, 393.

111. *Id.* at 387-89.

pursue the objective of the Security Council mandate, namely the protection of civilians.¹¹²

The problem with this argument is that it is based on the premise that a specific course of action, regime change, that was not explicitly authorized by the Security Council, could nevertheless be justified simply because the resolution did not exclude it. Could Resolution 1973's authorization of UN member states, acting alone or through regional organizations, to "take all necessary measures [to] protect civilians and civilian populated areas under threat of [attack],"¹¹³ be reasonably interpreted by NATO to include a mandate for the wholesale removal of the Gaddafi regime or Libyan government? In Payandeh's view, the answer is "yes" because regime change was a legitimate means for achieving a legitimate goal.¹¹⁴ However, was it a *necessary* means? Furthermore, is it correct, in judging the legitimacy of NATO's action, to look only at "objective facts" and ignore the publicly declared motives of the countries that spearheaded the NATO intervention?¹¹⁵

The Security Council has the unrivaled power to adopt decisions with binding effect on all UN member states pursuant to Article 25 of the Charter.¹¹⁶ The Security Council's decisions are not generally legislative in the sense of applying outside the framework of particular cases relating to the restoration of international peace and security.¹¹⁷ But, the Council's unique power makes it all the more necessary that its decisions, and the intention behind those decisions, be construed

112. *Id.* at 388 (footnote omitted).

113. S.C. Res. 1973, *supra* note 1, ¶¶ 4, 6.

114. Payandeh, *supra* note 2, at 391.

115. Such motive was clearly expressed in a joint op-ed article by the leaders of the U.S., U.K., and France published in some leading newspapers in the U.S. and Europe. See Barack H. Obama, David Cameron & Nicholas Sarkozy, *Libya's Pathway to Peace*, N.Y. TIMES (Apr. 14, 2011), <https://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html>. See *contra* Payandeh, *supra* note 2, at 389 (arguing that the mere fact that the intervening states were contributing to the overthrow of Gaddafi or acting with the political intention of achieving this goal did not render their attacks illegal).

116. U.N. Charter, art. 25 provides: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

117. U.N. SCOR, 6621st mtg. at 1, U.N. Doc. S/PRST/2011/18 (Sept. 22, 2011).

strictly.¹¹⁸ For this reason, one should be cautious not to imply mandates from Security Council resolutions that have not been explicitly authorized, to justify and give legitimacy to unauthorized actions. The ends may not always justify the means, as proponents of the argument supporting the legitimacy of regime change in Libya seem to suggest.

It seems inconceivable that the Security Council could ever intentionally use its powers and authority under Article 25 and Chapter VII to impose a new norm of regime change, as it supposedly did in Libya's case (and in Côte d'Ivoire under Resolution 1975 (2011)). That would necessarily result in the violation of one or more principles of the Charter. The principles of non-intervention¹¹⁹ and the prohibition of the use of force¹²⁰ clearly preclude the forcible removal of a state government by other states. This is true unless the action is authorized by the Security Council against the concerned state or is a case of self-defense, consistent with Article 51 of the Charter.¹²¹ But this was not the case under Resolution 1973. The Security Council has never formally authorized regime change anywhere.

To reiterate the point made earlier: there can be no question that the Security Council acted within its powers under the Charter in authorizing intervention in Libya. However, the implementation of Resolution 1973 was tainted by the deliberate misinterpretations of those who sought to justify the objective of regime change as part of the mandate. Consequently, a cloud of illegitimacy surrounded NATO's action. Arguments remain as to whether regime change was

118. *Id.*

119. U.N. Charter, art. 2(7); *see generally* Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, LEIDEN J. INT'L L. 345 (2009) (examining the existence, nature, content, and application of the principle of non-intervention in contemporary international law, including circumstances that may preclude the wrongfulness of intervention, for example Security Council authorization).

120. U.N. Charter, art. 2(4) (providing that "All Members of the United Nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

121. U.N. Charter, art. 51 (affirming the inherent right of individual or collective self-defense if an armed attack has occurred against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security). The Libyan situation and the action authorized by the Security Council did not fall within the rubric of self-defense, as understood in contemporary international law.

the P3's intended objective from the start or an opportunistic turn that happened as the NATO intervention evolved, and Gaddafi's vulnerability became more obvious. In any case, the outcome in Libya validated the warning that had been expressed by China and Russia, the non-western permanent members of the Security Council, to refrain from using the language and politics of protection to manipulate humanitarian intervention in order to achieve ulterior ends.

Although the NATO intervention ended in regime change with the fall of Gaddafi's regime, it was not designed as such, at least in terms of Resolution 1973. This is not to dispute the fact that subsequently political leaders of the P3 powers did not disguise their preference for Gaddafi's departure.¹²² It was not unreasonable to impute regime change motives from their statements.¹²³ It is reasonable to conclude that the NATO operation quickly descended into a project for regime change once Gaddafi was ousted from his base in Tripoli and the prospects of the rebels dislodging Gaddafi grew. The anger of the AU Assembly against the perceived deception and selective interpretation of Resolution 1973 by the P3 as well as the rejection of the AU's roadmap was apparent in its decision on the Libyan crisis adopted on May 25, 2011:

The Assembly expressed Africa's surprise and disappointment at the attempts to marginalize the continent in the management of the Libyan conflict, recalling that the role of the High-level ad hoc Committee is formally recognized by the Security Council in paragraph 2 of resolution 1973 (2011), and falls within the overall context of Chapter VIII of the UN Charter on the role of regional arrangements in the settlement of disputes among and within their member states. The Assembly also recalled that Africa, particularly the countries of the region, are those that bear the greatest impact of the conflict in Libya, both in terms of security and socio-economic consequences.¹²⁴

122. Obama, Cameron & Sarkozy, *supra* note 115.

123. *Id.*

124. African Union Assembly, Extraordinary Session on the State of Peace and Security in Africa, Decision on the Peaceful Resolution of the Libyan Crisis, EXT/ASSEMBLY/AU/DEC/(01.2011), ¶ 8, (May 25-26, 2011), https://au.int/sites/default/files/pressreleases/24345-other-decision_sur_la_situation_en_libye_eng_0.pdf. See also annex, Letter dated 2 June 2011 from the Permanent Observer of the Afri-

While reiterating the AU's commitment to Resolution 1970 and Resolution 1973, the AU Assembly expressed deep concern at "the dangerous precedence [sic] being set by one-sided interpretation of these resolutions in an attempt to provide a legal authority for military and other actions on the ground are clearly outside the scope of these [resolutions]." ¹²⁵ The Security Council effectively ignored the complaint. Not surprisingly, the Chairperson of the AU Commission reverted to this issue in June 2011. He stated that it was becoming increasingly clear that the pursuit of the military operations would undermine the very purpose for which Resolution 1970 and Resolution 1973 were adopted, the protection of civilians, and compound any transition to democratic institutions. ¹²⁶ He also argued that the military campaign was "significantly expanding beyond the objectives for which it was in the first place authorized, raising questions about the legality and legitimacy of some of the actions being carried out and the agenda being pursued." ¹²⁷

There is little doubt that NATO's involvement in the Libyan conflict displeased the AU. Yet the AU was, in large measure, the author of its own displeasure. First, its members were not able to speak with one voice and coalesce around the R2P norm implied in Article 4(h) of the AU Constitutive Act. ¹²⁸ Second, the AU Peace and Security

can Union to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2011/337 (June 6, 2011).

