

The Arabellion – Legal Features

*Christian Tomuschat**

I.	Introduction	447
II.	Libya	448
	1. The Ideological Background	449
	a) Human Rights	449
	b) Democracy	450
	2. The Measures Taken by the Security Council	454
	a) Referral to the International Criminal Court	454
	b) Travel Bans and Asset Freezing	455
	c) Armed Intervention: Security Council Resolution 1973	455
	3. The Recognition of the National Transitional Council	463
III.	Syria	464
	1. The Passivity of the Security Council	464
	2. Unilateral Humanitarian Intervention?	465
	3. Criminal Prosecution	466
IV.	Concluding Observations	466

I. Introduction

Hundreds of journalists have commented on what began in Tunisia in December 2010 when a fruit vendor set himself on fire. “Arabellion” has become a word whose connotation no one ignores. The media coverage of those events in Tunisia, Egypt, Libya, Syria – and even Yemen – has reached such high levels that nothing seems to remain undisclosed. Is everything known, has everything already been said, has the topic lost its freshness, its originality? It might be an error to take that view. Progressively, information spreads that sheds a dubious light on some of the military operations. Foreign elements seem to have played an active role in certain command centres of the rebels during the fighting in Libya.¹ And some media have raised questions concerning the armament of the Syrian rebels in Homs, suggesting that they possess heavy weapons whose origin appears mysterious, suggesting thereby at the same time that foreign powers may have their

* Prof. Dr. iur., Berlin.

¹ See C. Henderson, *International Measures for the Protection of Civilians in Libya and Côte d’Ivoire*, ICLQ 60 (2011), 767 (771).

hand in the armed conflict.² Thus, there is a lot of missing factual details relating to the background of the Arabellion which makes any legal analysis somewhat uncertain.

We all like to use for our thinking simple imagery. One of those attractive configurations is the good against the evil, represented on the one hand by the good people and, on the other, by the evil dictator. Such configurations do exist: *Adolf Hitler* was the embodiment of evil – but what about the German people? In the Arab world, Libya's leader *Qadhafi*, in his self-chosen terminology "Colonel", corresponded to that metaphor. And the same may have been true for Tunisia's *Ben Ali*. But what about President *Assad* in Syria and his opponents? Is it a fight of hell against heaven? Reverting to academic terms: the challenge is to approach the occurrences in the Arab world with a fresh perspective, without any prejudices, but also without boundless optimism. Fortunately, international law is generally not moulded by spontaneous feelings of sympathy or antipathy, providing instead the same yardstick for any international actor whose conduct has to be measured by its rules. Unfortunately, this elementary truth is often forgotten, even by scholars – when they are overwhelmed by nationalist emotions.

The main objective of the following observations is to answer a very simple question. Have we learned anything from the recent dramatic events in the Arab world? Have those events confirmed our well-established knowledge, or have they shattered such traditional wisdom? Is there anything new? Civil wars are not an invention of the 21st century; but there is indeed something which was absent in such conflicts, even 50 years ago: the active participation of the international community, as opposed to the involvement of individual states, a phenomenon frequently encountered in civil wars, particularly in the world of yesterday. The absolute predominance of sovereignty is a thing of the past. But the problem remains how to coordinate the basic principles of the traditional legal order made up of sovereign states with the modern concept of global responsibility.

II. Libya

The most striking feature, seen from a legal standpoint, is the international community's treatment of Libya. Libya suffered a downgrading of a

² When this paper was presented in March 2012, many questions about the involvement of foreign nations still remained open. Three months later, in June 2012, it has become clear that the rebels receive substantial foreign assistance of all kinds, including heavy weapons.

kind never witnessed before in the history of modern international law. Libya was not only criticised because of the way in which it dealt with its citizens. It was hit by a couple of severe blows. First, by Resolution 1970 (2011) of 26 February 2011 (hereinafter Resolution 1970) in which the situation in Libya was referred by the UN Security Council (hereinafter: SC) to the International Criminal Court as requiring an investigation since serious crimes appeared to have been committed (paras. 4-8). It was clear that the Security Council had especially in mind the operations of the dictator's armed forces not only against the rebels but also against the civilian population in the areas controlled by them. Second, the entire top group of the revolutionary leaders was targeted by a travel ban, which prevented them from moving beyond their national boundaries (paras. 15-16). Third, the Security Council determined that all the assets of the dictator's family were to be frozen (paras. 17-21).³ For its part, the General Assembly decided to suspend Libya's membership in the Human Rights Council.⁴ And lastly, a few weeks later, by Resolution 1973 (2011) of 17 March 2011 (hereinafter Resolution 1973), the Security Council authorised member states, acting nationally or through regional organisations or arrangements, to take all necessary measures to protect civilians and civilian populated areas under threat of attack. This series of sanctions imposed on Libya, more precisely on its leadership, is unheard of in the history of the world organisation.⁵ The government of Libya was totally delegitimated. Through the two resolutions, Libya became a genuine pariah in the eyes of the international community.

1. The Ideological Background

a) Human Rights

How can this dramatic downgrading be explained? One reason which cannot be disputed is that persuasive evidence showed the dictatorial regime had engaged in massive violations of human rights and international humanitarian law. There is no need to explain in detail Libya's obligation to

³ For a comment see *C. McCarthy*, What Happens to the Frozen Fortune? The Libya Situation and Claims for Reparation, EHRLR 16 (2011), 318.

⁴ UN GA Resolution 65/265, 1.3.2011.

