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Obama and Libya

Benjamin G. Davis

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OBAMA AND LIBYA

*Benjamin G. Davis**

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“In war, truth is the first casualty” – Aeschylus

I thank the Florida A & M University Law Review for this opportunity to discuss the legal regimes for the Obama Administration’s role in the Libyan conflict. I will address the international legal regime and then the United States legal regime in a method I call the *Dedoublement Analytique* or *Second Vision* method.¹ By starting my analysis with international law and coming back into the U.S. foreign relations law, my goal is twofold: 1) to enhance the understanding of

* Associate Professor of Law, University of Toledo College of Law. I thank Professor Jeremy Levitt for his insights. This article is dedicated to all Africans.

1. This method contrasts with the separate internal U.S. foreign relations law method that dominates discussion of these topics in the United States and the separate external international law method which United States leaders have to address with foreign and international counterparts. As described in earlier work, I believe it is essential for the American citizen to be conversant with both of these methods of approaching international law in order to see more clearly what is at stake in a particular situation. See Benjamin G. Davis, *A Citizen Observer’s View of the U.S. Approach to the War on Terrorism*, 17 *TRANSNAT’L L. & CONTEMP. PROBS.* 465-479 (2008).

the American citizen of the interplay between the international and domestic planes, and 2) to encourage citizens to use this method to understand both the content and context of their government's pronouncements – particularly about armed conflict, but in general with regard to matters whatever the ostensible international dimension. The hope is this method will permit citizens to be less dependent on the official presentation of a situation and also help citizens consider alternatives that might not be expressed in the official presentation.

Please note that the Libyan conflict has played out with breathtaking speed in the context of the already accelerated pace of the Arab Spring. Though I suspect the sources of uprising long predate the conventional wisdom as to its start, the Arab Spring appears to have started with the December 17, 2010 vegetable salesman² setting fire to himself in Tunisia.³ It is difficult to definitively state or confirm the veracity of facts or capture the extent of what happened or is happening in Libya.⁴ In this regard, I feel in a similar position in examining facts and events as I was in Paris in the 1989-1991 period when time seemed to speed up with the fall of the Berlin Wall, the opening of Eastern Europe, and the collapse of the Soviet Union. It is with that fluidity of the current situation in Libya in mind that I provide these first thoughts.

2. Borrowing from Francesco Alberoni's remarkable work on movements and institutions, Mohammed Bouazizi's personal sacrifice appeared to be the ultimate moving expression of an individual's "depressive overload" at the contradictions between his external social reality and his internal reality. His act appears to have triggered a similar experience in many others creating what might be termed a "nascent state" of consciousness for those persons similarly reacting to the oppression and contradictions. As these persons have sought affinity with others, we have witnessed the development of movements. A full presentation of Francesco Alberoni's insights on movements and institutions is beyond the scope of this paper. See generally, FRANCESCO ALBERONI, MOVEMENT AND INSTITUTION (Patricia C. Arden Delmoro trans., Columbia University Press 1984) (1977). That Mr. Bouazizi's act occurred in a technological environment which allows rapid global dissemination of a single event may have spurred the more rapid development of affinity in much wider circles than might have occurred for a similar act in the 1990 period with the fall of the Soviet Union. On the role of technology and movements see, Benjamin G. Davis, *Online Influence Space(s) and Digital Influence Waves: In Honor of Charly*, 25 OHIO ST. J. ON DISP. RESOL. 201-246 (2010).

3. A remarkably effective way of viewing the recent developments can be found at Garry Blight, Sheila Pulham and Paul Torpey, *Arab Spring: an Interactive Timeline of Middle East Protests*, THE GUARDIAN (Jan. 5, 2012), <http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>.

4. Glenn Greenwald, *The Human Rights "success" in Libya*, SALON.COM (Jan. 6, 2011), http://www.salon.com/2012/01/26/the_human_rights_success_in_libya/singleton/.

I. INTERNATIONAL LEGAL REGIME

With the above caveats, there are several key events in the December 2010 – February 2011 period, which predates the United Nations Security Council intervention. First, the early support by Col. Muammar Gadhafi of the Tunisian regime against the Tunisian protests, followed by additional protests and the resignations of diplomats of the Libyan government had a significant impact on the developing situation in Libya. In addition, the Libyan government's repression of protests and the arrest of a human rights campaigner in Benghazi,⁵ the deaths of civilians, and the incitement to hostility and violence against the civilian population made from the highest level of the Libyan government increased the pressure for outside intervention.⁶

A. *Libyan Obligations Under the International Legal Regime*

In late 2010 and early 2011, as protests and internal disturbances joined with governmental reaction, the Libyan state was, at a minimum, already subject to international human rights obligations under treaty law or customary international law through the Universal Declaration of Human Rights⁷ and the International Covenant on Civil and Political Rights.⁸ Whether, in practice, the Libyan state recognized and respected the human rights of the persons within its territory and subject to its jurisdiction internally is not the initial concern for the following reason. It is axiomatic that no state can invoke its internal law as a justification for its failure to perform a treaty.⁹ The principal point is that these international human rights treaty obligations were and remain upon the Libyan state regardless of internal treatment.

5. *Supra* note 4.

6. U.N.S.C. Res. 1970, Feb. 26, 2011, U.N. Doc., S/RES/1970 (2011).

7. Universal Declaration of Human Rights, U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, p. 71 (1948), available at <http://www.un.org/en/documents/udhr/>. Concerning the evolution of such rights into customary international law see *supra* at note 1, Jordan J. Paust, *International Law, Dignity, Democracy, and the Arab Spring*, 18 BARRY L. REV. _ (Forthcoming 2013), available at <http://ssrn.com/abstract=1991432>.

8. UN General Assembly, International Covenant on Civil and Political Rights, Dec. 16, 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html> [accessed 26 January 2012]. Libya ratified May 15, 1970.

9. Vienna Convention on the Law of Treaties, Art. 27, May 23, 1969, 1155 U. N. T. 331. The inability to extract oneself from one's international obligations through internal law is a well settled rule of customary international law crystallized in the Vienna Convention language.

As the protests rapidly evolved into open rebellion against the Libyan government, the Libyan situation could be viewed not only in terms of the Libyan state's international human rights obligations, but also in terms of the Libyan state's international obligations in a Non-International Armed Conflict (NIAC) under treaty and customary international humanitarian law.¹⁰ This NIAC appeared to be between rebels in the East centered around Benghazi and the central government, but significant disturbances appeared to occur in the capital of Tripoli and other places in the country. An international dimension to this situation appears to have also been present with the entrance (with the consent of the then Libyan government) of mercenaries from other nations to assist the government against the rebels.

In addition to international human rights and humanitarian law obligations derived from treaties and customary law, Libya is subject to its obligations in other regional international organizations such as the African Union,¹¹ the League of Arab States (Arab League)¹² and the Organization of Islamic Cooperation (formerly the Organization of the Islamic Conference).¹³ Finally, but not exclusively, Libya is a member of the United Nations with its obligations under the Charter of the United Nations.¹⁴

B. International Reaction to the Developments in Libya

The Libyan obligations described above interplay with the powers and roles granted by Libya and the regional and international communities to the regional and international governmental organiza-

10. Geneva Conventions I-IV, 1949 (Libya ratified them May 22, 1956) and Protocols I (involving two countries or International Armed Conflicts) and II (Non-International Armed Conflicts like civil wars) Additional to the Geneva Conventions, 1977 (Libya ratified them on July 7, 1978). These treaty obligations also crystallize customary international humanitarian law to some extent though such a discussion is beyond the ambit of this paper. For a study by the International Committee of the Red Cross of customary international humanitarian law see <http://www.icrc.org/customary-ihl/eng/docs/home>. This study has been the subject of discussion in the United States under the U.S. foreign relations law vision – a domestic U.S. debate that appears more related to internal justifications of U.S. actions in Iraq and Afghanistan in the War on Terror – rather than international law. It is beyond the scope of this paper to do more than highlight these discussions.