125. African Union Assembly, Decision on the Peaceful Resolution of the Libyan Crisis, *supra* note 124, ¶ 7. This view was repeated by the Minister of Foreign Affairs of Mauritania, speaking on behalf of the ministerial delegation of the AU High-Level Ad Hoc Committee, in a meeting of the Security Council on June 15, 2011; see U.N. SCOR, 66th Sess., 6555th mtg., U.N. Doc. S/PV/6555, 4 (June 15, 2011).

126. African Union, Report of the Chairperson of the Commission on Current Challenges to Peace and Security on the Continent and the AU's Efforts: Enhancing Africa's Leadership, Promoting African Solutions, EXT/ASSEMBLY/AU/2/(01.2011), ¶ 51, (May 25, 2011).

127. *Id.*

128. Art. 4(h) provides for the right of the African Union to intervene in a member state with the objective of preventing or stopping the occurrence of the atrocity crimes stipulated in the provision: war crimes, genocide, and crimes against humanity. See Tiyanjana Maluwa, *Reassessing Aspects of the Contribution of African States to the Development of International Law through African Regional Multilateral Treaties*, 41 MICH. J. INT'L L. 327, 378-394 (2020) (arguing that the provision establishes a re-

Council made no effort to verify with specificity any violation of the crimes under Article 4(h), while generally acknowledging the occurrence of violations of human rights and international humanitarian law.¹²⁹ The feeling of betrayal among many African states was a manifestation of a larger mistrust that has resurfaced from time to time in the interactions between the AU and the Security Council regarding the management of some threats to peace and security in Africa.¹³⁰

The NATO intervention thus had lessons for the AU in its relations with the Security Council. The Libyan crisis exposed the limits of the possibility for a collaborative partnership between the regional organization and the Security Council in the maintenance of international peace and security. Importantly, the crisis also revealed the limitations of the AU's still evolving mechanisms for managing peace and security. As argued above, the AU could not unilaterally invoke its new norm of intervention without usurping the authority of the Security Council.

After the Libya intervention, all the BRICS countries opposed the adoption of strong Security Council resolutions against Syria.¹³¹ During a debate on Syria on October 4, 2011, Russia told the Security Council not to consider the Syrian situation separately from the Libyan experience.¹³² It was worried that the NATO interpretation of Resolutions 1970 and 1973 could be a model for NATO actions in implementing the principle of the responsibility to protect in Syria.¹³³ South Africa also objected to the proposed resolutions on Syria based on the fact that recent Security Council resolutions had been abused and that their implementation had gone beyond what was intended.¹³⁴ Unsurprisingly, on three occasions China and Russia successively vetoed draft resolutions on Syria in the aftermath of the Libya campaign on October 4, 2011,¹³⁵ February 4, 2012,¹³⁶ and July 19, 2012.¹³⁷

gional treaty norm of intervention by the regional body that is essentially similar to the R2P norm, although it was adopted prior to and independently of the latter).

129. African Union Peace and Sec. Council, *Communiqué of the 261st Meeting*, *supra* note 71, ¶ 2.

130. *See* Africa & Pretorius, *supra* note 67, at 412.

131. Ulfstein & Christiansen, *supra* note 67, at 170.

132. U.N. SCOR, 66th Sess., 6627th mtg., *supra* note 92, at 4.

133. *Id.*

134. *Id.* at 11.

135. *Id.*

There is some agreement, but no consensus, among commentators that perceptions of NATO's military overreach and overstepping of the UN mandate doomed R2P, and that this may turn out to have been both the first and last use of the principle.¹³⁸ Underlying this opposition were the suspicions of the P3's motives for regime change in that country. It is arguable that apart from Syria, Myanmar might have justified R2P intervention but for the Libyan experience.

The Security Council's action on Libya has proved to be a setback in its role as a promoter of normative developments. For the AU, Libya did not prove to be a ready site to test its norm-entrepreneurship, as the promoter of the right of humanitarian intervention under Article 4(h) of the AU Constitutive Act, in what was the most significant crisis since its establishment.

III. TRAJECTORY OF THE R2P NORM AND THE PRINCIPLE OF PROTECTION OF CIVILIANS AFTER THE LIBYA INTERVENTION

The AU Constitutive Act has been in force for just over two decades. Its adoption in 2000 preceded the adoption by the UN General Assembly of the World Summit Outcome by five years. The incorporation of Article 4(h) in the AU Constitutive Act was thus wholly independent of, and uninfluenced by, the endorsement of R2P by the World Summit. On the contrary, African states regarded the proposed response to the commission of atrocity crimes stipulated in the World Summit Outcome as a reaffirmation of their own approach in the AU Constitutive Act.¹³⁹ Not surprisingly, some UN member states that spoke during the General Assembly thematic debate on R2P in 2009 acknowledged the pioneering role that African states played in pressing for the shift from the principle of non-interference to the principle of non-indifference implied in Article 4(h). Significantly, these in-

136. U.N. SCOR, 67th Sess., 6711th mtg. U.N. Doc. S/PV.6711 (Feb. 4, 2012).

137. U.N. SCOR, 67th Sess., 6810th mtg. U.N. Doc. S/PV.6810 (July 19, 2012).

138. Ulfstein & Christiansen, *supra* note 67, at 171.

139. *See, e.g.*, statements by the representatives of Algeria, South Africa, Ghana, and Nigeria in the 2009 UN General Assembly debate on the responsibility to protect, U.N. GAOR, 63rd Sess., 98th plen. mtg., U.N. Doc. A/63/PV.98, 6, 16, 19, 26 (July 24, 2009).

cluded non-African states.¹⁴⁰ The UN Secretary-General had earlier acknowledged this African leadership in his report:

The evolution of thinking and practice in Africa [has] been especially impressive. While the Organization of African Unity emphasized non-intervention, its successor, the African Union, has stressed non-indifference. In 2000, five years before the 2005 World Summit endorsed the responsibility to protect, the Constitutive Act of the African Union provided, in article 4(h), for the “right of the Union to intervene [in a Member State]”. It made a clear distinction between Member States, which were not to interfere “in the internal affairs of another” article 4(g)), and the Union, which could do so in response to the three “grave circumstances” noted [above].¹⁴¹

In his statement to the General Assembly, Secretary-General Ban Ki-moon stated that R2P “emerged from the soil, spirit, experience, and institutions of Africa.”¹⁴² Almost half of the AU member states spoke during the debate. All but four states expressed unequivocal support for the principle of the responsibility to protect.¹⁴³ Today, no

140. See, e.g., statements by the representatives of the United States (“The responsibility to protect follows a path laid out by the African union’s Constitutive Act, in which our African colleagues pledged non-indifference in the face of mass crimes”); and the Republic of Korea (“In fact, the African Union (AU) pioneered the R2P principle by stating in its 2000 Constitutive Act that it would not be indifferent in the face of failure by AU members to protect their populations from genocide, war crimes and crimes against humanity”), U.N. GAOR, 63rd Sess., 97th plen. mtg., U.N. Doc. A/63/PV.97, 17, 19 (July 23, 2009),

141. U.N. Secretary-General, *Implementing the Responsibility to Protect*, ¶ 8, U.N. Doc. A/63/677 (Jan. 12, 2009). (Secretary-General Ban Ki-moon presented the report on July 21, 2009, prior to the debate, which was held on July 23, 24 and 28, 2009).