⁵ A travel ban and an asset freeze were imposed roughly at the same time on ex-President *Laurent Gbagbo* and his wife by SC Resolution 1975 (2011), 30.3.2011, para. 12. But criminal prosecution was initiated on the basis of a declaration by the Government of Côte d'Ivoire of 18.4.2003 and a letter confirming the decision of 14.12.2010.

abide by human rights standards. Libya was one of the first states to ratify the International Covenant on Civil and Political Rights.⁶ Moreover, core human rights are applicable to all members of the international community on the basis of customary law.⁷ Rules of humanitarian law were applicable to Libya both qua treaty law⁸ and customary law.⁹ The dictator, however, had never shown any great respect for human rights. At the relevant time, he explicitly threatened to crush everyone resisting him like a “cockroach”.¹⁰ Such utterances must be taken seriously. They cannot simply be dismissed as the reflection of a specific Arab narrative style.

b) Democracy

Additionally, for many decades the dictator had shown open disdain for democratic principles. Since the fall of the dictatorial regime in Tunisia, and thereafter the demise of the Mubarak regime in Egypt, however, the key demand of the popular masses in the whole of the Arab world in North Africa had become: democracy! People did not wish to be governed any longer by benign autocrats who might have secured law and order under their rule, but who at the same time had arrogated to themselves all crucial political powers, relegating the citizens to the rank of mere subjects. In the world today, even the best-intentioned ruler does not find acceptance with such dictatorial pretensions. He may be able to continue his rule by the force of arms but he will be devoid of any legitimacy. Is that a political assessment only, or is democracy also a legal concept which produces legal effects likely to undermine a dictatorial regime?

In the Charter of the United Nations, democracy is not literally mentioned as a principle that should be binding for all states although it starts out with a truly democratic invocation: “We the Peoples of the United Nations”. The reasons for the reluctance of the drafters are easy to elucidate. On the one hand, in 1945 at least two of the principal founding members of the World Organization (France and the United Kingdom) still held many

⁶ Ratification on 15.5.1970.

⁷ See ICJ, *Barcelona Traction, Light and Power Company*, ICJ Reports 1970, 3, 32, para. 34. It is interesting to note that customary law is not referred to as basis of Universal Periodic Review, see Human Rights Council, Resolution 5/1, 18.6.2007, Annex, para. 1.

⁸ Libya ratified Additional Protocol II to the Geneva Convention of 1949 on 7.6.1978.

⁹ See *J.-M. Henckaerts/L. Doswald-Beck*, Customary International Humanitarian Law, Vol. I, 2005, XXV et seq.

¹⁰ References to these words of the dictator are given by *A. Bellamy*, Libya and the Responsibility to Protect: The Exception and the Norm, *Ethics & Int'l Aff.* 25 (2011), 263 (265).

peoples in Africa and Asia under colonial control. On the other hand, some of the founding members were organised as monarchies, not all of them bound by constitutional rules to respect the primacy of a parliamentary body elected by the people. If democracy had been established as a binding requirement for all member states, the United Nations' aim of universality would have been put in jeopardy. It was the adoption of the Universal Declaration of Human Rights in 1948¹¹ which advanced the principle of democracy forward in that it stipulated that (Article 21(3)):

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.¹²

This proclamation was followed in 1960 by the adoption of the Declaration on the granting of independence to colonial countries and peoples, which solemnly proclaimed that “[a]ll peoples have the right to self-determination”.¹³ All of a sudden, the internal and the external component of a people's political rights joined – although this was not immediately recognised. The right to self-determination was originally conceived solely as an instrument to fight colonialism, and the internal component of free elections as a basis for true self-determination of the people received little attention in many countries that had just emancipated themselves from the colonial yoke. But the pull of the democratic idea strengthened over the years. The two International Covenants of 1966 proclaimed in their common Article 1 the right of self-determination, and at the same time the Covenant on Civil and Political Rights laid down in a binding provision (Article 25) that all citizens of a country have the right to take part in the conduct of public affairs, in particular by voting and by being elected “at genuine periodic elections”. Assistance to the building of democratic institutions in sovereign states eventually crept unto the agenda of the World Organization in 1988 when the General Assembly, through a resolution adopted by consensus,¹⁴ emphasised the need to enhance the effectiveness of such elections, which was facilitated by the fact that that resolution targeted primarily South Africa. But in the following years this call for genuine democracy was gener-

¹¹ UN GA Resolution 217 A (III), 10.12.1948.

¹² Significantly enough, Saudi Arabia and South Africa abstained in the vote on UN GA Resolution 217 A (III).

¹³ UN GA Resolution 1514 (XV), 14.12.1960.

¹⁴ UN GA Resolution 43/157, 8.12.1988. In the following year the same circumstances facilitated the adoption of a similar resolution with the same title: UN GA Resolution 44/146, 15.12.1989.

ally nuanced first by a few negative votes¹⁵ and furthermore by a subsequent resolution that warned of foreign interference in electoral processes, a resolution promoted by the socialist countries and massively supported from all regions of the Third World.¹⁶

In the new century, the principle of democratic government received a new boost. In the Millennium Declaration of 8 September 2000,¹⁷ a large section (V., paras. 24 and 25) was devoted to “Human rights, democracy and good governance”. In a resolute fashion, the intention was voiced to

spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.

A few weeks later, General Assembly Resolution 55/96 of 4 December 2000 translated this intention into more detailed substance. It is a remarkable instrument in that it particularises in a comprehensive fashion all the inferences which one may possibly draw from the concept of democracy. It reads like a partisan pamphlet praising the virtues of liberal democracy. Accordingly, its adoption encountered considerable reticence within the General Assembly. No less than 16 states – among them Bahrain, Libya, Oman, Qatar, Saudi Arabia, and of course Cuba, which is never absent when liberal democracy can be stigmatised – abstained¹⁸ so that one can hardly speak of an international consensus having been reached. This reserved attitude of a significant number of states showed once again that democracy cannot be equated with self-determination. Self-determination is still understood by a broad majority in the United Nations, like half a century ago, only as an instrument to fend off foreign interference, colonialism, neo-colonialism, foreign occupation¹⁹ – but not as a binding legal precept requiring a state to be organised as a democratic regime. This is confirmed in particular by the

¹⁵ UN GA Resolutions 45/150, 18.12.1990: eight no votes; 46/137, 17.12.1991: four no votes. After that date, negative votes almost evaporated.