11. Constitutive Act of the African Union, July 11, 2000, http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

12. LEAGUE OF ARAB STATES, <http://www.arableagueonline.org>.

13. PERMANENT MISSION OF THE ORGANIZATION OF THE ISLAMIC CONFERENCE, <http://www.oic-un.org/index.asp>.

14. Charter of the United Nations, available at <http://www.un.org/en/documents/charter/index.shtml>.

tions in our international legal system. Separate from these structures (but interrelated), states on their own¹⁵ or in combination with other states, non-governmental institutions and individuals played roles (and continue to play roles) in the developments in Libya along with these regional and international governmental organizations. These further channels influenced the reaction of other member states and the Secretariat of these entities in their exercise of the relevant powers of the international governmental organizations.

The nature of the violence against civilian populations in the period preceding the United Nations Security Council Resolution 1970 of February 26, 2011 led to condemnations by the Arab League, the African Union, and the Secretary General of the Organization of Islamic Cooperation as serious violations of human rights and international humanitarian law in Libya.¹⁶ In addition, the United Nations General Assembly Human Rights Council dispatched an independent international commission of inquiry to investigate all alleged violations of human rights law in Libya. The task of the commission was to establish the facts and circumstances of such violations, determine the extent of the crimes perpetrated and, if possible, identify those responsible.¹⁷ Many organizations responded to the Libyan events but it is beyond the scope of this essay to explore all of them. Below I discuss the different emphases of the United Nations Security Council, the African Union, the Arab League, the Organization of Islamic Cooperation (formerly the Organization of the Islamic Conference) and the North Atlantic Treaty Organization to the events in Libya. Understanding the actions of these five particular international governmental organizations gives context for what President Obama confronted on the international plane while he formulated the United States' approach and addressed domestic plane concerns (discussed in the next section).

15. *See, e.g.*, the French recognition of the National Transitional Council as the legitimate representatives of the Libyan people on Mar. 10, 2011 in the run up to the United Nations Security Council Resolution 1973 authorization, inter alia, of the use of force. For discussion of the process of recognition of the National Transitional Council, *see* Stefan Talmon, *Recognition of the Libyan National Transitional Council*, 15 ASIL Insights 16, Jun. 16, 2011 available at <http://www.asil.org/insights110616.cfm>.

16. *Supra* note 7.

17. *Id.*

1. The United Nations Security Council – Diplomatic and Military Role

The initial response of the United Nations Security Council in United Nations Security Council Resolution 1970 of February 26, 2011 was under Chapter VII of the United Nations Charter taking measures under its Article 41 powers (i.e., not involving the use of armed force).¹⁸ Complying with the Security Council response became an obligation of all states whether acting as states or in international agencies.¹⁹ The response was wide-ranging: demanding an immediate end to the violence, urging restraint by the Libyan authorities, referral to the International Criminal Court, establishment of an arms embargo, travel ban, asset freeze, and designation of criteria related to human rights abuses for selection of those subject to the travel ban and asset freeze, creating a new Sanctions Committee, calling for humanitarian assistance by all member states to facilitate and make available humanitarian and related assistance in Libya, and expression of a commitment to review the situation.²⁰

When the measures taken by Libyan authorities were deemed insufficient, the United Nations Security Council adopted Resolution 1973 (2011) on March 17, 2011 pursuant to its Chapter VII powers to address the deteriorating situation.²¹ The Security Council demanded an immediate cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.²² While stressing the need to find a diplomatic solution (noting the Secretary General's Special Envoy to Libya and the work of the Peace and Security Council of the African Union), the Security Council authorized, inter alia, the use of armed force.²³ Armed force by member states acting nationally or through regional organizations or arrangements was authorized to protect civilians and civilian populated areas under the threat of attack while excluding a foreign occupation force of any form on any part of Libyan

18. "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." Article 41, Charter of the United Nations.

19. Article 48, Charter of the United Nations ("1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine. 2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.")

20. *Supra* note 7.

21. U.N.S.C. Res. 1973, Mar. 17, 2011, U.N. Doc. S/RES/1973 (2011).

22. *Id.*

23. *Id.*

territory.²⁴ In particular, the Security Council noted the special role of the League of Arab States while recognizing that member states could operate through other regional organizations.²⁵ It established a no fly zone over Libya, reinforced its prior authorizations of the arms embargo, the ban on flights, the asset freeze, and designations of those subject to sanctions, and created a panel of experts to assist the Sanctions Committee.²⁶

With the authorization of armed force by the United Nations Security Council and the deployment of force through the North Atlantic Treaty Organization (NATO) – led bombing campaign, the arming of rebel forces, and the attacks against regime leaders, the legal regime governing this conflict appeared to shift from purely international human rights law, to a mixed international human rights law with international humanitarian law for a NIAC, and within international humanitarian law to international humanitarian law for an International Armed Conflict (IAC).²⁷ The status of the rebels moved from rebels against a government that had effective control of the country into a more fluid setting where the rebels had control of significant swaths of the country, to a situation where the rebels supplanted the Gadhafi government control of the country. In sum, the actors with effective control of Libya changed while the international obligations on the state of Libya remained the same.

By September 16, 2011, the United Nations Security Council in its Resolution 2009 acted under Chapter VII under its Article 41 powers (not involving the use of armed force) to welcome the developments in Libya, call for an inclusive, representative transitional Government of Libya and emphasize the need for the transitional period to be underpinned by a commitment to democracy, good governance, rule of law and respect for human rights.²⁸ The Security Council went on to seek to encourage the National Transitional Council to proceed in this manner and in this regard established a United Nations Support Mission in Libya.²⁹ The Security Council narrowed the arms embargo, asset

24. *Id.*

25. *Id.*

26. *Id.*

27. For a discussion of the complexities of characterizing the conflict and counseling the Libyan rebels on the Law of Armed Conflict see Iain Scobbie, Operationalizing the Law of Armed Conflict for Dissident Forces in Libya, EJIL Talk (Aug. 31, 2011), available at <http://www.ejiltalk.org/operationalising-the-law-of-armed-conflict-for-dissident-forces-in-libya/#more-3711>. Issues arose as to the relevant rules for targeting and detention practices and teaching to resist reprisals or what was translated into Arabic as “revenge.”

28. U.N.S.C. Res. 2009, Sept. 16, 2011, S/RES/2009 (2011).

29. *Id.*

freeze and, although leaving them in place, signaled its readiness at the appropriate time to lift the no fly zone and ban on flights.³⁰

Shortly after the death of Col. Muammar Gadhafi on October 20, 2011, and the National Transitional Council's "Declaration of Liberation" of October 23, 2011, the United Nations Security Council in its Resolution 2016, acting under its Chapter VII powers, terminated the authorization of use of force to protect civilians as well as the no fly zone of its Resolution 1973.³¹ On October 31, 2011, in its Resolution 2017, the Security Council, mindful of its primary responsibility for the maintenance of international peace and security and concerned about arms proliferation, called on the Libyan authorities, states in the region, and all member states to take appropriate action to avoid arms proliferation that might fuel terrorist or other activities in the region.³² On December 2, 2011, in its Resolution 2022, the United Nations Security Council extended in time and scope the mandate of the United Nations Support Mission in Libya including authorizing it to address proliferation issues.³³

2. The African Union and Other International Governmental Organizations – Diplomatic Role

a. African Union

Although united in condemnation, the African Union response began to differ from that of the Security Council. In its communique of February 23, 2011, the African Union condemned the excessive use of force and lethal weapons against peaceful protestors in violation of human rights and international humanitarian law and called for restraint and dialogue between all the Libyan people.³⁴ Among other things, the African Union emphasized the legitimacy of the aspirations of the Libyan people for democracy, political reform, justice and socio-economic development and urged those aspirations be respected.³⁵