142. See GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT – THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 6 (Aug. 2009).

143. The four African states that aligned themselves with the reticent or skeptical position adopted by the Non-Aligned Movement (NAM) were Algeria, Egypt (whose representative spoke not in his national capacity but as spokesperson for the NAM), Gambia and Morocco. The rest of the African UN members, all of whom are also members of NAM, supported R2P, and most spoke proudly of Africa’s leadership in shifting from the norm of non-interference to that of non-indifference. On the tenth anniversary of the World Summit Outcome in 2015, both Algeria and Egypt signified a cautious change in their initial positions on R2P. But subsequently, at an

African state formally denies the value of R2P. The lingering contestations are not on whether to accept the principle but on *when and how* to implement it. All the A3 members of the Security Council that voted to authorize the intervention in Libya had supported R2P in the debate in the General Assembly.¹⁴⁴ The Resolution was adopted by consensus at the end of that debate.¹⁴⁵

As already noted, among the countries that abstained from voting on Resolution 1973, four belong to the BRICS group. International lawyers have paid attention to the potential impact of these countries on the future development of international law. One can analyze this impact through their participation and positions in existing institutions, participation in norm-creation, and articulation of their vision of these institutions and norms.¹⁴⁶ Although the resolution only made a passing reference to R2P in its preamble, the common view is that Resolution 1973 was, in effect, an operationalization of R2P.¹⁴⁷ As we have seen, one of the concerns raised by both China and Russia was the appropriateness of invoking the principle of the responsibility to protect in the Libya situation. Their positions regarding R2P at its adoption merit a brief recapitulation.

First, China supported the 2005 World Summit Outcome.¹⁴⁸ This established the framework of R2P negotiated by states.¹⁴⁹ However,

informal meeting held by the General Assembly on the issue in 2016, the representative of Egypt reiterated Egypt's cautious acceptance of the principle of R2P thus: "[While] we fully support the view that prevention lies at the core of the responsibility to protect, we nevertheless assert that any international strategies in this regard should garner the wider support of the general membership. Failure to do so may raise suspicions of member states who may construe such policies as tools that can be manipulated to intervene in the internal affairs of vulnerable countries for political gain." See Government of Egypt, Statement of the Arab Republic of Egypt at the Informal Interactive Dialogue of the General Assembly on the Responsibility to Protect (Sept. 6, 2016), <https://www.globalr2p.org/wp-content/uploads/2019/08/2016-IID-Egypt.pdf>.

144. G.A. Res. 63/308, The Responsibility to Protect (Sept. 14, 2009).

145. *Id.*

146. See, e.g., Aniruddha Rajput, *The BRICS as 'Rising Powers' and the Development of International Law*, in *THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE?* 105, 111 (Heike Krieger, Georg Nolte & Andreas Zimmermann eds., 2019).

147. See, e.g., Thielbörger, *supra* note 63, at 23-26.

148. Courtney J. Fung, *China and the Responsibility to Protect: From Opposition to Advocacy*, UNITED STATES INSTITUTE OF PEACE (June 8, 2016),

during the first thematic debate on R2P in 2009 China stated that the application of R2P should not contravene the principles of state sovereignty and non-interference in internal affairs of states.¹⁵⁰ It stated categorically that “[no] state must be allowed to unilaterally implement R2P.”¹⁵¹ From its point of view, “[the] responsibility to protect remains a concept and does not constitute a norm of international law.”¹⁵² China has consistently held the position that any R2P actions should be authorized by the Security Council rather than be established by law. Furthermore, China has maintained that “any response [to a crisis] should strictly conform to the UN Charter and the opinions of the country and the regional organization concerned should be respected.”¹⁵³ China’s unwillingness to embrace R2P as an international legal norm is consistent with its espousal of the principles of state sovereignty and non-interference in the internal affairs of states. It is also consistent with China’s preference for diplomatic and peaceful solutions in response to conflicts that threaten international peace and security. Thus, China reluctantly endorsed a very narrow implementation of R2P – authorizing its use only in exceptional circumstances to respond to gross human rights violations.¹⁵⁴ Furthermore, China emphasized the capacity-building functions of R2P and the need to ensure the concept’s limited application and differentiation from humanitarian intervention.¹⁵⁵

<https://www.usip.org/publications/2016/06/china-and-responsibility-protect-opposition-advocacy>.

149. *Id.*

150. U.N. GAOR, 63rd Sess., 98th plen. mtg., *supra* note 139, at 23.

151. *Id.*

152. *See, e.g.*, Thielbörger, *supra* note 63, at 23-26.

153. *See Position Paper of the People’s Republic of China on For the 77th Session of the United Nations General Assembly*, MINISTRY OF FOREIGN AFFS. OF THE PEOPLES REPUBLIC OF CHINA (Sept. 17, 2022), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/wjzcs/202209/t20220917_10767412.html.

154. U.N. GAOR, 63rd Sess., 98th plen. mtg., *supra* note 139, at 23-24.

155. *See* Rosemary Foot, *The Responsibility to Protect (R2P) and its Evolution: Beijing’s Influence in Norm Creation in Humanitarian Areas*, 6 ST. ANTHONY’S INT’L REV. 47, 49-50 (2011). *See also* Tiewa Liu & Haibin Zhang, *Debates in China about the responsibility to protect as a developing international norm: a general assessment*, 14 CONF. SEC. & DEV. 403 (2014) (discussing the different views of Chinese officials and scholars on the concept of R2P, based on a review of academic studies in China and interviews with Chinese senior diplomats and practitioners).

China's caution is consistent with the position that although the R2P doctrine is informed by and based upon humanitarian considerations, it is not synonymous with the much contested principle of humanitarian intervention. In essence, China rejected the claim that, under customary international law, there exists a right of individual states—acting individually or as part of a coalition of states—to use force on the territory of other states to pursue humanitarian ends determined unilaterally by those states.¹⁵⁶ Most scholars reject the existence of a principle of international law enshrining such a right, pointing at the very limited state practice and *opinion juris* supporting such a right.¹⁵⁷ The reality is the claim that humanitarian intervention is a recognized ground for using force under customary international law has never been universally accepted by a majority of UN member states. For example, in April 2000, the Group of 77, a coalition of 134 developing countries at the United Nations, issued the Declaration of the South Summit explicitly stating: “We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”¹⁵⁸ More recently, at its seventeenth summit in 2016, the 120-member Non-Aligned Movement, the largest grouping of states worldwide after the UN, reiterated its rejection of “the so-called ‘right’ of humanitarian intervention, which has no basis either in the UN Charter or in international law.”¹⁵⁹

Second, as is the case with China, Russia formally espouses the position that maintaining the sovereignty of existing states is the most

156. U.N. GAOR, 63rd Sess., 98th plen. mtg., *supra* note 150, at 23.

157. See Agata Kleczkowska, *The Illegality of Humanitarian Intervention: The Case of the UK's Legal Position Concerning the 2018 Strikes in Syria*, 19 *UTRECHT J. INT'L & EUR. L.* 35, 38 (2020). See also PETER MALANCZUK, *HUMANITARIAN INTERVENTION AND THE LEGITIMACY OF THE USE OF FORCE* 31 (1993); OLIVIER CORTEN, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 497 (2010).