¹⁶ UN GA Resolutions 44/147, 15.12.1989; 45/151, 18.12.1990; 46/130, 17.12.1991; 47/130, 18.12.1992; 48/124, 20.12.1993; 49/180, 23.12.1994; etc. The last confrontation between two opposed drafts took place in 2005.

¹⁷ UN GA Resolution 60/1, 16.9.2005.

¹⁸ Cf. General Assembly, Official Records, A/55/PV.81, 16: Bahrain, Bhutan, Brunei Darussalam, China, Cuba, Democratic Republic of the Congo, Honduras, Lao People’s Democratic Republic, Libyan Arab Jamahiriya, Maldives, Myanmar, Oman, Qatar, Saudi Arabia, Swaziland, Viet Nam.

¹⁹ See ultimately UN GA Resolutions 66/86-89, 9.12.2011: the General Assembly deals exclusively with the remaining bits and pieces of former colonial empires, American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, New Caledonia, Pitcairn, Saint Helena, Tokelau, the Turks and Caicos Islands, the United States Virgin Islands and Western Sahara.

World Summit Outcome of 2005 where, in carefully drafted language, it is stated that “democracy is a universal value” – but not a legal principle.²⁰

Self-determination and democracy are certainly siblings, and yet they are not identical. As a “value” only,²¹ democracy remains in a curious legal twilight. States are not obligated to embrace it; on the other hand, the World Organization takes the view that it is not prevented from promoting and fostering political processes inasmuch as the people themselves have manifested their longing for democracy. Thus, the General Assembly and the Security Council as well as the Human Rights Council do not shy away from expressing their support for democratic elections and institutions. Many examples can be given which are not confined to the Arab world. Thus, with regard to Côte d’Ivoire²² and Haiti,²³ the Security Council has frequently emphasised that the holding of credible, free and fair legislative and presidential elections is essential for a stable political and institutional environment. With regard to Syria, the General Assembly, in the midst of the turmoil, manifested its agreement with the Arab League’s decision to “facilitate a Syria-led political transition to a democratic, pluralistic political system”.²⁴ Again, a small group of hardliners voted “No” but were not able to stop the overwhelming majority.²⁵ A few weeks later, the Security Council expressed itself in similar terms through a statement of its President.²⁶

²⁰ UN GA Resolution 60/1, 16.9.2005, para. 135.

²¹ This is also the language used in UN GA Resolution 64/155, 18.12.2009, Preamble, para. 1.

²² SC Resolution 2000 (2011), 27.7.2011, Preamble, para. 11, op. para. 7 (i).

²³ SC Resolution 2012 (2011), 14.10.2011, op. para. 6.

²⁴ UN GA Resolution 66/253, 16.2.2012, op. para. 8.

²⁵ Adoption by 137 votes to 12 (Belarus, Bolivia, China, Cuba, Democratic Korea, Ecuador, Iran, Nicaragua, Russian Federation, Syria, Venezuela, Zimbabwe), 17 abstentions.

²⁶ Presidential Statement S/PRST/2012/6, 21/3/2012, para. 5: “The Security Council expresses its full support for the efforts of the Envoy to bring an immediate end to all violence and human rights violations, secure humanitarian access, and facilitate a Syrian-led political transition to a democratic, plural political system, in which citizens are equal regardless of their affiliations or ethnicities or beliefs, including through commencing a comprehensive political dialogue between the Syrian government and the whole spectrum of the Syrian opposition.”.

2. The Measures Taken by the Security Council

It is against this background of massive violations of human rights and disregard of democratic principles that the Security Council, making use of its powers under Chapter VII of the Charter and drawing inspiration from the “responsibility to protect”, took the measures that have already been mentioned.

a) Referral to the International Criminal Court

No specific legal issues arose from the decision to refer the situation in Libya to the International Criminal Court. The states parties to the Rome Statute have explicitly allowed the Security Council to make use of that institution which stands outside the UN family (Article 13(b)). On the other hand, the referral lies undoubtedly within the scope of the Security Council’s jurisdiction under the Charter; since the establishment of the two international criminal tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) it is common ground that the prosecution of war crimes pertains to the broad array of measures authorised by Chapter VII of the Charter. Politically, however, this was a highly symbolic gesture. It was only the second time that the Security Council had availed itself of the power of referral, thereby manifesting its evaluation that the Libyan Government’s actions were to be classified as most serious breaches of international peace and security. A Government whose members have to stand trial before the International Criminal Court loses any legitimacy as the representative of its people.²⁷

²⁷ Currently, the Libyan National Transitional Council (NTC) refuses to surrender the Dictator’s son, *Saif Al-Islam Qadhafi*, to The Hague as requested by the International Criminal Court (ICC), which has issued an arrest warrant against him. The NTC wishes to put him on trial in Libya. Under Art. 17 para. 1 Rome Statute the question arises whether Libya is able and willing to guarantee a fair trial to the accused. However, it is not clear whether Art. 17 para. 1 applies when a situation has been referred by to the ICC the SC. By a submission of 1.5.2012, <<http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf>>, the Libyan Government formally requested the ICC to declare the case inadmissible and to quash the surrender request.

