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The Quest for Self- Determination: Defining International Law's Inherent Interstate Limits

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TABLE OF CONTENTS

I. Introduction.....398

II. Inherent Self-Determination Limits.....399

A. The International Community and Libya 401

B. The International Community and Syria..... 404

C. Assessing Self-Determination's Limits..... 406

III. The Inherent Limits of International Law.....411

A. Tracing International Law's Limits..... 411

*B. The Systemic Placement of International Laws' Inherent Limits in
 the International Legal System.....* 414

IV. Conclusion.....418

I. Introduction

International law lacks the coherence that domestic law has. There is no world parliament, and judicial decisions, albeit binding, are not always respected. States seem to largely enjoy the discretion to shape international law according to their volition. Yet, quite paradoxically, and albeit not confined by any outer restraints, states feel inherently limited in their actions.

The present Article would like to trace these inherent limits of international law. In order to do this, the Article will use a paradigm that constitutes the awarding platform for all other human rights¹: the right to self-determination. Not by accident, in both human rights law cornerstone treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the specific right is entrenched in the opening provision.² As such, the Article will first deal with the question of whether the right to self-determination is subject to any limits. Subsequently, it will proceed to examine the repercussions for international law and interstate relations on a doctrinal and practical level.

II. Inherent Self-Determination Limits

Self-determination can be synopsised in the people's quest for freedom and their desire to shape their own political, economic, and social future.³ The notion has deep historical roots.⁴ Already from the beginning of the twentieth century and following World War I, the American President Woodrow Wilson supported the idea of ethnically identifiable peoples or nations governing themselves.⁵

While Wilson's vision was centered more on self-governance than self-determination,⁶ still, as the Aaland Islands case depicts,⁷ his vision contributed to the gradual consolidation of self-determination as a factor in the various international decisions.

After World War II, self-determination was normatively recognized, with its inclusion in the United Nations Charter, albeit still not defined and thus amorphous.⁸ The notion was

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1. James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L. J. 209, 210–11 (1991).
 2. Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 7 (2009).
 3. Susanna Mancini, *Rethinking the Boundaries of Democratic Secession: Liberalism, Nationalism, and the Right of Minorities to Self-Determination*, 6 INT'L J. CONST. L. 553, 554 (2008).
 4. See e.g., Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L. 137 (2010).
 5. Anthony Whelan, *Wilsonian Self-Determination and the Versailles Settlement*, 43 INT'L & COMP. L.Q. 99, 99–101 (1994).
 6. See JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 15 (2000); MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE: THE NEW DOCTRINE IN THE UNITED NATIONS 80 n.42 (1982).
 7. THOMAS D. MUSGRAVE, SELF-DETERMINATION AND NATIONAL MINORITIES 32 (1997).
 8. U.N. Charter arts. 1(2), 55. See also Alexandra Xanthaki, *The Right to Self-Determination: Meaning and Scope*, in MINORITIES, PEOPLE AND SELF-DETERMINATION 16 (Nazila Ghanea & Alexandra Xanthaki eds., 2005).

awarded the status of a “right” through the U.N. General Assembly Declaration against Colonialism.⁹ Gradually, it expanded to include also an internal facet, aside from its external repercussions in the decolonization process. This internal facet referred to the need for all peoples to freely and fairly participate in the democratic process of governance.¹⁰

In order to penetrate the non-change-prone international law structures,¹¹ self-determination has adopted a more flexible facet, more easily adaptable to the constantly changing economic, political, and security parameters.¹² This means the inclusion of dialogue in any self-determination claims and the preference of bilateral, consensual solutions over unilateral measures.¹³ This bilateralism pervades not only the right itself, but also its limits. Any attempt to contravene this bilateralism is ultimately detrimental for international security and legality.¹⁴

Until now, the question of whether the right to self-determination applied depended on criteria that did not have to do with any constraints embedded in the notion itself, but with external factors that had to be asserted. Without a specific repressive environment, not letting a certain people govern its fate,¹⁵ recourse to the right could not be supported.¹⁶

The Arab Spring, namely the turmoil in the Arab world that led to protests and regime changes in a number of Arab countries,¹⁷ revealed first that self-determination is subject to limits and second, that these limits are inherent. By definition, self-determination is bound to be harnessed. This is not in order for self-determination to be subdued. Yet, like its other re-

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9. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/RES/1514(XV) (Dec. 14, 1960). *See also* Reference re Secession of Quebec, [1998] S.C.R. 217, ¶ 124 (Can.); Robert McCorquodale, *Human Rights and Self-Determination*, in *THE NEW WORLD ORDER: SOVEREIGNTY, HUMAN RIGHTS AND THE SELF-DETERMINATION OF PEOPLES* 9, 11 (Mortimer Sellers ed., 1996); Declaration on the Occasion of the Twenty-Fifth Anniversary of the United Nations, G.A. Res. 2627 (XXV), ¶ 6, U.N. Doc. A/RES/2627(XXV) (Oct. 24, 1970); Human Rights Committee, General Comment 12, Article 1 (Twenty-first session, 1984), in *Human Rights Instruments, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 12 (1994); Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977, 983 (2011).
 10. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 59 (1992).
 11. ANNA MELJKNECHT, *TOWARDS INTERNATIONAL PERSONALITY: THE POSITION OF MINORITIES AND INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 5–6 (2001).
 12. CASTELLINO, *supra* note 6, at 18; Xanthaki, *supra* note 8, at 18; *The Autocrat Has Fled, But the Danger of Civil War Remains*, INDEPENDENT (June 6, 2011), <http://www.independent.co.uk/opinion/leading-articles/leading-article-the-autocrat-has-fled-but-the-danger-of-civil-war-remains-2293514.html>; Marc Weller, *Why the Legal Rules on Self-Determination Do Not Resolve Self-Determination Disputes*, in *SETTLING SELF-DETERMINATION DISPUTES: COMPLEX POWER-SHARING IN THEORY AND PRACTICE* 17, 28 (Marc Weller & Barbara Metzger eds., 2008).
 13. UNESCO, Rep. of the Int'l Conference of Experts Held in Barcelona, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, Nov. 21–27, 1998 (Michael C. van Walt van Praag & Onno Serro eds., 1999).
 14. Marc Weller, *Settling Self-Determination Conflicts: Recent Developments*, 20 EUR. J. INT'L L. 111, 114 (2009).
 15. Lee Seshagiri, *Democratic Disobedience: Reconceiving Self-Determination and Secession at International Law*, 51 HARV. INT'L L.J. 553, 556 (2010).
 16. Weller, *supra* note 12, at 26; CASTELLINO, *supra* note 6, at 26, 28, 40.
 17. Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT'L & COMP. L. REV. 145 (2012).

lated, highly cherished value—freedom—self-determination can end up in anarchy if not properly put in the right dimensions.¹⁸

In an effort to trace these inherent limits, the current note will examine two recent Arab Spring cases: Libya and Syria. These cases took place in close temporal vicinity and inside the same factual framework, yet merited totally different approaches from the international community. This renders the examination of the self-determination limits more palpable and telling regarding also interstate relations.