158. See Group of 77 South Summit, *Declaration of the South Summit*, ¶ 54 (Apr. 10-14, 2000), https://www.g77.org/summit/Declaration_G77Summit.htm.

159. See Island of Margarita, Bolivarian Rep. of Venezuela, *Report of the Seventeenth Summit of Heads of State and Government of the Non-Aligned Movement*, 777, NAM 2016/CoB/DOC.1 Corr.1 (Sept. 18, 2016), http://cns.miiis.edu/nam/documents/Official_Document/XVII-NAM-Summit-Final-Outcome-Documents-ENG.pdf.

fundamental principle of diplomacy in the modern world.¹⁶⁰ As such, Russia generally supported R2P in both 2005 and 2009 but expressed concern about its implications on state sovereignty.¹⁶¹ In 2009, Russia noted that the development and application of the principle “could significantly shape key trends that will determine the entire system of international relations and the international rule of law.”¹⁶² Accordingly, it warned “against taking rash and hasty steps to apply that idea arbitrarily to specific countries and interpreting it too broadly.”¹⁶³ Despite its avowed preference for diplomacy as the best route for resolving intra-state civil conflicts and crises, and its insistence that only the Security Council should sanction humanitarian intervention, Russia’s behavior has not been consistent. It justified its brief war with Georgia in the disputed region of South Ossetia in 2008, *inter alia*, as an act of humanitarian intervention “[to] protect people, to defend their right to exist simply as ethnic groups, and to prevent a humanitarian catastrophe.”¹⁶⁴ Yet, as commentators have noted, the Security Council did not authorize the action, which both Georgia and the international community condemned.¹⁶⁵ Indeed, when Russia brought the South Ossetia situation to the attention of the Security Council, it did not even seek a vote to authorize an intervention, clearly anticipating that it would receive little support from the elected members of the Coun-

160. China and Russia jointly reaffirmed their commitment to this position. See *The Declaration of the People’s Republic of China and the Russian Federation on the Promotion of International Law*, MINISTRY OF FOREIGN AFFS. OF THE PEOPLES REPUBLIC OF CHINA ¶ 2 (June 26, 2016), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/20160801_679466.html.

161. The Permanent Mission of the Russian Federation to the United Nations, Russian – Statement at the July 2009 GA Debate on RtoP (Statement of Mr. Marge-
lov, Special representative of the Russian President on cooperation with African
countries), <http://s156658.gridserver.com/media/files/russia-2009-r2p-debate.pdf>.

162. *Id.*

163. *Id.*

164. See Gregory Hafkin, *The Russo-Georgian War of 2008: Developing the Law of Unauthorized Humanitarian Intervention after Kosovo*, 28 B. U. INT’L L.J. 219, 225-26 (2010). See also Roy Allisson, *The Russian case for military intervention in Georgia: international law, norms and political calculation*, 18 EUR. SECURITY 173 (2009).

165. Gareth Evans, *Russia and the ‘Responsibility to Protect’*, INTERNATIONAL CRISIS GROUP (Aug. 31, 2018), <https://www.crisisgroup.org/europe-central-asia/caucasus/russianorth-caucasus/russia-and-responsibility-protect>.

cil and, further, that a U.S. veto was highly likely.¹⁶⁶ Nevertheless, Russia's claims of humanitarian intervention have been repeated in justification of its recent full-scale invasion of Ukraine (ostensibly to prevent mass killings and the genocide of ethnic Russian-speaking minorities, among other reasons), which started on February 24, 2022 and is ongoing at the time of this writing.¹⁶⁷ As with Georgia, the invasion belies its professed, albeit cautious, support of R2P and has rightly been condemned by Ukraine, the UN, and the broader international community as a flagrant violation of the UN Charter and international law.¹⁶⁸ As noted, the claim that one state can assert a right unilaterally to use force in the territory of another state to alleviate humanitarian suffering in that state, based on its own subjective determination of the humanitarian situation, is widely regarded as untenable.¹⁶⁹

Finally, India, Brazil, and South Africa also shared China's and Russia's positions in insisting that R2P should not be used as a pretext to weaken the sovereignty of states and the principle of non-interference.¹⁷⁰ Although Brazil and South Africa had also joined the 2005 consensus despite their misgivings, they have both continued to insist that implementation of the concept should not exceed the framework agreed at the World Summit.¹⁷¹ Thus, all five BRICS countries have formally supported R2P even as they voted for or abstained from Resolution 1973, with different levels of concern about the potential for the principle to be abused by powerful states intent on pursuing ulterior objectives under the guise of humanitarian intervention. In the immediate aftermath of the adoption of Resolution 1973,

166. Hafkin, *supra* note 164, at 237.

167. Heather Ashby, *How the Kremlin Distorts the 'Responsibility to Protect' Principle*, UNITED STATES INSTITUTE OF PEACE (Apr. 7, 2022), <https://www.usip.org/publications/2016/06/china-and-responsibility-protect-opposition-advocacy>.

168. At the conclusion of its eleventh emergency session on Mar. 2, 2022, the General Assembly adopted a resolution that deplored Russia's invasion of Ukraine, demanded a full withdrawal of its forces, and sought a reversal of its decision to recognize the self-declared People's Republics of Donetsk and Luhansk. *See* G.A. Res. 11/1 (Mar. 2, 2022).

169. *See* Abbas, *supra* note 72, at 132-33; Terry, *supra* note 65.

170. U.N. GAOR, 63rd Sess., 98th plen. mtg., *supra* note 139.

171. U.N. Secretary-General, *Implementing the Responsibility to Protect*, *supra* note 141.

India issued a statement expressing its strong belief that “the Security Council had passed a resolution authorizing far-reaching measures under Chapter VII of the Charter, with relatively little credible information on the situation on the ground in Libya.”¹⁷² Similarly, while reiterating that its decision to support Resolution 1973 was based on the principle of protecting civilians, South Africa subsequently expressed concern about the manner of its implementation.¹⁷³ As noted earlier, in a thinly veiled reference to Libya, in October of 2011, South Africa’s representative explained South Africa’s abstention in a draft resolution on Syria.¹⁷⁴ The representative noted that recent Security Council resolutions had been abused and that their implementation had gone beyond what was intended of the mandate.¹⁷⁵

Three issues stand out from the preceding discussion of Resolution 1973 and the Libya intervention. The first is the criticism that the Security Council did not clearly articulate or explain why the situation in Libya had an international dimension. It adopted Resolution 1970 and Resolution 1973 on the unstated premise that the situation in Libya was not an internal matter but one of international concern.¹⁷⁶ Therefore, it posed a threat to international peace and security. Secondly, Resolution 1973 referred to gross and systematic human rights violations and cross-border refugees in its preambular considerations.¹⁷⁷ It implied that these provided the rationale for authorizing the intervention to protect civilians. Assuming that it was appropriate to invoke the principle of the responsibility to protect in this situation, it is doubtful that the Security Council adhered to all the parameters set out in the World Summit Outcome. First, cooperation with the appropriate regional organizations was perfunctory. Moreover, the Security Council gave the AU’s peace initiative short shrift and appeared to let

172. U.N. SCOR, 66th Sess., 6498th mtg., *supra* note 39.

173. U.N. SCOR, 66th Sess., 6627th mtg., *supra* note 92. *See also* Ambassador Baso Sangqu, Permanent Representative of South Africa to the United Nations, Statement at the Informal Meeting Hosted by the Minister of External Affairs of Brazil (Feb. 21, 2012) (copy on file with author) [hereinafter *Statement by Ambassador Baso Sangqu*].