30. *Id.*

31. U.N.S.C. Res. 2016, Dec. 2, 2011, S/RES/2016 (2011).

32. U.N.S.C. Res. 2017, Oct. 31, 2011, S/RES/2017 (2011).

33. U.N.S.C. Res. 2022, Oct. 27, 2011, S/RES/2022 (2011).

34. African Union Peace and Security Council 261st Meeting Communique of February 23, 2011, (PSC/PR/COMM(CCLXI)).

35. *Id.* In this same period, three non-governmental organizations – the Egyptian Initiative for Personal Rights ("EIPR"), Human Rights Watch, and INTERIGHTS submitted a joint request for provisional measures to the African Human Rights Commission. On March 3, the African Human Rights Commission initiated proceedings against Libya in the African Human Rights Court which made an order for provisional measures on March 25, 2011 with which the Libyan government did not comply. *See*, Anna Dolidze, African Court

By March 10, 2011, the differences with the Security Council were growing more significant as the African Union rejected any foreign military intervention, whatever its form, and called for an approach which came to be called the African Union Roadmap (“AU Roadmap”) consisting of 1) immediate cessation of all hostilities, 2) cooperation of the competent Libyan authorities to facilitate humanitarian assistance to the needy populations, 3) the protection of foreign nationals, including the African migrants living in Libya, and 4) the adoption and implementation of the political reforms necessary for the elimination of the causes of the current crisis.³⁶ The African Union created an ad-hoc High-Level Committee on Libya, comprising five Heads of State and Government and the Chair of the Peace and Security Commission, who were to engage with all parties in Libya, facilitate an inclusive dialogue among the Libyan parties on the appropriate reforms, and engage the African Union’s partners (in particular the League of Arab States, the Organization of the Islamic Conference, the European Union and the United Nations) to facilitate coordination of efforts and seek their support for their resolution of the crisis.³⁷ The African Union called on its member states to provide logistical and humanitarian support to all African migrant workers wishing to leave Libya as well as to those neighboring countries forced to bear a disproportionate burden and to the countries of origin to facilitate the socio-economic reinsertion of these migrant workers.³⁸ The African Union also recalled the Organization of African Unity Convention on the Elimination of Mercenarism and sought the gathering of information on the reported presence of mercenaries in Libya and their actions.³⁹

With the March 17, 2011 United Nations Security Council Resolution 1973 authorization for the use of force to protect civilians and civilian populated areas under the threat of attack (while excluding a foreign occupation force of any form on any part of Libyan territory), the divergences between the Security Council’s mixed diplomatic and use of force approach and the African Union’s diplomatic approach became more apparent. As described in the April 26, 2011 Communique of the Peace and Security Council, the African Union diplomatic approach yielded talks by the African Union ad-hoc Committee of Heads

on Human and Peoples Rights – Response to the Situation in Libya, 15 ASIL Insight 20 (Jul. 26, 2011), available at <http://www.asil.org/insights110725.cfm>.

36. African Union Peace and Security Council 265th Meeting Communique of March 10, 2011, (PSC/PR/COMM.2(CCLXV)).

37. *Id.*

38. *Id.*

39. *Id.*

of State and Government with representatives of the Libyan Government and the Transitional National Council of Libya. The ground was prepared for ceasefire negotiations by all Libyan parties under the auspices of the African Union, the League of Arab States, the Organization of the Islamic Conference, the European Union and the United Nations.⁴⁰ The African Union continued outreach to these international governmental organizations as well as other formations such as the Libya Contact Group (A group of NATO countries, the Secretary General of NATO, Arab States, and other countries⁴¹), the BRICS (Brazil, Russia, India, China and South Africa) and bilateral partners requesting they extend the necessary cooperation to the African Union's efforts, bearing in mind the provisions of Chapter VIII of the United Nations Charter on the role of regional arrangements in the settlement of disputes among and within their Member States.⁴²

While African Union efforts to form a diplomatic solution on Libya were being made, the African Union made a separate declaration on April 28, 2011 after looking at the state of peace and security in the continent within the context of the uprisings that took place in North Africa.⁴³ In a wide ranging declaration addressing the peace and security architecture of Africa, the African Union expressed serious concern that, in some crisis and conflict situations, African efforts to attain peace are undermined by foreign actors, whose motives are, at times, neither complementary to, nor consistent with the implementation of African solutions to African problems.⁴⁴

While respecting the Resolution 1973, the African Union made it a point to stress the need for all countries and organizations involved

40. African Union Peace and Security Council 275th Meeting Communique of April 26, 2011, (PSC/MIN/COMM.2(CCLXXV)).

41. The Libya Contact Group first formal meeting was March 29, 2011, and further key meetings were held April 13, 2011 (calling for Gadhafi to leave power), May 5, 2011, and July 15, 2011; NATO Secretary General to attend Libya Conference in London, March 28, 2011 *available at* http://www.nato.int/cps/en/SID-74AEF80D-A91C4D92/natolive/news_71815.htm?mode=pressrelease; NATO Secretary General travels to Doha to attend the Libya Contact Group meeting, April 13, 2011 *available at* http://www.nato.int/cps/en/SID-227754C2-DC6799E9/natolive/news_72305.htm?mode=pressrelease; NATO Secretary General travels to Rome to attend the Libya Contact Group meeting, May 5, 2011 *available at* http://www.nato.int/cps/en/SID-15E77275-FAA4C4D1/natolive/news_73125.htm?mode=pressrelease; NATO Secretary General travels to Istanbul to attend the Libya Contact Group meeting, July 15, 2011 *available at* http://www.nato.int/cps/en/SID-23344093-1DAE4FOC/natolive/news_76408.htm?mode=pressrelease.

42. African Union Peace and Security Council 275th Meeting Communique of April 26, 2011 (PSC/MIN/COMM.2(CCLXXV)).

43. Declaration of the Ministerial Meeting of the Peace and Security Council on the State of Peace and Security in Africa of April 26, 2011 (PSC/MIN/BR.1(CCLXXV)).

44. *Id.*

in its implementation to act in a manner fully consistent with international legality and the resolution's provisions ensuring the protection of the civilian population.⁴⁵ In particular, the African Union urged all involved to refrain from actions, including military operations targeting Libyan Senior Officials and socio-economic infrastructure, that the African Union thought would further compound the situation and make it more difficult to achieve international consensus on the best way forward.⁴⁶ The African Union called upon the African Commission on International Law to consider in-depth the scope and legal implications of both United Nations Security Council Resolutions 1970 and 1973.⁴⁷ It went on, among other things, demanding that all parties respect international humanitarian law and strongly condemning the attacks and other abuses directed at African migrant workers.⁴⁸ The African Union went on to reaffirm the legitimacy and seriousness of the concerns of the countries of the Northern and Sahelo-Saharan regions with regard to the humanitarian and security implications of the situation in Libya, in particular as it relates to the proliferation of arms, terrorism and transnational crime.⁴⁹

The African Union continued its insistence on a political and diplomatic solution to the Libyan crisis, elaborating on June 30 and July 1, 2011 Proposals for a Framework Agreement on a Political Solution to the Crisis in Libya and communicating them to and seeking support for the African initiative from the other international governmental organizations, as well as bilateral partners.⁵⁰ At the same time, outside funding was given the rebels,⁵¹ rebels were armed by outside states (consistent with Resolution 1973 which overrode the ban in Resolution 1970),⁵² and the NATO led air campaign operated under what

45. African Union Peace and Security Council 275th Meeting Communique of April 26, 2011, (PSC/MIN/COMM.2(CCLXXV)).

46. *Id.*

47. *Id.*

48. *Id.* In this regard a meeting with the head of the International Committee of the Red Cross on its activities related to peace and security in Africa from the perspective of the promotion of the international human rights law was held right after the April 26, 2011 meeting. African Union Peace and Security Council Press Statement of the 276th meeting of April 28, 2011, (PSC/BR/BR.(CCLXXVI)).