A. The International Community and Libya

In February 2011, violent demonstrations erupted in Libya against the Qaddafi regime.¹⁹ The international community's reaction was rather swift and decisive.²⁰ In late February the U.N. Security Council convened and passed Resolution 1970.²¹

The Resolution made note of the “gross and systematic violation of human rights” in Libya, and reiterated the state's obligation to protect its citizens.²² The Resolution called upon the International Criminal Court (ICC) to intervene in case Libya appeared unwilling or unable to respect its citizens' basic human rights.²³

Indeed, quite swiftly, the ICC prosecutor announced in the beginning of March that he would open an investigation in the case of Libya.²⁴ The African Court on Human Rights followed suit, by issuing in the end of March its first judgment, asking Libya to refrain from any action that would result in loss of life or violate the physical integrity of people.²⁵ In May, the ICC Prosecutor requested the issuance of arrest warrants for Qaddafi, his son and the Head of the Intelligence for crimes against humanity.²⁶ In June 2011, these warrants were issued.²⁷

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18. Seshagiri, *supra* note 15, at 557–58; UNESCO, *supra* note 13, at 13.
 19. Anthony Shadid, *Clashes in Libya Worsen as Army Crushes Dissent*, N.Y. TIMES (Feb. 18, 2011), http://www.nytimes.com/2011/02/19/world/africa/19libya.html?_r=1.
 20. Angela Evans, *U.N. Acts Swiftly on Libya*, INTERPRETER (Mar. 1, 2011), <http://www.lowyinterpreter.org/post/2011/03/01/UNSC-Resolution-1970-Swift-Supported-and-Surprising.aspx>.
 21. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).
 22. *Id.* pmbl. See also Press Release, U.N. Secretary-General Special Adviser on the Prevention of Genocide, Francis Deng, and Special Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya (Feb. 22, 2011), available at <http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Libya,%2022%20February%202011.pdf>
 23. Mehrdad Payandeh, *With Great Power Comes Great Responsibility? The Concept of the Responsibility to Protect within the Process of International Lawmaking*, 35 YALE J. INT'L L. 469, 481 (2010); Edward Wyatt, *Security Council Calls for War Crimes Inquiry in Libya*, N.Y. TIMES (Feb. 26, 2011), <http://www.nytimes.com/2011/02/27/world/africa/27nations.html>.
 24. *ICC Prosecutor to Open an Investigation in Libya*, INT'L CRIMINAL COURT (Feb. 3, 2011), http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/libya/Pages/statement%20020311.aspx; *ICC to Launch Libya Probe*, AL JAZEERA (Mar. 2, 2011), <http://english.aljazeera.net/news/africa/2011/03/201132142735939241.html>.
 25. African Comm'n on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, Order for Provisional Measures, App. No. 004/2011, ¶ 25 (Afr. Ct. on Hum. and Peoples' Rts., March 25, 2011), available at <http://www.unhcr.org/refworld/pdfid/4da59c082.pdf>.
 26. Press Release, Int'l Crim. Ct., ICC—ICC Prosecutor: Gaddafi Used His Absolute Authority to Commit Crimes in Libya (May 16, 2011), available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/press%20releases/Pages/pr667.aspx.

Amidst fighting between rebel forces and those loyal to Qaddafi, in mid-March, the U.N. Security Council convened again and passed Resolution 1973.²⁸ Adopted under Chapter VII of the U.N. Charter, the resolution authorized member-states to take all measures to protect civilians and civilian populated areas under threat of attack in Libya, tacitly endorsing the use of military means.²⁹

Moreover, in the course of a global-regional interaction,³⁰ regional bodies convened almost in parallel with the U.N. Security Council. Thus, the African Union decided to remain seized of the matter, establishing the ad hoc High-Level Committee on Libya,³¹ the Arab League suspended Libya as a member,³² and the U.N. General Assembly suspended Libya's membership in the U.N. Human Rights Council.³³

These developments gave the wrong impression that the whole international community stood opposite Libya. This rendered a highly bipolar, Armageddon-like character to a potential confrontation, augmenting its ethical and actual dimensions and impact.³⁴

Libya's suspension from the Human Rights Council was unanimous, but the representative of Venezuela stalled until the last moment in deciding whether to back it;³⁵ actually Venezuela's president, Hugo Chavez, was one of the few leaders who openly supported Qaddafi.³⁶ The ICC arrest warrants met the opposition of the African Union, which recommended its state members not to cooperate with the Court.³⁷

Resolution 1970 also enjoyed the support of states traditionally reluctant to endorse intervention, such as Russia and China.³⁸ Yet these states, joined by a number of other key states

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27. Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11, Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1099314.pdf>.
 28. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).
 29. Michael N. Schmitt, *Wings over Libya: The No-Fly Zone in Legal Perspective*, 36 YALE J. INT'L L. ONLINE 45 (2011).
 30. U.N. Secretary-General, *The Role of Regional and Subregional Arrangements in Implementing the Responsibility to Protect*, U.N. Doc. A/65/877-S/2011/393 (June 27, 2011).
 31. African Union, *Communique of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV)* (Mar. 10, 2011) [hereinafter *AU Communique*].
 32. Matt Bradley & Charles Levinson, *Arab League Urges Libya 'No-Fly' Zone*, WALL ST. J. (Mar. 14, 2011), <http://online.wsj.com/article/SB10001424052748704838804576196681609529882.html>.
 33. Press Release, General Assembly, General Assembly Suspends Libya from Human Rights Council, U.N. Press Release GA/11050 (Mar. 1, 2011), available at <http://www.un.org/News/Press/docs/2011/ga11050.doc.htm>.
 34. James Pattison, *The Ethics of Humanitarian Intervention in Libya*, 25 ETHICS & INT'L AFF. 271 (2011); David Clark, *Libyan Intervention Was a Success, Despite the Aftermath's Atrocities*, GUARDIAN (Oct. 28, 2011), <http://www.guardian.co.uk/commentisfree/2011/oct/28/intervention-libya-success>; François Heisbourg, *Libya: A Small War with Big Consequences*, N.Y. TIMES (Aug. 29, 2011), <http://www.nytimes.com/2011/08/30/opinion/30iht-edheisbourg30.html>.
 35. Eric Shawn, *U.N. General Assembly Suspends Libya from Human Rights Council*, FOX NEWS.COM (Mar. 1, 2011), <http://www.foxnews.com/world/2011/03/01/general-assembly-suspends-libya-human-rights-council/>.
 36. Simon Romero, *Qaddafi Said to Accept Venezuelan Offer for Help*, N.Y. TIMES (Mar. 3, 2011), <http://www.nytimes.com/2011/03/04/world/americas/04venezuela.html>.
 37. *African Union Opposes Warrant for Qaddafi*, N.Y. TIMES (July 2, 2011), <http://www.nytimes.com/2011/07/03/world/africa/03african.html>.
 38. For the fact that this was perceived as a shift in China's stance vis-à-vis international law and institutions and a more reserved position, see Evans, *supra* note 20.