174. U.N. SCOR, 66th Sess., 6627th mtg., *supra* note 92.

175. *Id.*

176. *Id.* at 14.

177. *See* S.C. Res. 1973, *supra* note 1, at 1-2, pmb., 5th & 15th considerations. *See also* S.C. Res. 1970, *supra* note 35, at 1, pmb., 2nd & 7th considerations.

the British and French forces commence their aerial bombing of Libya with unseemly haste.¹⁷⁸ Once the NATO operation was underway, key members of the NATO alliance showed no interest in giving political and diplomatic negotiations a chance. According to Brockmeier, Stuenkel and Tourinho:

[a] senior Brazilian diplomat involved in the Security Council negotiations recalled that the suggestion to interrupt the military operation and pursue political negotiations was opposed by the countries leading the NATO intervention, with the argument that the military operation should not be micromanaged – not an argument that truly addressed the proposed termination of the operation.¹⁷⁹

Of the atrocity crimes envisaged as grounds for humanitarian intervention based on R2P— genocide, war crimes, crimes against humanity and ethnic cleansing—Resolution 1973 only mentioned that the attacks taking place against the civilian population *may* amount to crimes against humanity.¹⁸⁰ But, like the Security Council, the AU Peace and Security Council did not make any determination that these crimes had been committed at the time the Security Council adopted Resolution 1973.¹⁸¹ Finally, the execution of the NATO operation raised questions regarding the meaning of the words “all necessary

178. Within two days of the adoption of Resolution 1973, President Nicholas Sarkozy ordered French military strikes against Gaddafi’s forces without coordinating with France’s allies and before NATO had taken a decision to get involved in the implementation of the resolution. See Steven Erlanger, *Sarkozy Puts France at Vanguard of West’s War Effort*, N.Y. TIMES (March 20, 2011), <https://www.nytimes.com/2011/03/21/world/europe/21france.html>. This prompted criticism from the Secretary-General of the League of Arab States (LAS), Amr Moussa, who protested that the military action in Libya differed from the aim of imposing a no-fly zone and protection of civilians, which the LAS had requested at the Security Council. *Id.*

179. Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, *The Impact of the Libyan Intervention Debates on Norms of Protection*, 30 GLOBAL STUD. 113, 121-22 (2016) (referencing an interview with a senior Brazilian diplomat on Aug. 5, 2014).

180. See S.C. Res. 1973, *supra* note 1, at 1, pmb., 7th consideration (stating only that “[the] widespread and systematic attacks currently taking [place] against the civilian population *may* amount to crimes against [humanity]”) (emphasis added). There was no definitive determination at the time that such crimes had occurred.

181. *Id.*

measures” employed in Resolution 1973.¹⁸² What was the range of actions authorized by the resolution? It would seem respective states and regional organizations were left to interpret this in ways that suited their own pre-determined positions. This is evidenced by the disagreements between the P3 and A3, and NATO and AU, on the scale of the aerial bombing.

These concerns have undoubtedly played a part in the subsequent trajectory of R2P. One can plausibly argue that the memory of the abuse of the doctrine in the implementation of Resolution 1973 still lingers in the calculations of many states, not just China and Russia but also others, particularly in the Global South. The failure of the Security Council to agree on action to intervene in the post-Libya situations in Syria and Myanmar demonstrates the difficulty that states have with R2P's third pillar. In other words, there have been continuing disagreements over the appropriateness and manner of implementing the responsibility of the international community (states or international organizations), by using diplomatic, humanitarian and other means, to protect populations from atrocity crimes. When and how states and international organizations should conduct themselves in discharging this responsibility, the “duty of conduct”, as Jennifer Welsh characterizes it, remains a contested issue.¹⁸³ Welsh identifies three main effects on the duty of conduct that the situations in Libya and Syria have highlighted.

First, the “[epistemic] problems associated with arriving at a collective view of an atrocity crimes situation.”¹⁸⁴ In the case of Libya, there was a difference in what I would loosely term “a margin of appreciation” between the Security Council and the AU Peace and Security Council. While the former determined that crimes against humanity *may* have been committed, the latter *did not* make a similar determination. Indeed, the suggestion is that the AU did not think this was the case. Since the Security Council enjoys primacy over regional organizations, its determination enjoyed the benefit of the margin of ap-

182. I share the view that the Security Council's use of the phrase “all necessary measures” has been understood in the past as a cipher for the authorization to use military force, and that in the context of Resolution 1973, this meant that the use of force may not be excessive and that it must bear a relation to the objectives of the resolution, namely the protection of civilians. See Payandeh, *supra* note 2, at 385.

183. Welsh, *The Responsibility to Protect*, *supra* note 15, at 81.

184. *Id.*

preciation and prevailed. The second effect that Welsh identifies is the “[difficulty] of determining when military force should be considered.”¹⁸⁵ This harkens back to the questions raised by the abstaining members of the Security Council in the Libya debate, in particular China, India, and Russia, who were concerned about the appropriateness of using force at that juncture instead of pursuing diplomatic processes. Third, Welsh notes that the examples of Libya and Syria have underscored the “[challenges] that arise in efforts to estimate and weigh the costs when deliberating over the appropriateness of a military response.”¹⁸⁶ Some of the costs of the intervention in Libya should have been immediately obvious to the members of the Security Council, but the proponents of enforcement action and the NATO intervention elected to ignore them. The known cost was the likelihood of further damaging the fractured unity among the Libyan population through the P3’s deliberate disregard and obstruction of the AU High-Level Ad Hoc Committee’s efforts to pursue a mediated outcome aimed at ensuring the unity and territorial integrity of the Libyan state.¹⁸⁷ The unknown cost was the country’s descension into a decade-long humanitarian crisis following the NATO operations and the removal of the Gaddafi regime.¹⁸⁸

These three issues point to the need for a clearer interpretation and understanding of R2P’s third pillar. The starting point is to establish a *prima facie* case of the occurrence of atrocity crimes. As noted above, there was no consensus that the alleged atrocity crimes had already

185. *Id.*

186. *Id.*

187. *See de Waal, supra* note 67, at 371.