49. African Union Peace and Security Council 275th Meeting Communique of April 26, 2011, (PSC/MIN/COMM.2(CCLXXV)).

50. African Union Peace and Security Council Press Statement of the 285th Meeting of July 13, 2011, (PSC/PR/PS/2.(CCLXXXV)).

51. *Libya: Contact group creates fund for rebels*, BBC NEWS (May 5, 2011), available at <http://www.bbc.co.uk/news/world-africa-13292852?print=true>.

52. *French arming of Libya' rebels strategic*, BBC NEWS (Jun. 29, 2011), available at <http://www.bbc.co.uk/news/world-africa-13966976?print=true>.

appeared to be a definition of what was necessary to protect civilians and civilian populated areas under the threat of attack that, contrary to the African Union's position, could include Libyan Senior Officials.

By the end of August and September 2011, as noted above for the Security Council, the African Union maintained its diplomatic efforts for a political solution as the Transitional National Council gained more control of the country and the Libyan government's control began to wane.⁵³ After the death of Col. Muammar Gadhafi, the African Union on October 20, 2011 stated it relied on the assurances of the Transitional National Council of Libya, stressing 1) its strategic commitment to the African continent, 2) its commitment to give priority to national unity and to bring together all Libyan stakeholders, without any exception, to rebuild the country, and 3) its commitment to protect all foreign workers within Libya, including the African migrant workers.⁵⁴ In a significant development that addressed a potential contradiction with Article 30 of the Constitutive Act of the African Union of 2000 ("Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."⁵⁵), the African Union decided "in view of the [assurances of the Transitional National Council] above and taking into account the uniqueness of the situation in Libya and the exceptional circumstances surrounding it, and without prejudice to the relevant African Union instruments, to authorize the current authorities in Libya to occupy the seat of Libya in the African Union and its organs."⁵⁶ As to the differences of emphasis with the United Nations on the issues of peace and security, the African Union decided to continue the institutional dialogue with the United Nations on the appropriate modalities of each organization's intervention on these issues in Africa.⁵⁷

53. African Union Peace and Security Council 291st Meeting Communique of August 26, 2011, (PSC/AHG/COMM.(CCXCI); African Union Peace and Security Council 294th Meeting Communique of September 21, 2011, (PSC/MIN/COMM(CCXCIV));

54. African Union Peace and Security Council 297th Meeting Communique of October 20, 2011, (PSC/PR/COMM/2.(CCXCVII).

55. Article 30, Constitutive Act of the African Union, *available at* http://www.africanunion.org/root/au/AboutAU/Constitutive_Act_en.htm.

56. African Union Peace and Security Council 297th Meeting Communique of October 20, 2011, (PSC/PR/COMM/2.(CCXCVII).

57. African Union Peace and Security Council 307th Meeting Communique of January 9, 2012, (PSC/PR/COMM(CCCVIII).

b. *League of Arab States – Diplomatic Role*

On February 23, 2011, the League of Arab States (Arab League) suspended Libya in a protest of the Libyan government's crackdown on protestors.⁵⁸ On March 2, 2011, the Arab League opposed a military intervention urging the use of diplomatic and peaceful means before resorting to force.⁵⁹ On March 10, 2011, the Arab League called for a no-flight zone over Libya.⁶⁰ On March 20, 2011, shortly after the passage of the United Nations Security Council Resolution 1973 on March 17, 2011, and the beginning of the Anglo-French bombing campaign that became the NATO campaign (see below), the Arab League condemned the bombing campaign in Libya saying its call for the no-flight zone was based on a desire to prevent Col. Muammar Gaddafi's air force from attacking civilians and was not designed to endorse the intense bombing and missile attacks.⁶¹ This condemnation was muted a day later in further comments when the Arab League head said they respected the Security Council's resolution and that the Security Council and the Arab League were united on the need to protect civilians.⁶² By June 21, 2011, the Arab League leadership admitted having second thoughts about the bombing campaign and called for a cease-fire and a political solution.⁶³ On August 25, 2011, Libya was readmitted to the Arab League which accepted that the Transitional National Council take Libya's seat as a permanent member on its Council.⁶⁴

58. Natasha Mozgovaya, Shlomo Shamir and News Agencies, *Arab League suspends Libya as deadly crackdown persists*, HAARETS (Feb. 23, 2011), available at <http://www.haaretz.com/news/international/arab-league-suspends-libya-as-deadly-crackdown-persists-1.345096>; *Libya regains Arab League Seat*, AL-JAZEERA (Aug. 27, 2011), available at <http://www.aljazeera.com/news/africa/2011/08/2011827223817990105.html>.

59. *Military intervention in Libya opposed by OIC, Arab League*, ARABNEWS (Mar. 2, 2011), available at <http://arabnews.com/middleeast/article293526.ece>.

60. Ethan Bronner and Davis Sanger, *Arab League Endorses No-Flight Zone Over Libya*, WASHINGTON POST (Mar. 12, 2011), available at <http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all>.

61. Edward Cody, *Arab League Condemns Broad Bombing Campaign in Libya*, WASHINGTON POST (Mar. 20, 2011), available at http://www.washingtonpost.com/world/arab-league-condemns-broad-bombing-campaign-in-libya/2011/03/20/AB1pSg1_story.html.

62. *LIBYA: Arab League head backs off after criticizing airstrikes*, LOS ANGELES TIMES (Mar. 21, 2011), available at <http://latimesblogs.latimes.com/babylonbeyond/2011/03/libya-arab-league-head-backs-off-from-criticism-of-no-fly-zone.html>.

63. Ian Traynor, *Arab League chief admits second thoughts about Libya air strikes*, THE GUARDIAN (Jun. 21, 2011), available at <http://www.guardian.co.uk/world/2011/jun/21/arab-league-chief-libya-air-strikes>.

64. *Libya regains Arab League Seat*, AL-JAZEERA (Aug. 27, 2011), available at <http://www.aljazeera.com/news/africa/2011/08/2011827223817990105.html>; *Arab League recognises Libya's NTC*, FRANCE 24 (Aug. 25, 2011), available at <http://www.france24.com/en/20110825-arab-league-recognises-libya-national-transitional-council>.

c. *Organization of Islamic Cooperation – Diplomatic and Humanitarian Role*

On February 20, 2011, the Secretary General of the Organization of Islamic Cooperation (OIC – formerly the Organization of the Islamic Conference) condemned the excessive use of force against civilians⁶⁵ and drew attention to a humanitarian crisis of catastrophic proportions in Libya.⁶⁶ On February 28, 2011, Libya requested that the OIC send a fact-finding mission to Libya to review the situation.⁶⁷ On March 1, 2011, the OIC made an urgent appeal for help with the evacuation of displaced persons along the Egyptian and Tunisian borders of Libya and soon after started providing humanitarian assistance.⁶⁸ On March 2, 2011, at the same time as the Arab League, the OIC opposed a military intervention and urged the use of diplomatic and peaceful means before resorting to force.⁶⁹ On March 8, 2011, the OIC aligned itself with those calling for a no-fly zone to protect civilians in Libya and called for restraint.⁷⁰

The Secretary General of the OIC succinctly stated the international law issues he saw in Libya in his allocation of March 8, 2011 to the OIC:

65. *OIC General Secretariat Condemns Strongly the Excessive Use of Force against Civilians in the Libyan Jamahiriya*, ORGANISATION OF ISLAMIC COOPERATION (Feb. 22, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=4947&x_key=.