like Germany, India and Brazil,³⁹ abstained as to Resolution 1973 only some days afterwards.⁴⁰ All of these countries voiced concerns over the protracted conflict character and stability building potential of a unilaterally-imposed solution in the case of Libya.⁴¹ The African Union also expressed similar fears.⁴²

These fears proved substantial when the North Atlantic Treaty Organization (NATO) military intervened in Libya in order to enforce the U.N. Resolution,⁴³ and battles continued to be waged between rebels and Qaddafi forces on an indecisive scale.⁴⁴ The Russian President likened the airstrikes to “crusades”⁴⁵ and the Arab League Secretary-General, although continuing to support the U.N. Libya Resolution, stated that the Arab League had consented to something different.⁴⁶ This partial international recoil from the unilateral, military intervention-line fostered by the Libya Resolution bolstered the view that internal self-determination in Libya should come as a result of bilateral talks and could not be unilaterally imposed.

The U.N. Secretary-General, echoing previous remarks of other senior U.N. officials,⁴⁷ as well as calls by African states and the African Union,⁴⁸ underlined in July 2011 that no military solution existed in the case of Libya and that parties should “engage in direct negotiations” to end the impasse.⁴⁹ As such, the international community’s stance started to change gradually, from one advocating Qaddafi’s removal, to one accepting his departure from power

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39. *Security Council Authorizes “All Necessary Measures” to Protect Civilians in Libya*, U.N. NEWS CENTRE (Mar. 17, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37808&Cr=libya&Cr1>.
 40. Michael Fullilove, *China and the United Nations: The Stakeholder Spectrum*, 34 WASH. Q. 63, 71 (2011).
 41. Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011), available at <http://www.un.org/News/Press/docs/2011/sc10200.doc.htm>; *China Voices Misgivings about Libya “No Fly” Zone Plan*, ALERTNET (Mar. 1, 2011), <http://www.trust.org/alertnet/news/china-voices-misgivings-about-libya-no-fly-zone-plan/>.
 42. *AU Communique*, *supra* note 31.
 43. *Libya: NATO to Take Command of No-Fly Zone*, BBC NEWS (Mar. 25, 2011), <http://www.bbc.co.uk/news/world-africa-12856665>.
 44. Gaye Davis, *Libya Heading for Civil War—Dangor*, INDEPENDENT ONLINE (Mar. 2, 2011), <http://www.iol.co.za/news/africa/libya-heading-for-civil-war-dangor-1.1034626>.
 45. Gleb Bryanski, *Putin Likens U.N. Libya Resolution to Crusades*, REUTERS (Mar. 21, 2011), <http://www.reuters.com/article/2011/03/21/us-libya-russia-idUSTRE72K3JR20110321>.
 46. *Arab League Chief: We Respect U.N. Resolution on Libya Military Action*, HAARETZ (Mar. 21, 2011), <http://www.haaretz.com/news/world/arab-league-chief-we-respect-un-resolution-on-libya-military-action-1.350888>.
 47. Press Release, Security Council, Under-Secretary General for Political Affairs, Briefing Security Council on Libya Situation, Says Negotiation Process Must Have Time ‘to Grow and Bear Fruit,’ U.N. Press Release SC/10297 (June 27, 2011), available at <http://www.un.org/News/Press/docs/2011/sc10297.doc.htm>.
 48. *Britain, South Africa Disagree over Next Steps in Libya*, REUTERS (July 18, 2011), <http://af.reuters.com/article/libyaNews/idAFL6E7II0NU20110718?rpc=401&feedType=RSS&feedName=libyaNews&rpc=401>; *AU Communique*, *supra* note 31, ¶¶ 6–7.
 49. Press Release, Secretary-General, “No Military Solution to Crisis in Libya,” Secretary-General Stresses in Message, Calling for Lasting Solution That Addresses Aspirations of Libyan People, U.N. Press Release SG/SM/13706-AFR/2211 (July 15, 2011), available at <http://www.un.org/News/Press/docs/2011/sgsm13706.doc.htm>.

under agreement,⁵⁰ and ultimately to one allowing him to remain in Libya under certain conditions.⁵¹ As expected, such a scenario did not find any accord with the ICC Prosecutor.⁵²

Yet, even after the fall of the Libyan despot, when seemingly things could be shaped as *tabula rasa* in an authoritative way, the United Nations continued to endorse a dialectical stance. Thus, a meeting was called to examine ways in which the international community could work together on the post-conflict phase.⁵³

Eventually, NATO military strikes continued, ending only after Qaddafi was overthrown and subsequently killed by a crowd during his efforts to flee and hide.⁵⁴ Yet, the numbness and hesitance the international community had demonstrated regarding Libya⁵⁵ had already put its stamp on the international community's responsiveness to similar self-determination quests. The case of Syria will be elaborated in the next section.

B. The International Community and Syria

In Syria, the Arab Spring flowers did not sprout suddenly, but were the result of a gradual process. On January 26, Hasan Ali Akleh set himself on fire.⁵⁶ On February 2, a group of twenty people in civilian clothing beat people who had been holding a candlelight vigil in support for Egyptian demonstrators.⁵⁷ On February 5, hundreds of demonstrators called for the departure of Assad.⁵⁸ On March 6, a number of young boys were arrested for writing slogans supportive of the Arab Spring.⁵⁹ After March 15, demonstrations became massive and took the form of an uprising.⁶⁰ Thousands of civilians lost their lives.⁶¹

Yet, in the case of Syria, the international community did not show the unilateral pulse and quick instincts it had demonstrated in the case of Libya. The U.N. Secretary-General in-