188. *See* ULF LAESSING, UNDERSTANDING LIBYA SINCE GADDAFI 37-53 (2020) (providing a detailed account of the anarchy that has dominated Libya since 2011 and the role played by various Islamist militias and other armed groups and their confrontations with the Libyan national army, which have led to repeated cycles of civil war, massive loss of life, a humanitarian crisis, and displacement of civilians). The U.N. Office for the Coordination of Humanitarian Affairs (OCHA) reported that at the end of 2021, the number of Libyans affected by the crisis resulting from the ongoing conflict and instability stood at 1.5 million, with 803,000 in need of some form of humanitarian assistance and more than 199,949 internally displaced persons. *See* 2022 HPC | 2021 Humanitarian Response Plan (HRP) Review (January-December 2022), HUMANITARIAN RESPONSE, <https://www.humanitarianresponse.info/en/operations/libya/document/2022-libya>.

been committed in Libya. Resolution 1973 only noted that crimes against humanity *may* have been committed.¹⁸⁹

Additionally, even when a *prima facie* case of the occurrence of atrocity crimes exists, the third pillar requires that the peaceful and diplomatic means of preventing and stopping these crimes be exhausted before resorting to intervention with coercive military force. Military intervention should not be the default setting for the third pillar. This was a major point of contention between the AU and the UN Security Council. This is evidenced by the decisions adopted by the AU Peace and Security Council,¹⁹⁰ the AU Assembly,¹⁹¹ and the position expressed by the Chairperson of the AU Commission.¹⁹² It was also the basis of the split between the P3, who pushed for the adoption of Resolution 1973 and initiated the NATO intervention, and the P2 and other members of the Security Council who abstained. The different positions were articulated in statements made respectively by the representatives of Brazil, China, Germany, India, and Russia either during the debate or after to explain their abstentions after the adoption of the resolution. The A3 countries also expressed their preference for a diplomatic approach and peaceful resolution of the crisis even as they voted in favor of Resolution 1973.¹⁹³

Finally, if the Security Council deems it appropriate to authorize the use of force, it is necessary to have a clear understanding of the nature and scale of force required to achieve the stated objective of humanitarian intervention, namely the protection of civilian populations. One of the criticisms of the NATO intervention was that the force used was disproportionate and had calamitous consequences for the civilian population that the intervention was meant to protect.¹⁹⁴

189. S.C. Res. 1973, *supra* note 1, at 1, pmb1., 9th consideration.

190. African Union Peace and Sec. Council, *Communiqué of the 265th Meeting*, *supra* note 77.

191. African Union Assembly, Decision on the Peaceful Resolution of the Libyan Crisis, *supra* note 124.

192. *Supra* note 126.

193. International Crisis Group, *A Tale of Two Councils: Strengthening AU-UN Cooperation*, INTERNATIONAL CRISIS GROUP (June 25, 2019), <https://www.crisisgroup.org/africa/279-tale-two-councils-strengthening-au-un-cooperation>.

194. *See generally* Alan Kuperman, *A Model Humanitarian Intervention? Re-assessing NATO's Libya Campaign*, 38 INT'L SECURITY 105 (2013) (arguing that the intervention extended the war's duration about six-fold, increased its death toll ap-

The determination of the type and amount of force needed to achieve the objective of the intervention will vary from case to case, depending on the nature of the threat in question. Yet, at the very least, the force used must be reasonably justifiable, appropriate, and proportional to that threat and not run the risk of escalating, instead of diminishing, the conflict.

A. Post-Libya: Exaggerated Rumors of a Norm's Death?

The impasse in the Security Council over the appropriateness of invoking R2P in relation to the situations in Syria and Myanmar has provoked questions about the post-Libya status and viability of R2P. Is the principle of the responsibility to protect in a state of long-term decay or is it still alive and well? The list of many descriptive and distinct labels reflects the wide range of opinions on the question. John Dietrich, like many commentators who wrote shortly after the Libyan conflict, examined the impact of the NATO intervention and its implementation of Resolution 1973 on the subsequent debates on Syria.¹⁹⁵ His diagnosis of China's and Russia's positions in the Security Council and the resultant impasse was commonplace in the scholarly and political as well as public commentaries. He concluded:

The Libyan case therefore seems to have sensitized key players to such a point that major R2P action seems highly unlikely. [Overall] it appears that R2P is not dead, it is on life support. R2P intervention efforts may continue, although it is not clear that these efforts need the term R2P to move forward. [In] the wake of the Libyan case, interventions are likely to dwindle much as they did for the first decade of the 21st century following the backlash against humanitarian interventions of the 1990s.¹⁹⁶

Writing around the same time, another authoritative commentator on R2P echoed Dietrich's conclusion:

proximately seven to ten times, and exacerbated human rights abuses, humanitarian suffering, Islamic radicalism, and weapons proliferation in Libya and its neighbors).

195. See, e.g., John W. Dietrich, *R2P and Intervention After Libya*, 5 J. ALT. PERSP. SOC. SCI. 323, 345-48 (2013).

196. *Id.* at 347-48.

Libya proved to be almost a textbook illustration justifying R2P principles, but its implementation also demonstrated the need for legitimacy criteria to guide decisions on authorizing and overseeing international military intervention. Although successful, the Libyan operation proved particularly controversial among the emerging powers, and the price of exceeding the mandate there has been paid by Syrians. Nevertheless, it would be premature to conclude that R2P can be branded “RIP.”¹⁹⁷

Some post-NATO intervention commentaries have been more definitive in their verdicts. Mohammed Nuruzzaman’s comment exemplifies this view:

After Libya, R2P has stalled; it has not been used in Syria or Yemen where more egregious crimes against humanity, were and are being committed. If R2P had come of age in Libya, it has certainly seen a tragic death with the Security Council’s inability to initiate action on Syria.¹⁹⁸

More recently, Jed Lea-Henry, following Alex Bellamy,¹⁹⁹ noted that “[despite] early-stage successes, in both institutional and practical terms, R2P never really got going. As a doctrine, it died an early death, and remains today largely unimplemented as a policy directive, and the principle has been inconsistently applied. The same indeterminacy that plagued humanitarian intervention has continued to plague R2P.”²⁰⁰ Other writers have been less certain about R2P’s chances of long-term survival, even if they have not declared it dead.²⁰¹ Brighton Haslett, for example, noted that in the first thirteen

197. See Ramesh Thakur, *R2P after Libya and Syria: Engaging Emerging Powers*, 36 THE WASH. Q. 61, 61 (2013). See also Thomas G. Weiss, *RtoP Alive and Well After Libya*, 25 ETHICS & INT’L AFF. 287, 291 (2011) (asserting that “[Today] the main challenge facing the responsibility to protect is how to act, not how to build normative consensus.”).

198. Mohammed Nuruzzaman, Commentary, *The “Responsibility to Protect” Doctrine: Revived in Libya, Buried in Syria*, 15(2) INSIGHT TURKEY 57, 58 (2013).

199. See Alex J. Bellamy, *Responsibility to Protect – Five Years On*, 24 ETHICS & INT’L AFF. 143, 144 (2010) (arguing that “[profound] disagreements persist about the function, meaning, and proper use of [RtoP]”).

200. Jed Lea-Henry, *The Responsibility to Protect (R2P) and the Problem of Political Will*, 4 POLISH POL. SC. Y.B. 553, 554 (2018).

201. See, e.g., Berman & Michaelsen, *supra* note 15.

years since its inception, states had abused and misapplied the R2P doctrine.²⁰² Haslett points out that some states had executed interventions justified by R2P in violation of the principles underlying the doctrine, while situations warranting international action were ignored due to the economic and strategic interests of the states with the power to prevent intervention.²⁰³ Haslett concluded that if the abuses continued, R2P was unlikely to survive; however, he did not pronounce it dead yet.²⁰⁴ At the same time, other commentators have warned that the survival of R2P depended on ensuring that states do not use the principle of the responsibility to protect as a tool for regime change.²⁰⁵

The rush by some commentators to conclude that Libya represented both the test ground for the principle of the responsibility to protect and the location of its early death rests on at least two errors. The first is the misconception present in some of the analyses that norm decay is equivalent to norm death. Welsh examined the related issues of norm robustness and norm contestation in relation to R2P and concluded that even as the paralysis over its applicability to the Syrian conflict persisted in the Security Council, empirical evidence suggested that the acceptance of the norm among states continued to grow.²⁰⁶ The second error is to overlook that R2P is comprised of several core elements, and that claims of its demise seem to rest on the inability of the international community to agree on some of these core elements, mainly the doctrine's third pillar. Thus, while the overwhelming majority of states today agree on the concept or idea of R2P, contestation

202. Brighton Haslett, *No Responsibility for the Responsibility to Protect: How Powerful States Abuse the Doctrine, and Why Misuse will Lead to Disuse*, 40 N.C. J.J. INT'L L. & COM. REG. 171, 216 (2014) (noting, *inter alia*, the contrasting examples of the interventions by the United States in Iraq in 2003 and by Russia in Georgia in 2008).