b) Travel Bans and Asset Freezing

Travel bans and asset freezing have come to be an enforcement tool for many years. They are conceived, in accordance with the principle of proportionality, as an effective alternative to the launching of military operations. For the SC, such orders are all the more convenient since they do not burden the United Nations with expenditure. The entire financial weight falls on the shoulders of the member states whose mandate it is to carry out their implementation.

c) Armed Intervention: Security Council Resolution 1973

Clearly, the sanctions reached their culmination point with Resolution 1973 providing for the establishment of a no-fly zone (paras. 6-12) and issuing the authorisation, for the benefit of member states “acting nationally or through regional organizations or arrangements”, to “protect civilians and civilian populated areas under threat of attack” in Libya (paras. 4-5). Although the SC did not explicitly mention the famous “responsibility to protect” (RtoP),²⁸ that concept underlies its determination. As we know today, the authorisation eventually led to the downfall of the dictatorship and the death of the dictator himself. Accordingly, for international lawyers the question whether Resolution 1973 was lawful automatically takes centre stage.

Although human rights practices have long since lost their character as exclusively domestic matters, the question remains whether the Security Council is empowered to act in their defence. Article 24 UN Charter explicitly states that the SC is primarily responsible for maintaining international peace and security. It is the word “international” which requires closer attention. Originally, broad agreement existed to the effect that “international” peace and security is a state of affairs between and among states.²⁹ The SC was deemed to be mandated to secure peaceful relations between states as the primary actors in international relations. This understanding prevailed for decades after the founding of the World Organization. Only the policies of Israel and South Africa were subjected to closer

²⁸ Introduced by UN GA Resolution 60/1, 16.9.2005, paras. 138-139.

²⁹ See *H. Kelsen*, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, 1950, 19: “international peace is a condition of absence of force in the relations among states (...) it is not the purpose of the United Nations to maintain or restore internal peace by interfering in a civil war within a state”. Same view: *L. M. Goodrich/E. Hambro*, *Charter of the United Nations: Commentary and Documents*, 2nd ed. 1949, 93.

scrutiny. Still, after the end of the second Gulf War, the SC considered it necessary to underline, in a Resolution criticising Iraq for its persecution of the Kurdish population in the northern parts of the country, that the ensuing “massive flow of refugees towards and across international frontiers” threatened international peace and security because of this transboundary element.³⁰ In the legal literature, this narrow view was shared by prominent authors still in 1991.³¹

It was the conflict in Somalia which led to a more expansive and differentiated construction of the concept of “international”. In order to justify its recourse to Chapter VII of the Charter, the SC referred to the “magnitude of the human suffering caused by the conflict” – that was the determinative finding.³² No transboundary effect was deemed necessary, and at that time no such effect could be found. Massive violations of human rights, that was the inference to be drawn, amount to a threat to, or a disturbance of, international peace and security. This line of argument was continued with SC Resolution 841 (1993)³³ in respect of the situation in Haiti resulting from the toppling of the legitimate President, *Jean-Bertrand Aristide*, by a military coup. Apparently, the SC still felt some uneasiness regarding its courageous interpretation of its competences since it explicitly stated that it was confronted with a “unique and exceptional situation”, warranting “extraordinary measures”. More recently, yet, such inhibitions were resolutely shed. From the very inception of the confrontation in Côte d’Ivoire between the former incumbent president, *Laurent Gbagbo*, and his successor, *Alassane Ouattara*, who had won the elections of 28 November 2010, the SC unhesitatingly called upon the loser to hand over governmental powers to his successful rival. Its main objective was to stabilise the unrest provoked by the stubborn clinging onto power by a politician intent on disregarding the will of the people.³⁴ No mention was made of any possible repercussions on neighbouring states.

³⁰ SC Resolution 688 (1991), 5.4.1991, Preamble, para. 3.

³¹ See *J. A. Frowein*, Artikel 39, in: B. Simma et al. (eds.), *Charta der Vereinten Nationen. Kommentar*, 1991, 562 margin number 6.

³² SC Resolution 767 (1992), 27.7.1992, Preamble, para. 7. The subsequent SC Resolution 794 (1992), 3.12.1991, Preamble, para. 3, underlines the “magnitude of the human tragedy caused by the conflict”.

³³ Adopted on 16.6.1993.

³⁴ See SC Resolution 1962 (2010), 20.12.2010, op. para. 1: “Urges all the Ivorian parties and stakeholders to respect the will of the people and the outcome of the election in view of ECOWAS and African Union’s recognition of *Alassane Dramane Ouattara* as President-elect of Côte d’Ivoire and representative of the freely expressed voice of the Ivorian people as proclaimed by the Independent Electoral Commission”. A similar statement can be found in SC Resolution 1975 (2011), 30.3.2011, op. para. 1.

The World Summit Outcome confirmed, on the part of the General Assembly, the new reading of the Security Council's powers. In para. 139 of that document, the General Assembly authorised the Security Council to resort to Chapter VII of the Charter should a government engage in grave violations of human rights, in particular genocide, war crimes, ethnic cleansing and crimes against humanity. Thus, the Security Council's practice received its final blessing. One can now speak of an established legal rule. Informal amendments of the Charter by re-interpretation of its provisions may take place if there exists agreement between the Security Council and the General Assembly, as we know from the constructive interpretation of Article 27(3) UN Charter in the sense that the absence or the abstention of a permanent member does not hinder the valid adoption of a resolution.³⁵

Apart from this pragmatic approach, one finds moreover solid arguments capable of showing that the SC's reading of "international" is far from being an arbitrary attempt to circumvent the limits of the Charter. It suffices to realise that "international" can be related to the applicable legal rules governing a situation submitted to the SC. In the world today, international peace and security are widely dependent on a state's respect for the network of human rights brought into being in the course of more than six decades. Any such grave violation inevitably produces repercussions in the wider neighbourhood of the state concerned and possibly even in the world at large. Two criteria have to be met. On the one hand, the rules infringed must be of an international origin. On the other hand, the violation must be serious, deep or massive according to the relevant concrete circumstances. There can be no doubt that the Libyan dictator had no scruples in infringing basic rules of human rights law and international humanitarian law. His troops had already committed atrocities of that kind,³⁶ and the dictator had threatened to commit even further violations should he succeed in defeating the rebels.