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50. Ewen MacAskill, *U.S. and Libya in Face to Face Talks*, GUARDIAN (July 18, 2011), <http://www.guardian.co.uk/world/2011/jul/19/us-libya-talks-tunisia>.
51. Simon Tisdall, *Can Gaddafi Really Stay in Libya and Cede All Power?*, GUARDIAN (July 26, 2011), <http://www.guardian.co.uk/commentisfree/2011/jul/26/gaddafi-libya-power>; Jonathan Steele, *Libya's Stalemate Shows It Is Time to Tempt Gaddafi Out, Not Blast Him Out*, GUARDIAN (July 26, 2011), <http://www.guardian.co.uk/commentisfree/2011/jul/26/libya-gaddafi-war-nato-ceasefire>.
52. Richard Norton-Taylor & Chris Stephen, *Gaddafi Can't Be Left in Libya, Says International Criminal Court*, GUARDIAN (July 26, 2011), <http://www.guardian.co.uk/world/2011/jul/26/gaddafi-in-libya-hague-icc>.
53. *U.N. Calls Urgent Meeting on Libya*, BIG NEWS NETWORK (Aug. 24, 2011), <http://feeds.bignewsnetwork.com/?sid=831780>.
54. Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 358, 380 (2012); James Meikle, *Muammar Gaddafi Is Dead, Says Libyan PM*, GUARDIAN (Oct. 20, 2011), <http://www.guardian.co.uk/world/2011/oct/20/gaddafi-dead-says-libyan-pm>.
55. Payandeh, *supra* note 54, at 380–82.
56. Ali Sarihan, *Is the Arab Spring in the Third Wave of Democratization? The Case of Syria and Egypt*, 3 TURK J. POL. 67, 72 (2012).
57. Lauren Williams, *Syria Clamps Down on Dissent with Beatings and Arrests*, GUARDIAN, (Feb. 24, 2011), <http://www.guardian.co.uk/world/2011/feb/24/syria-crackdown-protest-arrests-beatings>.
58. Sarihan, *supra* note 56, at 67, 72.
59. Joe Sterling, *Daraa: The Spark That Lit the Syrian Flame*, CNN (Mar. 1, 2012), <http://edition.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/index.html>.
60. Sarihan, *supra* note 56, at 67, 72.
61. Michelle Nichols, *Syria Death Toll Likely near 70,000, says U.N. Rights Chief*, REUTERS (Feb. 12, 2013), <http://www.reuters.com/article/2013/02/12/us-syria-crisis-un-idUSBRE91B19C20130212>.

deed swiftly condemned the deaths in the beginning of the riots.⁶² Nevertheless, Syria's candidacy for the U.N. Human Rights Council was not rejected, despite calls for the opposite.⁶³ It was only deferred for a two-year time, following a Syrian agreement with Kuwait to swap candidacies for the Council.⁶⁴ The U.N. Security Council did not issue any resolution,⁶⁵ but only a presidential statement, five months after the outburst of violence, condemning Damascus' bloody crackdown on civilian protesters.⁶⁶ The Arab League did not condemn the Syrian regime nor did it take any other action.⁶⁷ The ICC did not even voice the need for any arrest warrants to be issued against the Syrian political and military echelon.⁶⁸

Rather, reaction on an international level was lukewarm. The U.N. Human Rights Council approved a fact-finding mission to Syria to explore possible human rights violations,⁶⁹ and in July 2011 two of the U.N. Secretary-General's advisers on issues of genocide and human rights protection actually voiced the possibility that "crimes against humanity may have been committed and continue to be committed in Syria."⁷⁰

Countries such as the United Kingdom and the United States which had been active in the issue of military action against Libya, as well as the Organization of Islamic Cooperation, expressed only their concern for the reports about the violence used by the Syrian regime against the demonstrators.⁷¹ No military scenario was put on the table regarding Syria and reactions were restricted to a bilateral level, where the United States and the European Un-

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62. Caroline Faraj, *U.N. Secretary-General Condemns Reported Syrian Rioting Deaths*, CNN (Mar. 18, 2011), http://articles.cnn.com/2011-03-18/world/syria.riots_1_demonstrators-syrian-government-syrian-authorities.
 63. *Syria Should Not Be Allowed on the U.N. Human Rights Council*, CAIRO INSTITUTE FOR HUMAN RIGHTS STUDIES (Apr. 21, 2011), <http://www.cihrs.org/?p=1414>; *Letter from African NGOs to African States re Syria's Candidacy for the U.N. Human Rights Council*, EGYPTIAN INITIATIVE FOR PERSONAL RIGHTS (Apr. 28, 2011), <http://www.eipr.org/en/pressrelease/2011/04/28/1148>.
 64. Patrick Worsnip, *Kuwait Elected to U.N. Rights Panel Instead of Syria*, REUTERS (May 20, 2011), <http://www.reuters.com/article/2011/05/20/us-rights-un-council-idUSTRE74J5IO20110520>.
 65. *Russia Says Opposed to Any U.N. Security Council Resolution on Syria*, HAARETZ (June 9, 2011), <http://www.haaretz.com/news/world/russia-says-opposed-to-any-un-security-council-resolution-on-syria-1.366822>.
 66. Patrick Worsnip, *U.N. Council Statement Condemns Use of Force by Syria*, REUTERS (Aug. 3, 2011), <http://www.reuters.com/article/2011/08/03/us-syria-un-idUSTRE7724EB20110803>.
 67. Bassem Mroue, *Arab League Tells U.S. to Stop Interfering in Syria*, JAKARTA POST (July 13, 2011), <http://www.thejakartapost.com/news/2011/07/13/arab-league-tells-us-stop-interfering-syria.html>.
 68. *Security Council Must Refer Syria to the ICC*, AMNESTY INT'L (Apr. 26, 2011), <http://www.amnesty.org/en/for-media/press-releases/security-council-must-refer-syria-icc-2011-04-26>.
 69. *U.N. Human Rights Council Calls for Investigation into Alleged Abuses in Syria*, U.N. NEWS CENTRE (Apr. 29, 2011), <http://www.un.org/apps/news/story.asp?NewsID=38237&Cr=syria&Cr1>.
 70. *Syria: U.N. Advisers Warn That Crimes against Humanity May Have Been Committed*, U.N. NEWS CENTRE (July 22, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39128&Cr=syria&Cr1#USYSRnOfsXw>.
 71. *Report: Syrian Committee to Investigate Friday's Deadly Clashes*, CNN (Mar. 19, 2011), http://articles.cnn.com/2011-03-19/world/syria.riots_1_peaceful-protest-lethal-force-demonstrators; *OIC Ready to Play a Role in Resolution of Syrian Crisis*, ORG. OF ISLAMIC COOPERATION (Aug. 13, 2011), http://www.oic-oci.org/topic_print.asp?t_id=5569.

ion, on separate bases, imposed sanctions on Assad's regime.⁷² Gradually, the regime was left to collapse on its own.⁷³

C. Assessing Self-Determination's Limits

The international community's reaction in the case of Syria palpably depicts the inherent limits that chain and constrain any self-determination quests. It is important that the international community does not compromise its moral doctrinal stance, which is based upon the ideals of freedom, human life, and dignity, enshrined in all major human rights instruments.⁷⁴ The fact that in the case of Libya, the Security Council endorsed for the first time the "responsibility to protect" doctrine,⁷⁵ demonstrates the international community's resolution not to tolerate mass atrocities, even if that means that a military intervention has to take place. On the other hand, such intervention does not always bring the desired results as far as self-determination is concerned. Democratization is not always achieved and regional stability is not always ensured. This is partly due to the fact that self-determination cannot be achieved just through the imposition of outer, *blitzkrieg* solutions, but rather must result from the fermenting of certain conditions inside a society.