203. *Id.*

204. *Id.*

205. Jon Western & Joshua S. Goldstein, *R2P after Syria: To Save the Doctrine, Forget Regime Change*, FOR. AFF. (Mar. 26, 2013), <https://www.foreignaffairs.com/articles/139080/jon-western-and-joshua-s-goldstein/r2p-after-syria>. See generally Maggie Powers, *The Responsibility to Protect after Libya – dead, dying or thriving?*, 19 INT'L J. HUM. RTS. 1257 (2015) (arguing that contrary to the popular conception that the Security Council avoids R2P because of its perceived toxicity, the empirical record reveals a strong and growing acceptance of R2P language by UN members).

206. See generally Welsh, *The Responsibility to Protect*, *supra* note 15, at 80.

over the situation in which the international community may invoke and apply it continues. However, this contestation mainly persists among a minority of states, which include some of the most powerful and critical voices as members of the Security Council. As a *normative* matter, R2P is still alive. As an *applicatory* matter, all is not well, and the principle lies in a state of decay.

B. Resolution 1973 and the Principle of Protection of Civilians

The remainder of this Part will briefly discuss the related issue of the application of the PoC norm in Libya. It has been noted that there was a mismatch, exacerbated by the ambiguity and vagueness of the language in the text, between the declared objective of the resolution (intervention to protect civilians under attack) and its actual execution and outcome (regime change).²⁰⁷ That NATO carried out regime change in Libya is not a matter for debate. The question remains whether the implementation of Resolution 1973 through NATO's military campaign also achieved its objective in protecting the Libyan population.²⁰⁸ And, whether this could not have been achieved through diplomatic and regional initiatives as the African Union had suggested.²⁰⁹

If one assesses the implementation of Resolution 1973 strictly within the narrow confines of the objective of "protecting civilians and civilian populated areas under threat of attack,"²¹⁰ the obvious conclusion is that it was a success. A success to the extent that NATO intervention prevented the threatened extermination of protestors in

207. See Thielbörger, *supra* note 63, at 18 (describing Resolution 1973 as spongy and vague, and "employing very broad language [which] revealed a mismatch of the intervention's rationale expressed in the text of the resolution as opposed to the one which shone through its execution"). See also Ashley Deeks, *The NATO Intervention in Libya – 2011*, in *THE USE OF FORCE IN INTERNATIONAL LAW: A CASE-BASED APPROACH* 749 (Tom Ruys, Olivier Corten & Alexandra Hofer eds., 2018).

208. Thielbörger, *supra* note 63, at 13.

209. See, e.g., *Statement by Ambassador Baso Sangqu*, *supra* note 173 (noting that the Libyan experience highlighted that the means used to implement R2P must be guided by the ultimate objective to be achieved; and asking: "Was elimination and destruction the only means to diffuse the threat to the Libyan population?").

210. S.C. Res. 1973, *supra* note 1, ¶ 4.

Benghazi and elsewhere in Libya.²¹¹ But it was a qualified success, in view of the civilian killings and suffering that persisted for the better part of the next decade at the hands of armed groups, militias, and regionally-aligned political factions.²¹² Arguably, the consequences of NATO intervention and the removal of the Gaddafi regime have engendered insecurity not only within Libya but also beyond its borders within the Sahel region.²¹³ Consequently, the weakened security over the past decade has also facilitated the prominence of Libya as the dominant transit route for migrants from Africa, the Middle East, and Asia, making or attempting to make the perilous journey across the Mediterranean.²¹⁴

The NATO military intervention in Libya was enforcement action rather than a peacekeeping operation. The P3 and their allies launched the operation, at least initially, for the specific objective of protecting

211. The launching of aerial bombings by NATO allies on March 19, 2011 effectively prevented Colonel Gaddafi from achieving his threat to exterminate the anti-government rebels and protesters in Benghazi. The NATO intervention thus succeeded in protecting the civilian population from the anticipated onslaught by Gaddafi's forces. Yet there is no question that the fighting that ensued in the period of nine months until the collapse of the Gaddafi government in August 2011 resulted in huge civilian casualties whose exact numbers have never been determined. It is also widely believed that some of these deaths resulted from the NATO air strikes. However, to date NATO has refused to acknowledge or investigate the number of civilians killed in its bombings. *See generally* JEFFREY BACHMAN, *Libya: A UN Resolution and NATO's Failure to Protect*, in LAND OF BLUE HELMETS: THE UNITED NATIONS AND THE ARAB WORLD 212 (Karim Makdisi & Vijay Prasha eds., 2017) (arguing that NATO's actions resulted in civilian casualties, which NATO has refused to investigate, and that NATO continued to support the rebels militarily while they were committing war crimes and severe human rights violations). *See also* C.J. Chivers & Eric Schmitt, *In Strikes on Libya by NATO, an Unspoken Civilian Toll*, N.Y. TIMES (Dec. 17, 2011). *See also* HUMAN RIGHTS WATCH, UNACKNOWLEDGED DEATHS: CIVILIAN CASUALTIES IN NATO'S AIR CAMPAIGN IN LIBYA (May 13, 2012).

212. *See generally* Laessing, *supra* note 188.

213. Kuperman, *supra* note 194, at 128-29.

214. Mustafa O. Attir, *North African Regular and Irregular Migration: The Case of Libya*, 20 NEW ENG. J. PUB. POL'Y 1, 3-8 (2018). *See generally* Lucia Pradella & Sahar Taghdisi Rad, *Libya and Europe: Imperialism, Crisis and Migration*, 38 THIRD WORLD Q. 2411 (2017) (analyzing the linkage between recent financial and migration crises in Europe and the military interventions in the Middle East and North Africa (Libya) through the twin lenses of Marx's theories of imperialism and reserve labor).

civilians as per the authorizing resolution.²¹⁵ The principle of protection of civilians in UN peacekeeping operations has evolved over the past two decades, almost in tandem with the principle of the responsibility to protect, but less debated than the latter. Nevertheless, as a shield to protect civilians against violence and armed attacks, the principle is equally applicable in the context of enforcement actions.