A second general point deserves close attention. The UN member states have authorised the SC to take measures of enforcement against states identified by it as elements endangering international peace and security. In principle, it is the SC itself that has been vested with these powers that deeply affect national sovereignty. The SC is not authorised to make use of these powers at its pleasure, nor are the members of the SC allowed to acti-

³⁵ In the *Namibia* case, the International Court of Justice gave its approval to that understanding of the veto power, *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, 16, 22, para. 22.

³⁶ Confirmed in the Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68, 8/3/2012, paras. 15-29, 39-40, 44-48, 66-68, 72-78.

vate them solely for their own advantage. According to a logically coherent scheme, the original plan consisted of putting at the SC's disposal national troop contingents that would be permanently available for the enforcement of resolutions under Chapter VII (Article 43 UN Charter). It is well known that this system never came into being. The permanent members feared that such a standing force might be misused by their opponents in the continuous power struggle for world leadership. Thus, the SC is a commander without an army – which is not an enviable position.

Until the demise of the socialist system in 1989/90, this institutional weakness of the SC had no great importance. The SC was in any event unable to agree on the sending of combat forces to a theatre of military conflict. For decades, it had confined itself to organising peacekeeping operations. The first decisive test in the new era occurred in the course of Iraq's invasion of Kuwait when the SC authorised "Member States co-operating with the Government of Kuwait ... to use all necessary means" to liberate Kuwait.³⁷ Strictly speaking, this authorisation would not have been necessary since the operation could be based on the right of collective self-defence under Article 51 UN Charter. But it paved the way for future operations pursuant to that model. Thus, in 1999, after the Kosovo war, the Security Council entrusted the maintenance of security to an "international security presence" (KFOR) under the command ("substantial participation") of NATO, and Resolution 1973 (2011) provides the latest – and most delicate – example of such outsourcing.

Is this model of delegation of enforcement powers in accordance with the letter and the spirit of the UN Charter? Is it not the responsibility of the SC itself to remain at the helm of such operations? Clearly, what is desirable and what is feasible are on a collision course here. Should one contend that any delegation of enforcement powers is unlawful, then the SC would become paralysed. It would be unable to discharge its functions. The Charter itself takes into account the eventuality that members of the World Organization may be called upon for assistance (Article 42). Hence, it is not only the needs of pragmatism that militate in favour of admitting an enhanced role of member states.

However, it should be an imperative requirement that the SC maintain overall responsibility of any operation based on delegating enforcement powers.³⁸ For that purpose, strict reporting obligations should be placed on

³⁷ SC Resolution 678 (1990), 29.11.1990.

³⁸ Observers might deem it necessary to make such an operation dependent on actual consent to be tested at any time. However, any such operation has enormous dimensions and needs a certain amount of stability. As the veto right applies to any substantive decision, it is

any alliance of the willing. In that regard, Resolution 1973 provides in unequivocal language that the member states concerned must “inform the Secretary-General immediately of the measures they take” (paras. 4, 11). In that regard, no defect can be perceived. It emerges from available documentation that indeed the reports were submitted as prescribed by Resolution 1973. NATO submitted its first report on 26 April 2011, which was then complemented by further subsequent reports.³⁹

It is difficult for a lawyer who does not dispose of specialist knowledge to evaluate whether the facts observable in Libya in March 2011 corresponded to the situation susceptible of triggering RtoP. It should be recalled that from the crimes encompassed by it only war crimes and crimes against humanity could be seriously considered. While crimes against humanity, following the Nürnberg tradition, must from the very outset be understood as a “widespread or systematic attack directed against any civilian population”,⁴⁰ war crimes do not presuppose such a massive character, according to the Geneva humanitarian conventions. Even an individual act may be a war crime. In the present context, war crimes should however be construed in light of the chapeau of Article 8 of the Rome Statute as being committed “as part of a plan or policy or as part of a large-scale commission of such crimes”; only then do they stand on a par with the other classes of crimes listed in para. 139 of the World Summit Outcome.

Did the occurrences in Libya in March 2011 reach this threshold of seriousness? Some critics have flatly denied this. Such individual assessments are hardly convincing. The SC is better placed than anyone far away from the armed conflict to proceed to an evaluation. According to the original intent of the drafters it shall enjoy a wide margin of appreciation. The exercise of this discretion cannot be scrutinised in the same way as a German administrative judge would appraise an individual decision in a matter relating to the application of construction law. One should not forget, above all, that the SC was deliberately exempted from any kind of judicial review, precisely because a judge lacks the historical, political and social knowledge which one finds in a condensed form in the SC where the knowledge of 15

more or less excluded to repeal an authorization. Every member of the Security Council knows, therefore, that the decision to be taken will be unassailable on legal grounds. With regard to peacekeeping operations, it has become the rule to limit the mandate given to six months.

³⁹ Security Council Meeting Record, 27.6.2011, UN Doc. S/PV.6566, 3.