For example, the Egyptian revolution was succeeded by a military government, postponement of elections, and a slow pace of political change.⁷⁶ Even when such elections took place,

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72. Bassem Mroue & Elizabeth A. Kennedy, *Syrian Violence Intensifies as Troops Surround Hama*, HUFFINGTON POST (May 12, 2011), http://www.huffingtonpost.com/2011/05/12/syria-protest-violence_n_861027.html.
73. Max Fisher, *Writing on the Wall: Why World Leaders Now Foresee Assad's Fall*, WASH. POST (Dec. 13, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/13/writing-on-the-wall-why-world-leaders-now-foresee-assads-fall/>.
74. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ."). The first articles of the European Convention on Human Rights also refer to the protection of life and freedom. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, concluded Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Eur. Conv. on Human Rights] ("Everyone's right to life shall be protected by law."); *id.* art. 4 ("No one shall be held in slavery or servitude.").
75. The "responsibility to protect" doctrine stipulates that states have the primary responsibility of protecting their populations from mass atrocities. To the extent that the state appears unwilling or unable to do so, the international community has the responsibility to intervene through coercive measures such as economic sanctions or a military intervention. See Max du Plessis, *Chinese Arms Destined for Zimbabwe over South African Territory: The R2P Norm and the Role of Civil Society*, 17 AFR. SECURITY REV. 17, 20 (2008); Alex J. Bellamy, *Libya and the Responsibility to Protect: The Exception and the Norm*, 25 ETHICS & INT'L AFF. 263 (2011); A More Secure World: Our shared Responsibility, Rep., transmitted by letter dated Dec. 1, 2004 from the Chairman of the High-level Panel on Threats, Challenges and Change to the U.N. Secretary-General, ¶ 203 U.N. Doc. A/59/569 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf>; Allen Buchanan, *A Principled International Legal Response to Demands for Self-Determination*, in IDENTITY, SELF-DETERMINATION AND SECESSION 139, 143 (Igor Primoratz & Aleksandar Pavkovic eds., 2006).
76. *Youth Movement Calls for Mass Protest Friday to Demand Gov't Resignation*, EGYPT INDEP. (July 19, 2011), <http://www.egyptindependent.com/news/youth-movement-calls-mass-protest-friday-demand-govt-resignation>; Sherif Younis, *The Long Road Ahead*, EGYPT INDEP., (July 17, 2011), <http://www.egyptindependent.com/opinion/long-road-ahead>; *At Least 231 People Injured in Cairo Demonstrations*, THE JERUSALEM POST (July 24, 2011), <http://www.jpost.com/MiddleEast/Article.aspx?id=230695>; Oren Kessler, *Egypt Army Moves to Se-*

the rise of Islamist powers posed the question of whether democracy is indeed feasible in all states and whether the overthrowing of a despot equals necessarily the inauguration of a period of more freedom or ultimately serves the interests of the West.⁷⁷ The will of Egypt's new President to pass a constitution awarding broad powers to him sparked a new round of turmoil and violent protests.⁷⁸ Likewise, in Tunisia, two years after the ousting of President Ben Ali, the country was still tormented by violence and high unemployment rates.⁷⁹

As past experience has demonstrated in regions like Eastern Europe,⁸⁰ enthusiasm for democracy embodied in unilateral self-determination initiatives such as demonstrations, riots, and ultimately the overthrowing of a ruling cast, is positive and necessary for change. Yet, it is not enough on its own to yield that change. It has to be followed by bilateral concrete steps, aimed at strengthening, as in the cases of Egypt and Tunisia,⁸¹ civil society voices, accelerating democratization and supporting internal dialogue and interstate interaction.⁸²

The inherent limits of self-determination have been diagnosed by the international community. In Libya, there was an attempt to solve the crisis through resort to unilateral measures, such as Security Council resolutions and a military intervention. Yet, this approach, pervasive of unilateralism, did not prove adequate once transplanted to the exigencies of a non-U.S. hegemonic world, with Russia trying to recapture its former power and states like China emerging in the international arena.⁸³ Once military operations began, all lurking disagreements regarding the strategy that should be followed towards the Qaddafi regime came to the surface.⁸⁴ This in turn damaged the legal grounds and efficiency of the expedition on an international and domestic level.⁸⁵

cure Key Role in Country's Future, THE JERUSALEM POST (July 20, 2011), <http://www.jpost.com/MiddleEast/Article.aspx?id=230229>.

77. Jamie O'Connell, *Common Interests, Closer Allies: How Democracy in Arab States Can Benefit the West*, 48 STAN. J. INT'L L. 341, 345, 347 (2012) (citing Western fears on whether democracy in the Arab world does serve Western interests and arguing that it does).
78. *Tanks Move in as Morsi Backers, Opponents Clash over Egypt Constitution*, DEUTSCHE WELLE (Dec. 6, 2012), <http://www.dw.de/tanks-move-in-as-morsi-backers-opponents-clash-over-egypt-constitution/a-16430765>.
79. Bouazza Ben Bouazza & Paul Schemm, *Violence Plagues Tunisia's Politics 2 Years Later*, YAHOO! NEWS (Jan. 14, 2013), <http://news.yahoo.com/violence-plagues-tunisia-politics-2-years-later-074610046.html>.
80. James Bell, *Will Enthusiasm for Democracy Endure in Egypt and Elsewhere?*, PEW RES. CENTER (Mar. 8, 2011), <http://pewresearch.org/pubs/1918/enthusiasm-for-democracy-in-egypt-tunisia-fragile-eastern-europe-experience-shows>.
81. *U.N. Political Chief to Focus on Transition Process During Visits to Egypt and Tunisia*, U.N. NEWS CENTRE (July 15, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39053>.
82. G.A. Res 60/1, U.N. GAOR, 60th Sess., U.N. Doc. A/RES/60/1, ¶¶ 138–39; Jean-Pierre Lacroix, Deputy Permanent Representative of France, Statement to the U.N. General Assembly: The Responsibility to Protect (July 23, 2009), *unofficial translation available at* <http://www.franceonu.org/spip.php?article4072>.
83. Stephen Blank, *Russia in Latin America: Geopolitical Games in the U.S.'s Neighborhood*, RUSSIE.NEL.VISIONS, Apr. 2009, at 1, *available at* <http://www.ifri.org/?page=contribution-detail&id=5332>; *China Seen Overtaking U.S. as Global Superpower*, PEW RES. CENTER (July 13, 2011), <http://www.pewglobal.org/2011/07/13/china-seen-overtaking-us-as-global-superpower/>; Mark Urban, *U.N. Syria Failure Shows Declining Power of the West*, BCC NEWS (June 15, 2011), <http://www.bbc.co.uk/news/world-13785954>.
84. *See supra* Part II.A.
85. Thus, the ICC arrest warrants remained unexecuted to the detriment of the court's prestige. Moreover, in the United States itself, the legality of the intervention was questioned on constitutional