66. *Ihsanoglu Presses International Community On Immediate Assistance For Persons Displaced By Disturbances In Libya*, ORGANISATION OF ISLAMIC COOPERATION (Feb. 24, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=4966&x_key=.

67. *Libyan Arab Jamahiriya requests OIC General Secretariat to dispatch fact-finding mission*, ORGANISATION OF ISLAMIC COOPERATION (Feb. 28, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=4984&x_key=.

68. *Ihsanoglu launched an urgent appeal for assistance in evacuating the displaced on the Egyptian and Tunisian borders with Libya*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 1, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=4994&x_key=; *Secretary General Makes Urgent Appeal For Assistance To Evacuate Displaced Persons On Tunisia-Libya Border And Warns Of Epidemic Outbreak*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 3, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5010&x_key=; *OIC Commences Distribution Of Assistance To Displaced Persons On Libyan Border*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 7, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5020&x_key=.

69. *Military intervention in Libya opposed by OIC, Arab League*, ARABNEWS (Mar. 2, 2011), available at <http://arabnews.com/middleeast/article293526.ece>.

70. *Ihsanoglu Support No-Fly Decision At Oic Meeting On Libya, Calls For An Islamic Humanitarian Programme In And Outside Libya.*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 8, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5031&x_key=; *Final Communique Issued By The Emergency Meeting Of The Committee Of Permanent Representatives To The Organization Of The Islamic Conference On The Alarming Developments In Libyan Jamahiriya*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 8, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5022&x_key=.

International law provides that one of the primary duties of any state is to guarantee for its citizens the right to livelihood and to freedom and security. The same law makes it a duty for the state to respect the human rights of its people and their basic freedoms. And, based on these inalienable legal rules, we felt it incumbent upon us to condemn these serious developments which the human Rights Council depicted as practices that are tantamount to crimes against humanity, involving flagrant relations of the human rights in Libya, along with the attendant military aggressions against civilians and the mass-killings outside the scope of law, as well as the indiscriminate detention, jailing and torture. We still insist that it is the Libyan authorities' duty to assure its responsibility and protect its citizens, to end all human rights violations against them, and to refrain from aggressing civilians. It also must respect the human rights and freedoms of its citizens including the freedom of expression and assembly, to release all the detainees that were arrested indiscriminately, and to put an end to all punitive measures against the citizens who took part in the peaceful demonstrations, and respect the people's will and aspirations.⁷¹

On March 19, 2011, the OIC took an approach that welcomed the United Nations Security Council Resolution 1973 of March 17, 2011. The approach called for the establishment of a ban on all flights in the airspace of Libya in order to help protect civilians, cease hostilities and facilitate the delivery of humanitarian assistance in Libya. The OIC also requested that Member States contribute to the implementation of this resolution. In this connection, the OIC supported the provision in the resolution which excluded a foreign occupation force of any form on any part of Libyan territory, and called for the adoption of a new resolution by the Security Council to annul the provisions of Resolution 1973 as soon as the motives standing behind its adoption have disappeared.⁷² Consistent with the opposition previously expressed to military intervention, the OIC appeared to not speak directly to the part of the Resolution 1973 that authorized the use of force. On March 23, 2011, through its Secretary General, the OIC requested that all sides avoid targeting of civilians.⁷³ On March 25,

71. *Statement Of Professor Ekmeleddin Ihsanoglu Oic Secretary General To The Meeting Of The Permanent Representatives On The Situation In The Libyan Jamahiriya*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 8, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5023&x_key=.

72. *Final Communiqué Issued By the Emergency Open Ended Ministerial Meeting of the OIC Executive Committee on the Alarming Developments in Libyan Jamahiriya*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 19, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5057&x_key=Libya.

73. *Ihsanoglu Calls on All Parties in the Military Operations in Libya to Avoid Targeting Civilians*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 23, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5089&x_key=Libya.

2011, the OIC participated in the African Union meetings on Libya.⁷⁴ At the Libyan Contact Group meeting in London on March 29, 2011, the OIC called on all parties to show restraint and sought to encourage a political solution to the humanitarian catastrophe in Libya.⁷⁵ The OIC continued its work in Libya repatriating displaced persons.⁷⁶ At the April 13-14, 2011 Libyan Contact Group meeting, the OIC called for an integrated roadmap approach and a political solution to the Libyan crisis.⁷⁷

By May 7, 2011, the OIC went on to express their support for the UN Security Council Resolutions 1970 and 1973. They urged the international community to remain within the limits of the mandate given by the Security Council in these resolutions while dealing with the Libyan crisis and, in particular, the need to put special emphasis on the protection of civilians. The Secretary General of the OIC appealed to all parties involved in the on-going military operations in Libya to exercise maximum restraint, avoid targeting civilians and populated areas and preserve the resources and properties of the Libyan people.⁷⁸ The organization, through its Secretary General, continued diplomatic efforts, and on August 22, 2011 and October 20, 2011, congratulated the Libyan people for their revolution and reiterated the OIC support for the Transitional National Council.⁷⁹ By

74. *OIC Participates In African Union High-Level Ad-Hoc Meeting On Libya*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 26, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5107&x_key=.

75. *Ihsanoglu calls upon the International Community to preserving Unity, Territorial Integrity and Independence of Libya*, ORGANISATION OF ISLAMIC COOPERATION (Mar. 29, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5119&x_key=.

76. *OIC begins repatriating displaced people on Libyan borders to their countries*, ORGANISATION OF ISLAMIC COOPERATION (Apr. 5, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5150&x_key=.

77. *Ihsanoglu Calls for Coordinated International Positions and Agreement on Integrated Road Map to End Bloodshed in Libya*, ORGANISATION OF ISLAMIC COOPERATION (Apr. 13, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5199&x_key=; *Ihsanoglu emphasizes the need for a political solution to the Libyan crisis and for an inclusive political process to allow Libyans determine their own future*, ORGANISATION OF ISLAMIC COOPERATION (Apr. 16, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5201&x_key=.

78. *Ihsanoglu: Political solution to the Libyan crisis is the only way to bring lasting peace to Libya*, ORGANISATION OF ISLAMIC COOPERATION (May 7, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5279&x_key=.

79. *The Secretary General Congratulates the Libyan People for the Success of their Revolution and Reiterates OIC's Support to the National Transitional Council*, ORGANISATION OF ISLAMIC COOPERATION (Aug. 22, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5588&x_key=; *OIC Congratulates Libyan People on Successful Revolution and Liberation of Entire Libyan Territory*, ORGANISATION OF ISLAMIC COOPERATION (Oct. 20, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=5881&x_key=.

December 15, 2011, the Secretary General of the OIC visited Libya and signed a cooperation agreement with the National Transitional Council.⁸⁰

3. North Atlantic Treaty Organization – Military Role

Starting with expressions of shock on February 21, 2011,⁸¹ the North Atlantic Council moved on February 25, 2011 to monitor the Libyan situation which was said to affect the safety and security of thousands of citizens, including those from NATO countries.⁸² On March 22 and 23, 2011, NATO moved to enforce the arms embargo and the no-fly zone as needed.⁸³ By March 31, 2011 NATO further expanded its role by taking over command of all Libyan air operations including actions to protect civilians and civilian centers.⁸⁴ On April 13, 2011, the Libya Contact Group held a meeting requesting that Gadhafi step down from power. Shortly after the meeting, NATO ministers strongly endorsed the request that Gadhafi leave power.⁸⁵ In June, NATO extended its mission in Libya for 90 days and in September further extended it – this time pursuant to the mandate in the United Nations Security Council Resolution 2009 and at the request of the Transitional National Council.⁸⁶ With the death of Col. Muammar Gadhafi, on October 20, 2011, the NATO Secretary General announced that NATO and its partners had successfully implemented the historic mandate of the United Nations to protect the people of Libya. NATO

80. *Historical visit to Tripoli Ihsanoglu meets with Libyan Leaders, signs cooperation Agreement and reiterates support for the New Libya*, ORGANISATION OF ISLAMIC COOPERATION (Dec. 15, 2011), available at http://www.oic-oci.org/topic_detail.asp?t_id=6132&x_key=.