In fact, the Libyan crisis provided space for the normative and operational convergence of the two norms of the responsibility to protect and the protection of civilians. As previously noted, the international community accepted the principle of the responsibility to protect only in 2005.²¹⁶ By contrast, the norm of protection of civilians had begun to evolve in the realm of the Security Council and the General Assembly more than half a decade earlier.²¹⁷ While R2P focuses on the need for intervention to prevent or stop mass atrocities, PoC aims to protect civilians once the UN deploys peacekeepers on the ground.²¹⁸ Yet, as Hugh Breakey and Angus Francis conclude in their discussion, there is a close relationship between these two norms, which have evolved in response to the same humanitarian tragedies, draw on the same well of international obligation, espouse the same language of international protection, and engage a similar cross-section of protection actors.²¹⁹ Under the PoC norm, peacekeepers aim to protect civilians from

215. S.C. Res. 1973, *supra* note 1, ¶ 4.

216. G.A. Res. 60/1, *supra* note 14, ¶¶ 138-39.

217. The Security Council first explicitly authorized the protection of civilians under Chapter VII of the Charter in 1999 when it adopted Resolution 1270 mandating the United Nations Mission in Sierra Leone “[to] afford protection to civilians under imminent threat of physical [violence]”; see S.C. Res. 1270 (Oct. 22, 1999), ¶ 14. This marked the birth of the PoC norm, which the Security Council has incorporated into subsequent resolutions and has been reaffirmed in various Security Council presidential statements and the Secretary-General’s reports on the protection of civilians in armed conflict. See generally Emily Rhoads & Jennifer Welsh, *Close Cousins in Protection: The Evolution of the Two Norms*, 95 INT’L AFF. 597 (2019) (analyzing the joint evolution of PoC and R2P within the UN system and the related question of the discrepancy between their degree of institutionalization and actual state practice).

218. See generally Charles T. Hunt & Shannon Zimmerman, *Twenty Years of the Protection of Civilians in UN Peace Operations*, 23 J. INT’L PEACEKEEPING 50 (2019).

219. Hugh Breakey & Angus Francis, *Points of Convergence and Divergence: Normative, Institutional and Operational Relationships between R2P and PoC*, 7 SEC. CHALLENGES 39, 49 (2011).

crimes outlawed by international humanitarian law within their areas of deployment.²²⁰ While in normative terms one norm might have a narrower focus than the other, operationally PoC and R2P are intertwined. Atrocity crimes invite the application of both norms. Hence, the two norms converged in Libya, where there was an imminent threat of the commission of atrocity crimes. This convergence can also be seen in the other post-Libya theatres of conflict which the UN Security Council has failed to ameliorate due to the inability of the P5 members to agree on the appropriateness of applying the principles of both R2P and PoC to these situations.²²¹

The specific provision in Article 4(h) of the AU Constitutive Act and the R2P doctrine rest on the same idea: the responsibility of the international community to intervene on humanitarian grounds to protect populations, whose governments fail to protect them, against atrocity crimes and egregious human rights violations. This does not mean that the two norms are identical in their content and scope of application, but that they share a common logic and are inspired by the same objectives.²²²

The interests of the AU and the UN converged in the Libyan conflict around their shared objective of protecting civilians, which presented both organizations with legal and political justifications to invoke the R2P norm. The UN Security Council did so by adopting Resolution 1973, even though in its operative paragraphs the resolution did not explicitly refer to R2P.²²³ The AU attempted to implement this objective through its failed mediation effort, which was aimed at both averting the NATO military action and securing a peaceful resolution of the crisis, although this was wrongly characterized by some of the AU's critics merely as an attempt to save Muammar Gaddafi's regime.²²⁴ Given the scale of the loss of human life and suffering that

220. See generally Hunt & Zimmerman, *supra* note 218.

221. *Id.* at 41.

222. See generally Pergantis, *supra* note 84 (examining the narrative of equation between the two concepts, the differences between them, and the impact of this narrative on the architecture of the use of force and on the relationship between the AU and UN).

223. S.C. Res. 1973, *supra* note 1.

224. See, e.g., E.Y. Omorogbe, *The African Union, the Responsibility to Protect and the Libyan Crisis*, 59 NETH. INT'L L. REV. 141 (2012) (arguing that the AU's response reflected the tendency of African organizations to prioritize peer sol-

many Libyans have experienced in the instability that has ensued for the greater part of a decade since 2011, the real success of the UN intervention through NATO's operation as a protective mission remains a matter for debate.

CONCLUSION

The central question raised in this Article concerns the ramifications of Resolution 1973 and its implementation by NATO on the future trajectory of the R2P norm. The P3 members have been criticized for turning an authorized enforcement action to protect civilians and civilian populated areas under threat of attack into a regime change operation, widely regarded at the time as a cynical move to achieve a pre-determined agenda. While the issue of regime change was not a core aspect of this discussion, I share the view that the fact of its occurrence was more consequential than whether regime change had been the intended outcome of the NATO operation or merely opportunistic turn embraced by the P3 once the operation got underway. This Article argues that this has negatively impacted the trajectory of the norm and doomed its further crystallization. When the General Assembly endorsed R2P, some states warned about the specter of powerful states using the pretext of humanitarian intervention to pursue ulterior agendas. The members of the Security Council that abstained on Resolution 1973 repeated these concerns and some, most notably the P2 members who wield the veto power, have since used this experience to oppose similar action in other situations.

idity over effective action, and that it did not act in Libya because it lacks the will to confront incumbent leaders). *See also* Africa & Pretorius, *supra* note 67, at 412, n. 61 (stressing that there was little trust in the AU to act as a non-partisan peacemaker because Gaddafi funded the AU). The perception that Libya funded the AU, while common in certain circles, was factually incorrect. Gaddafi was known to fund some client states among AU members to buy their loyalty and support for his causes. However, in 2011, Libya was only one of five top contributors to the AU's regular budget (accounting for 60% of the budget), along with Algeria, Egypt, Nigeria, and South Africa, based on the AU's scale of assessment for member states' contributions. *See* African Union Executive Council, Twentieth Ordinary Session, *Report of the Sub-Committee on Contributions on the 2011 Budget of the African Union*, EX.CL/687(XX)iv, Annex, (Jan. 23-27, 2011), <https://archives.au.int/handle/123456789/4117>.

The NATO intervention in Libya represented an opportunity to test the applicability and implementation of a still evolving international norm. Although, in my view, the NATO operation did not kill R2P, NATO's action and the mistrust it provoked among many states, especially in the Global South, may have put the principle on a perilous path to its eventual decay. However, two issues should be separated here. One is the fact of its acceptance by states as a guiding principle for the protection of populations facing atrocity crimes (*normative existence*); the other is the inability of states to agree on the appropriateness and manner of invoking it to address specific situations (*efficacious application*).

The R2P trajectory may have stalled over the past decade, but it is not yet off course. The principle remains as alive today as it was at the time of the Libyan intervention. Yet, there can be little doubt that post-Libya it lies in a state of political uncertainty and legal limbo. For this stalled norm to regain its trajectory, at the very least members of the Security Council, especially the P5, need to reimagine the true meaning and applicability of R2P's third pillar as a tool to protect victims of mass atrocities to address the misconceptions about that pillar noted in this Article. This will require further adjustments, clearer definitions and interpretations of the third pillar, and the doctrine more broadly, as well as greater support by international actors, including members of the Security Council and other concerned states and relevant international organizations. More than a decade after the adoption of Resolution 1973, critics continue to regard it as providing a pretext for regime change in Libya. The NATO intervention, which the resolution authorized, achieved the objective of protecting civilians and civilian populated areas under threat of attack. However, just as significantly, the operation also had the unintended consequence of stalling the trajectory of the nascent responsibility to protect norm.