Carrying the case of Libya in its collective sub-consciousness, the international community has appeared much less willing to intervene in Syria. The United States, France and the United Kingdom all have acquiesced to the Syrian people's self-determination pleas and have acknowledged the Syrian opposition as the sole legitimate representative of the Syrian people.⁸⁶ Yet, at the same time, with their reluctance to militarily or more actively diplomatically intervene, world powers have made clear that self-determination has limits.⁸⁷ These limits stem from the possible chaos that escorts anything new and fills with fear an international community that is anchored to stability and to the current status quo.⁸⁸

The unlimited fragmentation of states may lead to non-viable new states⁸⁹ and this cannot be condoned by international law.⁹⁰ Thus, for example, secession of Somaliland from Somalia has not been positively received,⁹¹ partly due to the fact that such secession would deprive Somalia of a region which could function as a stimulating factor for Somalia's stability and the reorganization of its tattered state institutions.⁹²

In order for self-determination to apply, the international community has to be convinced that the creation of a new state is the only way to end a civil war, human rights abuses, or an occupation.⁹³ Yet, even in these cases, the confrontational element embedded in unilateral initiatives can negatively impact international security and legality.⁹⁴ This negative impact

terms, due to lack of congressional authorization for the engagement of military troops. See Norton-Taylor & Stephen, *supra* note 52; Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT'L L. REV. 43 (2012).

86. Dapo Akande, *Self-Determination and the Syrian Conflict—Recognition of Syrian Opposition as Sole Legitimate Representative of the Syrian People: What Does This Mean and What Implications Does It Have?*, EJIL: TALK! (Dec. 6, 2012), <http://www.ejiltalk.org/self-determination-and-the-syrian-conflict-recognition-of-syrian-opposition-as-sole-legitimate-representative-of-the-syrian-people-what-does-this-mean-and-what-implications-does-it-have/>; *U.S. Recognises Syria Opposition Coalition Says Obama*, BBC NEWS (Dec. 12, 2012), <http://www.bbc.co.uk/news/world-middle-east-20690148>; Steven Erlanger & Rick Gladstone, *France Grants Its Recognition to Syrian Rebels*, N.Y. TIMES (Nov. 13, 2012), <http://www.nytimes.com/2012/11/14/world/middleeast/syria-war-developments.html>.
87. McCorquodale, *supra* note 9, at 10; Seshagiri, *supra* note 15, at 556; Sundhya Pahuja, *The Postcoloniality of International Law*, 46 HARV. INT'L L.J. 459, 464 (2005).
88. Thus for example, in the aftermath of the civil war in Yugoslavia, the Badinter Commission insisted that all external frontiers should be respected and that the Yugoslavia-era boundaries of the newly formed states would ultimately be their frontiers. See Alain Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT'L L. 178, 185 (1992).
89. Vladimir Rudnitsky, *Self-Determination in a Modern World: Conceptual Development and Practical Application*, in THE NEW WORLD ORDER: SOVEREIGNTY, HUMAN RIGHTS AND SELF-DETERMINATION, *supra* note 9, at 71, 77; Christian Tomuschat, *Secession and Self-Determination*, in SECESSION: INTERNATIONAL LAW PERSPECTIVES 23, 24 (Marcello G. Kohen ed., 2006); Serge Sur, *The State between Fragmentation and Globalization*, 3 EUR. J. INT'L L. 421, 424–25 (1997).
90. Aaron Kreuter, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 MINN. J. INT'L L. 363, 394 (2010).
91. Benjamin R. Farley, *Calling a State a State: Somaliland and International Recognition*, 24 EMORY INT'L L. REV. 777 (2010).
92. Kreuter, *supra* note 90, at 384–85; Farley, *supra* note 91, at 812.
93. See Zohar Nevo & Tamar Megiddo, *Lessons from Kosovo: The Law of Statehood and Palestinian Unilateral Independence*, 5 J. INT'L L. & INT'L REL. 89 (2009) (discussing the cases of Timor-Leste, Kosovo and the issue of Palestinian statehood).
94. For examples in the framework of the Israeli-Palestinian conflict, see Menachem Klein, *The Israeli-Palestinian Wonder: Losing Trust in Official Negotiations While Maintaining It on "Hard" Track II Talks*, in THE SEARCH FOR ARAB-ISRAELI PEACE: LEARNING FROM THE PAST AND BUILDING TRUST 44 (Edwin G. Corr et al. eds., 2007). For examples from the field of international trade, see Arne Mel-

can be traced in all three self-determination quests that have taken a prominent place in the international diplomatic and legal agenda over the last decade: Kosovo, South Sudan and the issue of Palestinian statehood.

Kosovo's unilateral declaration of statehood has been supported by a large part of the international community.⁹⁵ Nevertheless, because it is not the product of a bilateral coordination with the mother-state of Serbia, Kosovo inherited problems of fighting. Moreover, it appeared unable to control parts of its territory, in particular in districts where Serbians constituted the majority.⁹⁶ Although unilaterally created, Kosovo had to grapple with issues of its sovereignty only through a bilateral track, involving talks with Serbia and the signing of an EU brokered bilateral agreement between the two sides.⁹⁷

South Sudan declared its independence in 2011, seceding from the state of Sudan. In the case of South Sudanese independence, there was an attempt for the two parties—Sudan and South Sudan—to engage in a bilateral approach. As such, independence came under an agreement with the mother-state of Sudan. In fact, Sudan's support was deemed critical.⁹⁸ Still, even these bilateral steps did not ultimately erase frictions with Sudan regarding the border demarcation in an oil-rich frontier-territory.⁹⁹

Under this lens, the Palestinian U.N. statehood should be seen also on a broader security, political, and economic base. Self-determination has been acknowledged for the Palestinians.¹⁰⁰ A Palestinian state is endorsed by the United Nations and the wider international

chior, *A Global Race for Free Trade Agreements: From the Most to the Least Favoured Nation Treatment?* (Norwegian Inst. of Int'l Aff., Paper No. 653, 2003), available at <http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=27540> (quoting the statement of the Director-General of the World Trade Organization).