81. Statement by the NATO Secretary General on events in Libya, Feb. 21, 2011, available at http://www.nato.int/cps/en/natolive/news_70731.htm?mode=pressrelease.

82. Statement by the NATO Secretary General on the situation in Libya, Feb. 25, 2011, available at http://www.nato.int/cps/en/natolive/news_70893.htm?mode=pressrelease.

83. Statement by the NATO Secretary General on Libya arms embargo, Mar. 22, 2011, available at http://www.nato.int/cps/en/SID-7D337D32-88273C2D/natolive/news_71689.htm?mode=pressrelease; NATO Secretary General's statement on no-fly zone over Libya, Mar. 23, 2011, available at http://www.nato.int/cps/en/SID-E510CFA2-7BED72BA/natolive/news_71722.htm?mode=pressrelease.

84. NATO takes command in Libya air operations, Mar. 31, 2011, available at http://www.nato.int/cps/en/SID-A3316B86-E49FB2C2/natolive/news_71867.htm?mode=pressrelease.

85. Statement on Libya following the working lunch of NATO Ministers of Foreign Affairs with non-NATO contributors to Operation Unified Protector, Apr. 14, 2011, available at http://www.nato.int/cps/en/SID-87B4C257-B3B3E6BA/natolive/official_texts_72544.htm?mode=pressrelease.

86. NATO Secretary General statement on NAC decision to extend Libya mission, Sep. 21, 2011, available at http://www.nato.int/cps/en/SID-938419C4-92F53860/natolive/news_78355.htm?mode=pressrelease.

would terminate its mission in coordination with the United Nations and the National Transitional Council. NATO also called for restraint and no reprisals.⁸⁷ The North Atlantic Council on October 21, 2011 agreed that the operations were nearing completion and took a preliminary decision to end the operation on October 31, 2011.⁸⁸

4. Discussion

I started this essay with a quote from Aeschylus that stated “In war, truth is the first casualty.” I felt this reminder was important as each of the institutions described above gathered and evaluated information concerning the events in Libya to determine each of their courses of action. I have provided a somewhat belabored presentation of the approaches of the United Nations Security Council and key international governmental organizations to the Libyan crisis in order to somewhat memorialize their reactions and subsequent strategies as they were confronted with these events. A plethora of individual state, non-governmental organizations, or other international governmental organization reactions might be added to round out this presentation but, in the interest of space, only a partial rendition of the complexities of the international reaction seemed appropriate in a paper focused on President Obama’s approach to the Libyan crisis. The hope is this brief picture helps the reader understand the international pressures on the United States that helped develop the policy of President Obama and his Administration.

A most critical first analysis of all parties concerned was in the early January and February 2011 period, as to the nature and extent of the human rights and humanitarian law violations of the Libyan government. The reactions in that early period of the international governmental organizations canvassed above reflect a consensus that the Libyan government’s suppression of the legitimate aspirations of the Libyan people was extensive and violent. Whether we think in terms of arbitrary deprivation of life or torture under international human rights law or ignoring the principle of distinction with regard to civilians who are not directly participating in hostilities or in a contin-

87. Statement by the NATO Secretary General on Libya, Oct. 20, 2011, available at http://www.nato.int/cps/en/SID-77D79283-9CC54AAD/natolive/news_79742.htm?mode=pressrelease.

88. North Atlantic Council Statement on Libya, Oct. 21, 2011, available at http://www.nato.int/cps/en/SID-63360991-89303911/natolive/news_79800.htm?mode=pressrelease; NATO Secretary General statement on end of Libya mission, Oct. 28, 2011, available at http://www.nato.int/cps/en/SID-8C431EAD-30A9A63C/natolive/news_80052.htm?mode=pressrelease.

uous combat function in a NIAC in international humanitarian law, the facts on the ground appeared sufficiently grave for all of the institutions involved.

The key institutional divergences appeared to crystallize at two key points. The first point was in the period between the adoption of the United Nations Security Council Resolution 1970 of February 17, 2011 which put in place measures short of the use of force and the United Nations Security Council Resolution 1973 of March 17, 2011 that, *inter alia*, authorized the use of force to protect civilians and civilian populated areas under the threat of attack while excluding a foreign occupation force of any form on any part of Libyan territory. The second was with the manner in which the use of force was perceived to evolve over the course of the military intervention up to and including the killing of Col. Muammar Gadhafi. I will discuss these two key periods in particular.

In the interregnum between the early condemnations of the events in Libya up to the United Nations Security Council Resolution 1970 and the adoption of the United Nations Security Council Resolution 1973, the African Union was most emphatic in rejecting any foreign military intervention of whatever form in Libya. In this sense, examining the same events as all the other international governmental organizations, the African Union's view was that foreign military intervention was not authorized and should not take place. Instead, through the African Union roadmap process, the African Union sought to foster a political and diplomatic negotiation that would include all Libyan stakeholders with the goal of developing a negotiated solution to the conflict. Long familiar and suspicious of the motives of foreign interventions on the African continent, the African Union sought to fashion an African solution to the Libyan crisis. Such a solution took into account the domestic Libyan parameters but also addressed the African Union concerns for the plight of African migrant workers and the regional impact of the crisis. The Arab League and the OIC took a similar, though it seems less categorical, approach, urging the resort to political and diplomatic methods before the use of force.

Under the current international system, in the absence of a situation of self-defense triggering Article 51 of the Charter of the United Nations, the United Nations Security Council is charged with evaluating threats to the peace and authorizing the use of force.⁸⁹ All member

89. I am well aware of the efforts to argue a third paradigm for self-defense for armed attacks less than those that trigger Article 51 and/or responsibility to protect without United Nations Security Council authorization, but leave these arguments to the side, at least partially, because there is United Nations Security Council Resolution authorizing the

states are to comply with United Nations Security Council Resolutions on their own, collectively or through the international agencies to which they belong. This primacy of the United Nations Security Council under the Charter of the United Nations over the member states, and by extension the other international governmental organizations also concerned by the situation, was well reflected in the reaction of the African Union, the Arab League, and the OIC to the passage of United Nations Security Council Resolution 1973 authorizing the use of force. These international governmental organizations' responses ranged from "respect" to "welcoming" said Resolution 1973, apparently seeking by such language to avoid an outright direct organizational conflict on foreign military intervention and, in so doing, demonstrating a deference, if only slight but certainly non-negligible, to the United Nations Security Council's determination.

Of course, the actual authorization to use force to protect civilians and civilian populated areas under the threat of attack while excluding a foreign occupation force of any form on any part of Libyan territory is subject to interpretation in its application. In this regard, as the conflict turned from one where the principal legal regimes were international human rights/NIAC international humanitarian law, to a more NIAC/IAC international humanitarian law conflict with significant international intervention in the prosecution of the armed conflict, the overall level of lethality of the weaponry across the battlefield was increased. Divergences as to the appropriate calculus in terms of military objectives, military advantage, principles of necessity, proportionality, and distinction, funding and arming of the rebels appear across all of the international governmental organizations and actors. Moreover, that on April 13, 2011, the Libyan Contact Group called for Gadhafi to leave power suggests that his presence at the helm of the Libyan state had come to be viewed as an obstacle to protecting civilian and civilian populated areas. Put another way, the military objective and military advantage of Gadhafi being removed from power became overtly crystallized at the political level and endorsed at the military level by NATO.