⁴⁰ See chapeau of Art. 7 Rome Statute. From the literature see *G. Werle*, *Principles of International Criminal Law*, 2nd ed. 2009, 288 margin number 779: “Crimes against humanity are mass crimes committed against a civilian population”; *A. Cassese*, *International Criminal Law*, 2nd ed. 2008, 98: “They are not isolated or sporadic events”.

governments merges. In the meantime, the recent Report of the International Commission of Inquiry on Libya, established by the Human Rights Council, has confirmed that massive violations of human rights were indeed committed by the *Qadhafi* forces at the time the SC took its decision.⁴¹

Some other possible objections deserve special mention. In a somewhat equivocal manner, *Reinhard Merkel* observed in an article in the *Frankfurter Allgemeine Zeitung* that the people of Libya did not have a right to rise against the dictatorship from which they were suffering; supporting them would therefore have amounted to supporting unlawful activities.⁴² At a later stage, *Merkel* rejected this reading of his article as incorrect. It is true that no rule of international law imposes a duty of obedience on the citizens of a country that has fallen into the hands of a ruler who, on his part, disregards basic legal precepts. A right of resistance belongs to the core achievements of political philosophy in the modern world where no other remedy is reasonably available.⁴³ International law does not curtail essential civil rights.⁴⁴

A weightier objection might be derived from a look at the considerable costs which the uprising entailed. It was clear from the very outset that the struggle for freedom could not be fought without excruciating losses of human life, and it was indeed the SC's duty to take these consequences into account. Starting a military operation whose costs would have far exceeded the hoped for benefits would not have been justifiable according to the general yardstick of proportionality. On the other hand, a dictatorial regime cannot be displaced simply by words and economic sanctions. Chapter VII of the Charter provides for military operations, being fully aware of the death toll that may have to be expected. The Charter does not embrace an ideal of perfect peacefulness in accordance with a pacifist ideology. Only a gross discrepancy between costs and benefits would have marred the resolution of the SC, something that could not be foreseen and did not materialise during the months from March to September 2011.

⁴¹ UN Doc. A/HRC/19/68 (note 36).

⁴² *R. Merkel*, Die Militärintervention gegen Gaddafi ist illegitim, *Frankfurter Allgemeine Zeitung*, 22.3.2011, 31.

⁴³ See also Universal Declaration of Human Rights, UN GA Resolution 217 A (III), 10.12.1948, preambular para. 3: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

⁴⁴ A right of resistance must also be recognized under international law, see *C. Tomuschat*, The Right of Resistance and Human Rights, in: UNESCO (ed.), *Violations of Human Rights: Possible Rights of Recourse and Forms of Resistance*, 1984, 13 et seq.

A number of additional elements speak in favour of Resolution 1973. When the Resolution was adopted on 17 March 2011, the only Arab state in the SC, Lebanon, took a clear stance for its adoption as the speaker for the Arab League.⁴⁵ A few days earlier, the Arab League had clearly condemned the occurrences in Libya. Likewise, the African states in the Security Council (Gabon, Nigeria, South Africa) voted unanimously for the adoption of Resolution 1973. None of the 15 states formulated any objections against the lawfulness of the Resolution. The Russian delegate criticised the text for not being clear enough and not specifying the rules of engagement but did not call into question its legal validity.⁴⁶ In sum, even the most thorough scrutiny of Resolution 1973 does not reveal any relevant legal defects resulting from the substantive and procedural conditions of its adoption.

It is legitimate, on the other hand, to raise the question whether the way in which Resolution 1973 was implemented casts a negative shadow on its lawfulness. It is true that the Resolution did not call for a regime change – which eventually did take place. If the draft submitted to the SC had contained those words it would certainly not have been adopted. To bring about regime change may be legitimate under very peculiar special circumstances. The national-socialist regime in Germany, because of its intrinsic wickedness, had to be dismantled after Germany's surrender in 1945. The fact is, however, that the SC did not wish to go that far. It stands to reason, on the other hand, that the factual circumstances under which the alliance of the willing had to execute its mandate compelled it to carry out military operations by targeting the armed forces of the dictator in general, without being able to take rescue measures in a specified manner, each time where a threat of egregious wrongdoing by the armed forces of the dictator materialised. As the Resolution explicitly stated, foreign troops were not admitted onto Libyan soil as an "occupation force" (para. 4). Since NATO forces could only carry out their attacks from the air or from the sea, they had to attack the Libyan military forces wherever they were present so that eventually the implementation of Resolution 1973 boiled down to a fight against the Libyan military in general – hardly distinguishable from a fight against the regime as such. For an outsider, in any event, it is nearly impossible to reach a clear conclusion as to whether the mandate's scope was respected or disregarded. To elucidate this question will be a task for historians. Whether the attacks on the command centres in Tripoli can be considered legitimate under international humanitarian law belongs without any doubt to the borderline issues that require close attention. NATO has publicly stated its

⁴⁵ UN Doc. S/PV.6498, 3–4.

⁴⁶ UN Doc. S/PV.6498, 8.

view that at all times it endeavoured *bona fide* to remain within the confines of the authorisation issued to it.⁴⁷ In any event, even a light-handed use of Resolution 1973 would not retroactively affect its validity. All members of the SC were entitled to assume, on the basis of the principle of good faith, that its limits would be respected.

Although China and Russia have argued that they were deceived by the wide interpretation given to Resolution 1973 by the NATO forces, it is not absurd to argue that the two governments were perfectly aware of the ambiguity of the Resolution, realising without any great difficulty that its implementation would lead to the fall of the dictator. By abstaining instead of casting their veto they were in an enviable position. On the one hand, they did not block the operation against *Qadhafi*; on the other hand, if *Qadhafi* had left the military confrontation as the victor, they could have told him that they had not voted against him. One cannot be sure, though, whether they reasoned in such Machiavellian terms. In any event, the broad reading of Resolution 1973 by the NATO countries involved in the operations against Libya serves them today as a pretext to block any critical resolution against Syria.