95. Kosovo Declaration of Independence, Feb. 17, 2008, 47 I.L.M. 467 (2008); *Kosovo MPs Proclaim Independence*, BBC NEWS (Feb. 17, 2008), <http://news.bbc.co.uk/2/hi/europe/7249034.stm>; Accordance with International Law of the Unilateral Declaration of Independence In Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (July 22), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.
96. *Kosovo Tense after Deadly Clash on Serbian Border*, BBC NEWS (July 26, 2011), <http://www.bbc.co.uk/news/world-europe-14303165>; Jane Dougall, *NATO Steps In Amid Kosovo-Serbia Border Row*, SKY NEWS (July 27, 2011), <http://news.sky.com/home/world-news/article/16038032>; *North Kosovo: Dual Sovereignty in Practice*, INT'L CRISIS GROUP (Mar. 14, 2011), http://www.crisisgroup.org/en/publication-type/media-releases/2011/europe/North_Kosovo_Dual_Sovereignty_in_Practice.aspx.
97. Dan Bilefsky, *Serbia and Kosovo Reach Agreement on Power-Sharing*, N.Y. TIMES (Apr. 19, 2013), http://www.nytimes.com/2013/04/20/world/europe/serbia-and-kosovo-reach-milestone-deal.html?_r=0.
98. Josh Kron, *Sudan Leader to Accept Secession of South*, N.Y. TIMES (Feb. 7, 2011), <http://www.nytimes.com/2011/02/08/world/africa/08sudan.html>.
99. Alexander Dziadosz & Charlton Doki, *Sudan, South Sudan to Discuss Rebel Support Next Month*, REUTERS (Dec. 19, 2012), <http://www.reuters.com/article/2012/12/19/us-sudan-south-talks-idUSBRE8B11GC20121219>; James Copnall, *Sudan: Why Abyei Is Crucial to North and South*, BBC NEWS (May 23, 2011), <http://www.bbc.co.uk/news/world-africa-13502845>; Enjoli Liston, *The lie of the Land: Mapping the Borders of South Sudan Has Been Fraught with Difficulty*, INDEP. (July 21, 2011), <http://www.independent.co.uk/news/world/africa/the-lie-of-the-land-mapping-the-borders-of-south-sudan-has-been-fraught-with-difficulty-2317701.html>.
100. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 118 (July 9); Peter Malanczuk, *Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law*, 7 EUR. J. INT'L L. 485, 489 (1996).

community, but this should be the start and not the end of the Palestinian statehood journey.¹⁰¹ Self-determination should be coupled with stability.¹⁰²

Self-determination is not anymore based just on the assertion of the classical Montevideo statehood criteria, but also on other factors such as political and economic viability parameters.¹⁰³ In the case of Palestinian statehood, this is shared by all interested parties. The international community has supplied financial aid to the Palestinians¹⁰⁴ and has long documented the economic growth in the West Bank and Gaza.¹⁰⁵ Israeli politicians have underlined the role of economic prosperity in regional Middle East stability,¹⁰⁶ and economic cooperation between Israel and the Palestinian Authority was included in the Oslo accords signed between Israel and the PLO.¹⁰⁷ As for Palestinians, they have both aspired to achieve reconciliation between the Hamas and Fatah rival fractions¹⁰⁸ as well as draw investments and economic help from Arab states.¹⁰⁹

It is these parameters that largely determine whether the international community will ultimately sanction secession. International law is silent on the legality of secession.¹¹⁰ Nevertheless, self-determination is further limited by the assertion that any secession quests, both before as well as after their configuration, must be based on a bilateral, dialectic platform.¹¹¹

Thus, in the case of Quebec, the Canadian Supreme Court affirmed these limits, ruling in favor of secession only in case of a bilateral approach failure and the closing of all channels of

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101. Press Release, General Assembly, General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations, U.N. Press Release GA/11317 (Nov. 29, 2012), available at <http://www.un.org/News/Press/docs//2012/ga11317.doc.htm>.
102. ENVER HASANI, SELF-DETERMINATION, TERRITORIAL INTEGRITY AND INTERNATIONAL STABILITY: THE CASE OF YUGOSLAVIA 30 (2010).
103. Nevo & Megiddo, *supra* note 93, at 108.
104. JIM ZANOTTI, CONG. RESEARCH SERV., RS 22967, U.S. FOREIGN AID TO THE PALESTINIANS (2013), available at <http://www.fas.org/sgp/crs/mideast/RS22967.pdf>; BARRY RUBIN, ISRAEL, THE PALESTINIAN AUTHORITY AND THE ARAB STATES (1997).
105. WORLD BANK OPERATIONS EVALUATION DEP'T, WEST BANK AND GAZA: AN EVALUATION OF BANK ASSISTANCE, Rep. No. 23820 (Mar. 7, 2002), available at http://unispal.un.org/pdfs/WB_assistance_23820.pdf; Khaled Abu Toameh, *Abbas Appeals to Arab League for Financial Aid*, JERUSALEM POST (July 25, 2011), <http://www.jpost.com/MiddleEast/Article.aspx?id=230925>; *World Bank: W. Bank, Gaza Growth Not Likely Sustainable*, JERUSALEM POST (Apr. 7, 2011), <http://www.jpost.com/International/Article.aspx?id=215495>.
106. SHIMON PERES, THE NEW MIDDLE EAST 34–35 (1993).
107. Oren Gross, *Mending Walls: The Economic Aspects of Israeli-Palestinian Peace*, 15 AM. U. INT'L L. REV. 1539, 1541 (2000).
108. *Palestinian Reconciliation Talks to Resume in Egypt*, TIMES OF ISRAEL (Jan. 28, 2013), <http://www.timesofisrael.com/palestinian-reconciliation-talks-to-resume-in-egypt>.
109. *Arab States Agree on \$100 Million in Monthly Aid for Palestinian Authority*, HAARETZ (Dec. 9, 2012), <http://www.haaretz.com/news/middle-east/arab-states-agree-on-100-million-in-monthly-aid-for-palestinian-authority-1.483698>; *Qatari Emir in Landmark Visit to Gaza*, TELEGRAPH (Oct. 23, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/qatar/9627618/Qatari-emir-in-landmark-visit-to-Gaza.html>.
110. Borgen, *supra* note 2, at 8.
111. Weller, *supra* note 12, at 23; Emilio J. Cárdenas & María Fernanda Cañas, *The Limits of Self-Determination*, in THE SELF-DETERMINATION OF PEOPLES: COMMUNITY, NATION, AND STATE IN AN INTERDEPENDENT WORLD 101 (Wolfgang Danspeckgruber ed., 2002); Rudnitsky, *supra* note 89, at 76–77.

dialogue with the central government.¹¹² In cases like Quebec and Canada, where secession is being asked in the framework of a democratic state respecting human rights and the rule of law, even a pro-secession majority in a referendum cannot unilaterally lead to such secession. Rather, if it materializes, it must be the fruit of a dialectic process with the main government. The latter is expected to respect the people's will and facilitate the process.¹¹³ Similar are the cases of Catalonia,¹¹⁴ Scotland,¹¹⁵ Gibraltar,¹¹⁶ and Puerto Rico,¹¹⁷ where any pleas of independence or autonomy acknowledge the fact that they have to be agreed by the central government through a bilateral process, engaging the central government's ultimate consent.¹¹⁸

III. The Inherent Limits of International Law

A. Tracing International Law's Limits

The right to self-determination is an inalienable, *erga omnes* right.¹¹⁹ It constitutes the platform for the exercise of all other rights.¹²⁰ Nevertheless, even this right is subject to limits. If limits apply to such a cardinal, absolute right, this must be true also for other international law notions. In essence, self-determination functions as a paradigm for the ultimate exploration of international law's inherent limits.