Removing Gadhafi as a military objective, in a state run by him and his family appeared to change the calculus in terms of what was the range of acceptable uses of force under the United Nations Security Council Resolution 1973 civilian protection parameters for achieving

use of force. My personal views are closer to those of Antonio Cassese and the threat to global security of such approaches. See Antonio Cassese, *Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, EJIL 23 (1999).

such an objective. The range of views as to what was an acceptable deployment of force ranged from that of NATO which considered all of its operations to have been done in compliance with the United Nations Security Council Resolution 1973 and the laws of war, through the somewhat ambivalent positions on use of force of the Arab League and the OIC, through to the African Union's view that Libyan Senior Officials should be spared (which I understand as meaning the Libyan Senior Officials should not be targeted for the military advantage that might be gained from their killing whether for their continuous combat function in a NIAC or status in an IAC). Whatever the stated position and the legality of the result, with the rapid recognition and integration by all of these international governmental organizations (and states) of the National Transitional Council before and after the killing of Col. Muammar Gadhafi, one appears led to a conclusion that whether or not such an objective was a legitimate military objective, all the international governmental organizations involved acquiesced to this extra-constitutional violent transfer of power.

Yet, the transfer of power does not end the story. During the past year, the Gadhafi government's violations of international human rights and international humanitarian law (NIAC and/or IAC) rules were alleged and documented by non-governmental organizations and claims of the rebels and press. At the same time, as they have gained power, the rebels also have been accused of gross violations of the relevant legal regimes, also, in places such as Tawergha where revenge exactions against a primarily black Libyan populace was alleged to have been committed by those in the nearby town of Misurata.⁹⁰ The plight of thousands of non-Libyan and black Africans held in makeshift prisons is a further dramatic situation that is painfully slowly being addressed.⁹¹ The torture of persons believed to be Gadhafi loyalists has also been signaled since the fall of the Gadhafi regime.⁹² And, the apparent murder of Col. Muammar Gadhafi once he was under the

90. Tarik Kafala, *'Cleansed' Libyan Town Spills its Terrible Secrets*, BBC NEWS MAG (Dec. 12, 2011) available at <http://www.bbc.co.uk/news/magazine-16051349?print=true>.

91. Rami Al-Shaheibi, *Libya: Justice Ministry to Take Over Prisons*, ABC NEWS, (Jan. 29, 2012) available at <http://abcnews.go.com/International/wireStory/libya-justice-ministry-prisons-15467563>.

92. *Id.*

94. *Doctors Without Borders says it halts work in Libyan city's prisons because of torture*, ASSOCIATE PRESS (Jan. 26, 2012), available at <http://www.startribune.com/world/138114483.html>; http://www.washingtonpost.com/world/middle-east/doctors-without-borders-says-it-halts-work-in-libyan-citys-prisons-because-of-torture/2012/01/26/gIQAbAHdSQ_story.

control of the rebels⁹³ and the apparent murder of prisoners completely within the control of one or another of the parties to this conflict remain vivid in the collective conscience.⁹⁴ Beyond the Gadhafi loyalists and rebels, the insistent questions as to civilian casualties resulting from the NATO-led bombing remain unresolved.⁹⁵ The reality of these results of the conflict suggest that, whatever the prevailing view at the end, the other views expressed at the beginning across the international governmental organizations as to the appropriate path to address the legitimate aspirations of the Libyan people also have their vitality as they remind all concerned of the need for sustained engagement with Libya as it moves through the current transition.

II. DOMESTIC UNITED STATES LEGAL REGIME

Given the texture and complexity of the facts in the international legal regime discussed above, addressing the domestic United States legal regime might at first blush appear to be a simpler task. Yet, that would be an error because of the intersection between the United States political and diplomatic roles and treaty obligations as both a member of the United Nations and as one of the five permanent members of the United Nations Security Council (a guarantor of the international system) and its role in NATO with regard to: 1) the separation of powers under the United States Constitution, 2) the War Powers Resolution, and 3) the sophistication and extent of the United States' military, intelligence and other assets that could be brought to bear in the Libyan situation.

The crucial dilemma for any United States President is the intersection between, on the one hand, the Charter of the United Nations obligations and, on the other hand, the Commander in Chief and Chief Executive, Foreign Affairs, and Declare War powers of the United States Constitution and the War Powers Resolution (whether or not it is considered constitutional). The Declare War power, as a matter of

93. Barry Malone, *Gaddafi Killed in Hometown, Libya Eyes Future*, REUTERS (Oct. 20, 2011) available at <http://www.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020>.

94. AFP, *Pro-Qaddafi 'Mass Murderer' Awaits Fate in Libyan Jail*, AL ARABIYA NEWS, (Jan. 31, 2012) available at <http://english.alarabiya.net/articles/2012/01/31/191670.html>.

95. C. J. Chivers and Eric Schmitt, *In Strikes on Libya by NATO, an Unspoken Civilian Toll*, NEW YORK TIMES, (Dec. 17, 2011) available at <http://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html?pagewanted=all>. See generally, United Nations Human Rights Council, Report of the International Commission of Inquiry on Libya (Advanced Unedited Version) dated Mar. 2, 2012 (A/HRC/19/68) available at <http://www.nytimes.com/interactive/2012/03/03/world/africa/united-nations-report-on-libya.html>.

constitutional construction, would appear to leave the power to declare war exclusively in the hands of Congress (requiring an explicit declaration of war even, rather than just an Authorization of the Use of Military Force). Yet, the number of armed conflicts since World War II to which the United States has been a party without such a declaration (as opposed to an authorization of use of military force) suggests that the situation is more nuanced.⁹⁶ In an analysis of the approach to be taken, a new approach described as the Clinton/Obama formula has been suggested as the manner in which to determine appropriate action. In the Clinton/Obama formula, Congressional authorizations of military force appear to have been the operative method for the United States to enter military interventions of a more significant duration, intensity or scope in the post-World War II era – with the exception of Korea.⁹⁷ At the same time, again in the Clinton/Obama view, some Presidential unilateralism might be permitted for military interventions of lesser duration, intensity and scope – the brief and relatively costless (in blood and treasure) interventions.⁹⁸ While superficially attractive, of course, the problem with this approach is a bit obvious: it is very difficult to know a priori what will be the duration, intensity and scope of a conflict – and therefore whether the President should have acted unilaterally or sought Congressional approval. Thus, at the time of the action, whatever the rationale, the President in our Constitutional structure makes a choice: to act unilaterally or to act with Congressional approval.

Let us now think about that Presidential choice within the overlay of the United Nations structure. In the United Nations era, as the principal guarantor (or at least as one of the five permanent members that are principal guarantors together) of the international system, I believe a further central thought experiment type question is whether the President of the United States can constitutionally vote in any circumstances in the United Nations Security Council to authorize the use of force in the absence of a specific prior Congressional approval (we might call this the “Congressional deliberative maximalist position”). If one considers the Charter of the United Nations as a treaty obligation of the United States the constitutional interaction with the

96. An excellent discussion on Libya and Presidential War Powers is summarized by Benjamin Wittes, Peter Margulies Reports on AALS III, Jan. 12, 2012, available at <http://www.lawfareblog.com/2012/01/peter-margulies-reports-on-aals-iii/>.