Supposing for the sake of argument that the expansive understanding of Resolution 1973 was indeed incompatible with its letter and spirit, one would have to conclude that the attacks against *Qadhafi's* armed forces amounted to unlawful aggression against Libya. Yet no voices can be heard that this "crime of crimes" should entail sanctions in accordance with the general rules of international responsibility. The fundamental principles of the international legal order do not change over night. But the views on what measures of reparation are appropriate in a given case may change fairly fast. Soon after the fall of the dictatorship, the Security Council "welcome[d] the statements of the National Transitional Council",⁴⁸ which amounted to a kind of implicit recognition. No complaint was raised in the

⁴⁷ See NATO, Fact Sheet, Operation UNIFIED PROTECTOR. Protection of Civilians and Civilian-Populated Areas and Enforcement of the No-Fly Zone, October 2011, <http://www.nato.int/nato_static/assets/pdf/pdf_2011_10/20111005_111005-factsheet_protection_civilians.pdf>: "Targeting is done with extreme care and precision, using the weapon with the smallest yield possible, to avoid harm to the Libyan people and their infrastructure." In fact, the Report of the International Commission of Inquiry on Libya (note 36), para. 89, concludes that NATO did not deliberately target civilians in Libya. However, NATO would be well-advised to follow the advice given to it by the Commission, para. 130, and by Amnesty International to carry out an investigation into the deaths entailed by its bombardments. See Amnesty International, Libya – The Forgotten Victims of NATO Strikes, March 2012, 18, <<http://www.amnesty.org/en/library/asset/MDE19/003/2012/en/8982a094-60ff-4783-8aa8-8c80a4fd0b14/mde190032012en.pdf>>.

⁴⁸ SC Resolution 2009 (2011), 16.9.2011, op. para. 4.

aftermath against the armed intervention. Attention shifted very soon to the proliferation of arms of all types in the hands of the most diverse groups. In March 2012, the most recent Resolution of the SC on Libya reaffirmed that the UN “should lead the coordination of the efforts of the international community in supporting the Libyan-led transition and rebuilding process aimed at establishing a democratic, independent and united Libya”.⁴⁹ During the meeting of the Security Council, the diplomatic delegate of Libya declared:

The Council has done a praiseworthy job in defending civilians in Libya ... We believe that the Security Council must always stand by peoples being subjected to killing and oppression by their rulers.⁵⁰

In other words, the state itself, through its legitimate representative, declared unequivocally that the Security Council had acted in full accordance with the wishes of the Libyan population. This closes the debate.⁵¹ The example shows once again that the consequences of a breach of a *jus cogens* rule do not have a *jus cogens* nature themselves. They belong to a class of dispositive rules which the states directly affected may handle as they see fit.⁵²

3. The Recognition of the National Transitional Council

The Security Council’s “downgrading” of the Libyan Government also justifies the recognition of the National Transitional Council (NTC) by the Western powers in various differentiated forms.⁵³ Obviously, under normal conditions a foreign government would commit a breach of the principle of non-intervention by recognising an organisation claiming to exercise governmental functions in open opposition to the official government. The first acts of recognition were tentative and hesitant. However, a head-on collision was brought about on 15 July 2011 by the meeting of 32 nations, including the United States and the United Kingdom, which, within the

⁴⁹ SC Resolution 2040 (2012), 12.3.2012, Preamble, para. 12; see also op. paras. 1, 2, 6(a).

⁵⁰ UN Doc. S/PV.6733, 12.3.2012, 3.

⁵¹ But see the negative assessment by R. Merkel, Die Intervention der NATO in Libyen. Völkerrechtliche und rechtsphilosophische Anmerkungen zu einem weltpolitischen Trauerspiel, Zeitschrift für Internationale Strafrechtsdogmatik 6 (2011), 771 et seq.

⁵² See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy)*, 3.2.2012, para. 93.

⁵³ See assessment by S. Talmon, Recognition of the Libyan National Transitional Council, ASIL Insights, 16.6.2011; see also S. Talmon, De-Recognition of Colonel Qaddafi as Head of State of Libya?, ICLQ 60 (2011), 759 (764 et seq.).

framework of the Libya contact group, issued a declaration in which the participants stated that they would deal with the National Transitional Council “as the legitimate governing authority in Libya”.⁵⁴ At that time, the dictator’s government was still present in Tripoli, holding large sways of the country under its control. Thus, the recognition of the NTC ran counter to the principle of effectiveness, which according to the *Estrada* doctrine of 1930⁵⁵ had been accepted for decades as the guiding parameter for the recognition of governments. In July 2011, the NTC was at the most a government *in statu nascendi*. But its lack of factual power was compensated by its legitimacy which it possessed as the voice of the Libyan people, although not confirmed by formal elections. Without the measures taken against the dictatorship by the SC, the different declarations of recognition would never have been made. The role of the SC in the building of the new Libya can thus hardly be overrated.

III. Syria

1. The Passivity of the Security Council

Currently, all eyes are fixed on the tragic events in Syria. Attempts to obtain a resolution of the Security Council condemning or just criticising the relentless, indiscriminate attacks on the positions of the rebels, which entailed grave losses and injuries among the civilian population, proved abortive for many long months. China and Russia were opposed to any such resolution, relying, as they contended, on their bad experiences with the allegedly abusive application of Resolution 1973 against Libya. A Presidential Statement issued on 21 March 2012⁵⁶ overcame this blockade to some extent. In that Statement, the SC called for an end of the fighting and pleaded for a UN supervised cessation of armed violence in all its forms by all parties to protect civilians and stabilise the country.⁵⁷ Eventually, in two later Resolutions, adopted unanimously, the SC “condemne[d]” the Syrian authorities’ “widespread violations of human rights”.⁵⁸

⁵⁴ See statement by British Foreign Secretary *William Hague*, 15.7.2011, <<http://www.fc.gov.uk/en/news/latest-news/?id=631324382&view=News>>.