97. *Id.*

98. *Id.* I leave to the side those who might be described in all circumstances as Congressional exclusivists (Congressional power only) or Presidential unilateralists (unfettered Presidential power).

language of the War Powers Resolution at Section 8 further suggests the general need for prior Congressional approval, to wit:

“SEC. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—
(2) from any *treaty* heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.”
(Emphasis added).⁹⁹

Under this part of the War Powers Resolution, when the United Nations Security Council authorizes the use of force under its Chapter VII powers of the Charter of the United Nations and the United States votes in favor of such a resolution, a reasonable interpretation of that act might be that at the moment of that vote, the involvement in hostilities is clearly indicated. In such a case, so the argument would go, the situation would fit within the Section 8(a)(2) language indicating specific prior authority from Congress would be needed for such a United Nations Security Council vote by the United States. Failing such Congressional authorization, the Executive would be without power to engage the United States through a favorable vote. Such a Congressional deliberative maximalist approach would encourage the vetting of such proposed authorizations very carefully by both the Executive and Legislative branches and assure that our engagements under the auspices of the United Nations would have the fullest bicameral support. Of course, as a practical matter again, this kind of deliberative approach before a United Nations vote has probably never consciously occurred – suggesting it is more a thought experiment of how the United States could interact with the world rather than how it does interact with the world. To take a recent example, in the 1991 Gulf War, the United States voted in favor of the United Nations Security Council Resolution 678 of November 29, 1990 authorizing the use of force *before* the Authorization of Use of Military Force was passed by Congress on January 12, 1991.

Conversely, when an Article 51 of the Charter of the United Nations self-defense setting is not present, but the United States Congress (or the President alone) authorizes the use of military force, in the absence of a prior or subsequent Security Council Resolution authorizing that use of force, the question arises whether as a matter of international law (whatever the result under domestic law) the

99. War Powers Resolution of 1973, 50 U.S.C. §§ 1541-1548 (2006).

United States is in compliance with its Charter of the United Nations obligations if it enters hostilities. Again, as a practical matter, the manner in which the United States commenced the War in Iraq can be interpreted by reasonable people as an act without any prior or subsequent authorization by the United Nations Security Council.¹⁰⁰ As a matter of domestic Constitutional law, such a declaration of war might be seen as properly entering an armed conflict but, as a matter of international law, such declaration is seen as aggressive war. This approach might be described as the “American unilateralist approach.”

Where does Libya fit? In his legal rationale, the President asserted his Constitutional authority to direct this limited military operation abroad and viewed the United States military operations were distinct from the “hostilities” contemplated by the War Powers Resolution 60 day termination provision.¹⁰¹ The President asserted he authorized these actions 1) to limit the spread of violence and instability in a region pivotal to our security interests, particularly while it is undergoing sensitive transitions, 2) to prevent an imminent humanitarian catastrophe, and 3) to show the people of the Middle East and North Africa that America stands with them at a time of momentous transition.¹⁰² In the absence of the asserted need for Congressional authorization, the President went on to detail, nevertheless, the extent of Congressional consultation since February 2011.¹⁰³

In taking this approach, the President appears to have shaped the nature of the military operations that the United States was willing to undertake in a manner that would assure sufficient Congressional acquiescence (even without Congressional mollification). The shape of this intervention with no troops (at least non-covert forces) on the ground in Libya and the use of air assets and drones in an environment of absolute air supremacy reduced significantly the risks in blood. The distribution of tasks under the NATO-led structure also helped to reduce the risks in treasure to a manageable estimated \$1 billion. The immediate contrast with the costs of the War in Iraq, of

100. The impact of United Nations Security Council Resolution 1441 of November 8, 2002 and the import of references back in the Authorization to Use Military Force in Iraq of 2002 to United Nations Security Council Resolutions 678 (1990) and 687 (1991) are subjects of rich discussion outside the scope of this article.

101. Report on United States Activities in Libya to Speaker of the House, Jun. 15, 2011 at 25.

102. Report, *supra* note 102 at 2-3.

103. Report, *supra* note 102 at 26-31.; One notable historical point about the United States and Libya is that from Jefferson to Regan to Obama, apparently every U.S. intervention in Libya occurred without clear Congressional authorization. See Benjamin Wittes, Peter Margulies Reports on AALS III, Jan. 12, 2012, available at <http://www.lawfareblog.com/2012/01/peter-margulies-reports-on-aals-iii/>.

over four thousand dead troops, thousands of wounded, and \$ 1 trillion in treasure, is obvious.

Yet, the aftermath of the war in Libya, like the aftermath in Iraq, is still being written and lived. It appears clear that the new Libya will have years of unsettled consolidation of power and re-structuring ahead. Whether the aspirations of all the Libyans for meaningful enjoyment and recognition of human rights will occur or descend into another form of oppression is being determined each day. The outcome is uncertain but the need for meaningful and prompt engagement from all sides and the international community is without doubt. In a time of tight budgets, the United States role over the years ahead may be severely constrained. Whether other nations step into any vacuum of engagement to attempt to anchor and then encourage the aspirations of the Libyan people is another imponderable about which we must wait and see.

III. A SUMMARY, A REGRET, AND A CONCLUSION

In the first section, I describe the international legal regime in which the Libyan intervention came to occur. I highlighted the roles of several key international government organizations to which Libya was a member or which played crucial roles in the Libyan conflict. My goal was to have the reader – particularly one not familiar with the international plane – get a sense of the dynamics on the international plane and the legal consequences of the approaches taken on that plane. In the second section, I guided the reader from the United States' role on the international plane back through our domestic constitutional structure to understand how the domestic United States regime operated with regard to Libya. Here, I noted the international and domestic legal structures that impinge on a President's autonomy in our Constitutional structure. I pointed out how President Obama navigated those constraints through, on the one hand, garnering international support through the United Nations Security Council and NATO approval of an intervention and, on the other hand, minimizing (i.e. no boots on the ground) the nature of the American dimension of the intervention so as to be able to argue at least minimal compliance with Constitutional and War Powers Resolution constraints. In this third section, I seek to add some more personal thoughts about this intervention so far for posterity.

As a person who lived in Europe and watched Timisoara and Srebrenica happen, who saw the Rwandan genocide happen before his eyes, and who had lived through the Biafran War in Nigeria, the Alge-

rian War from the perch of Tunisia, as a Libero-American (an American born in Liberia) instead of an Americo-Liberian (descendant of slaves sent back to Africa) or indigenous Liberian, as a person who worked many years in international commercial arbitration with wonderful colleagues from Libya and from all the countries of the Arab Spring, as I watched events unfold, I tried to understand as an ordinary citizen the dramatic events occurring before my eyes. My central concern was with what was the best way to support the legitimate aspirations of the Libyan people. As has been shown above, people of goodwill did differ on the path to take, and the range of reactions from cynicism about the outcome to hope for a future in the outcome, have their supporters.

I regret the killing of Gadhafi, for if there was a man who knew too much¹⁰⁴ – given his complex role in international relations for 42 years – he was one. Non-governmental organizations were combing the governmental offices gathering information about the still secret set of complex relations Gadhafi and his government had with intelligence services around the world. In a criminal prosecution in Libya or before the International Criminal Court, there would have been an accounting about those activities, a sharing with the ordinary citizens of Libya and the world of the complex processes of the governments of the international community. Maybe some of that will occur with the criminal prosecution in Libya of his son Seif, but I sense that Gadhafi's killing closes a door until a future period of declassification on much information that is closely guarded. I, for one, would like to know how Al-Libi¹⁰⁵ got into Libyan hands from the Egyptian Intelligence Service who tortured him at the request of the Central Intelligence Agency. Just this bit of information would shed light on the person whose testimony under torture was used to try to convince the world of the propriety of the War in Iraq. I suspect there are many, many, more nuggets about world affairs that have been lost with Gadhafi's death.

Beyond that, I think of all the Libyans who are awaking in the brave new Libya and hope that they consider that my country and, by extension, I (as an ordinary citizen) have kept the faith with their legitimate aspirations in supporting this revolution. I hope for reconciliation among all the people of Libya, an opportunity that may come through discussion, mediation and/or dialogue now instead of brutal confrontation. I have deep respect for their sacrifice.

104. Benjamin G. Davis, *The Man Who Knew Too Much: A Convenient Suicide in a Libyan Prison*, JURIST (May 12, 2009), available at <http://jurist.law.pitt.edu/forumy/2009/05/man-who-knew-too-much-convenient.php>.

105. *Id.*