⁵⁵ Mexican Minister of Foreign Affairs, *G. Estrada*, Declaration of 27.9.1930, reprinted in: M. M. Whiteman (ed.), *Digest of International Law*, Vol. 2, 1963, 85.

⁵⁶ UN Doc. S/PRST/2012/6, 21/3/2012.

⁵⁷ See also Presidential Statement of 5/4/2012, UN Doc. S/PRST/2012/10.

⁵⁸ SC Resolution 2042 (2012), 14.4.2012, preambular para. 4; SC Resolution 2043 (2012), 21.4.2012, preambular para. 4.

In any event, the requirements for the application of RtoP would appear to have been fulfilled. According to evidence publicised by the media, torture is being practiced by the Syrian security forces as a general strategy. In the attacks on the rebels, no serious attempt was made to avoid collateral damage to the civilian population.

RtoP has become a legitimate power of the SC, but does not qualify as a duty. The SC may take action for the prevention of war crimes and crimes against humanity but it is not obligated to do so. The fact that, in the Libyan case, it acted by authorising the use of military force does not mean that it is compelled mechanically to continue its line of conduct. And there are in fact weighty arguments that militate against engaging in an operation of the type that led to the downfall of dictator *Qadhafi*. To analyse the occurrences in Syria as the fight of an entire people against a corrupt dictatorial elite would be a gross distortion of the current political configuration. Dictator *Assad* does seem to enjoy the support of large sectors of the Syrian population. External intervention in this power struggle would mean to set the entire country ablaze – and perhaps even some of the neighbouring states – and to risk the death of many more human beings than killed today by the security forces. A simple cost-benefit assessment must lead to the conclusion that recourse to peaceful modalities of settlement is, in light of the circumstances, the only acceptable method of implementing RtoP, notwithstanding the fact that every day dozens of new victims are to be deplored. A full-fledged war is not the best remedy; it is to be averted in the interest of the Syrian people in spite of the high daily blood toll. Although the Chinese and the Russian attitude may have been regrettable inasmuch as the two governments initially rejected any kind of censure of the Syrian government, they are certainly right in discarding any suggestion to replicate the Libyan experience.

2. Unilateral Humanitarian Intervention?

It is clear that under the prevailing circumstances any alternative plan to intervene unilaterally without the approval of the SC, as was done in 1999 for the protection of the Albanian population in Kosovo, should be categorically rejected. Humanitarian intervention has not been accepted by the international community. Whereas on the eve of the World Summit Outcome of 2005 hope arose that the General Assembly might pronounce itself in favour of unilateral rescue operations (at least in extreme cases), the General Assembly has formally distanced itself from opening such a new hole in

ZaöRV 72 (2012)

the protective wall of the ban on the use of force. Its determination is clear: The SC is the only holder of the power to authorise or order enforcement action for the protection of endangered populations. The anti-colonial instincts of the majority of the countries of the Third World cannot condone military operations that strike at the heart of their national sovereignty.

3. Criminal Prosecution

Syria is not a party to the Rome Statute of the International Criminal Court. Therefore, as long as the current regime stays in power, no criminal prosecution by the international community can take place if the Security Council refuses to refer the situation to the Court. It will then be the moment of truth for the principle of universal jurisdiction, which is in any event applicable to war crimes. The courts of third countries would, however, face enormous, almost insurmountable difficulties in trying to subject to judicial review the entire gamut of crimes committed by the Syrian leadership – and perhaps also by the insurgent forces.

IV. Concluding Observations

A summary of our considerations may be given in a few short sentences. The democratic principle comes out as the winner of the Arabellion that has held the Arab world bordering the Mediterranean Sea in its grip for more than one year. For the SC, it has become almost a routine strategy to work for the establishment and strengthening of democratic regimes as a means of settling internal conflicts in states that beforehand had lived under dictatorial rule. Democracy has gained the upper hand in Tunisia, it has taken its first steps in Egypt and in Libya. In Syria, the outcome of the power struggle is still very much open, not least because many sectors of the population are both sceptical and fearful of the post-*Assad* period. Democracy has definitively been embraced by the international community as the principal criterion of a government's legitimacy. However, a word of warning: democracy is not a panacea for peace and social justice.

The SC has emerged as the principal winning actor. Its potential is enormous, almost frightening in that it may decide on the existence or non-existence of governments of UN member states. But it is a giant only where its permanent members agree. Its usual paralysis reappears as soon as any issue touches upon conflictive interests of those members, reducing it to the

size of a dwarf. The world then falls back into the status of an anarchic society where each state alone claims to be the master of its fate.

RtoP provides the instruments which the SC may set in motion to pursue its goals. However, as just mentioned, RtoP can produce its full effects only where the permanent members succeed in acting united. On the other hand, RtoP should not be misunderstood as an opening only for military enforcement action. The concept of RtoP has reconfirmed that the international community bears a responsibility for the well-being of every human being on this globe and that states can be held accountable for their actions *vis-à-vis* the international community. It remains to be seen whether the International Criminal Court will be able effectively to fulfil the hopes which have been placed in its creation. The proceedings against the members of Libya's dictatorial elite have just begun in The Hague.⁵⁹ It will take many years before a definitive assessment can be made.

⁵⁹ For the most recent developments in the case: see note 27.