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112. Reference re Secession of Quebec, [1998] S.C.R. 217, ¶ 128 (Can.).
113. Peter Radan, *Secession: Can It Be a Legal Act?*, in *IDENTITY, SELF-DETERMINATION AND SECESSION*, *supra* note 75, at 157.
114. Jonathan House, *Catalonia Calls for Independence Increase; Regional Politician in Spain Causes Headaches for Prime Minister Rajoy with Pledge to Seek Referendum after Elections*, WALL ST. J. (Nov. 23, 2012), <http://online.wsj.com/article/SB10001424127887324712504578130891031680124.html>.
115. Severin Carrell & Nicholas Watt, *Alex Salmond Hails Historic Day for Scotland after Referendum Deal*, GUARDIAN (Oct. 15, 2012), <http://www.guardian.co.uk/politics/2012/oct/15/alex-salmond-scotland-referendum-deal>.
116. Christian Leathley, *Gibraltar's Quest for Self-Determination: A Critique of Gibraltar's New Constitution*, 9 OR. REV. INT'L L. 153, 159 (2007); *U.K. Defends Gibraltar's Sovereignty and Self-Determination*, PANORAMA, http://www.panorama.gi/localnews/headlines.php?action=view_article&article=5107 (last visited Apr. 11, 2013).
117. Roger Runningen & Julianna Goldman, *Obama Wants Puerto Rico to Decide Statehood or Independence*, BLOOMBERG (June 14, 2011), <http://www.bloomberg.com/news/2011-06-14/obama-wants-puerto-rico-to-decide-statehood-or-independence-1.html>.
118. Cárdenas & Cañas, *supra* note 111.
119. East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, 102 (June 30); African Charter on Human and Peoples' Rights art. 20, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982); Press Release, General Assembly, Universal Recognition of Inalienable Right to Self-Determination Most Effective Way of Guaranteeing Fundamental Freedoms, Third Committee Told, U.N. Press Release GA/SHC/4051 (Nov. 6, 2012), available at <http://www.un.org/News/Press/docs/2012/gashc4051.doc.htm>.
120. Robert Araujo, *Sovereignty, Human Rights and Self-Determination: The Meaning of International Law*, 24 FORDHAM INT'L L.J. 1477, 1480 (2001). Self-determination is embedded in Article 1 of both the International Covenant on Civil and Political Rights (ICCPR), art. 1, G.A. Res. 2200A (XXI), annex, U.N. GAOR, 21st Sess. Supp. No. 16 at 55, U.N. Doc. A/6316 (Dec. 19, 1966), 999 U.N.T.S. 171 [hereinafter ICCPR], and the International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 1, G.A. Res. 2200A (XXI), annex, U.N. Doc. A/6316 (Dec. 16, 1966), 993 U.N.T.S. 3 [hereinafter ICESCR]. Moreover, the Human Rights Committee has held the language in Article 1 to have a special status as a non-justiciable article that is used to shed light on the ICCPR's other provisions. See *Kitok v. Sweden*, Comm. No. 197/1985, ¶ 6.3, ACHPR AAR (Aug. 10, 1988).

By definition, law is restricted in its efforts to coordinate social behaviors.¹²¹ Courts are restrained in providing an effective solution in cases where a political solution is needed.¹²² For example, the European Court of Human Rights has widely resorted to the “margin of appreciation” doctrine, granting state authorities discretion regarding the measures they have to take in order for the European Convention’s goals to be met.¹²³

Even when domestic courts appear to make major breakthroughs, they are quickly entrenched in their previous conservative jurisprudence. Thus for example, even though the Israeli Supreme Court has agreed to hear Palestinian petitions and has intervened in security projects such as the security fence,¹²⁴ still on a doctrinal level, the Court has appeared reluctant to question the view of the military commander as far as security issues are concerned.¹²⁵ Similarly, in the question of the Israeli settlements, the Court has held that a settlement cannot be built on Palestinian private land.¹²⁶ Yet, the Court has systematically refrained from pronouncing on the legality of the settlements.¹²⁷

In U.S. constitutional law, the Supreme Court’s ruling in *Brown v. Board of Education* was immediately credited as one of the Court’s most groundbreaking decisions.¹²⁸ Nevertheless, the decision, itself, was not able to change things on the ground.¹²⁹

Similar to domestic law where limits aspire to safeguard social peace and harmony, in the international arena these limits try to ensure global peace and stability. Mimicking the fact that limits in domestic jurisdictions are also dictated by other non-positivist parameters, such as politics and ideology,¹³⁰ international law limits equally do not always source from a positivist duty.

Often international players engage in or refrain from certain actions because, unconsciously and habitually, they feel they must.¹³¹ States comply with international law and respect its

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121. Eric Claes et al., *Introduction to FACING THE LIMITS OF THE LAW* 1, 12–13 (Eric Claes et al. eds., 2009).
122. See Matthias Kumm, *Alexy’s Theory of Constitutional Rights and the Problem of Judicial Review*, in *INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY* 201 (Matthias Klatt ed., 2012); ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 341 (2002).
123. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *EUR. J. INT’L L.* 907 (2005).
124. SOLON SOLOMON, *THE JUSTICIABILITY OF INTERNATIONAL DISPUTES: THE ADVISORY OPINION ON ISRAEL’S SECURITY FENCE AS A CASE STUDY* 145 (2009).
125. HCJ 2056/04 Beit Sourik Village Council v. Gov’t of Israel, 58(5) PD 807, ¶ 29 [2004] (Isr.); see also Guy Davidov & Amnon Reichman, *Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel*, 35 *LAW & SOC. INQUIRY* 919, 921 (2010) (arguing that Israeli courts have started limiting deference to the military commander’s discretion).
126. DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 2, 9 (2002).
127. Yuval Shany, *Capacities and Inadequacies: A Look at the Two Separation Barrier Cases*, 38 *ISR. L. REV.* 230 (2005); Ronen Shamir, “*Landmark Cases*” and the *Reproduction of Legitimacy: The Case of Israel’s High Court of Justice*, 24 *LAW & SOC’Y REV.* 781, 788 (1990).
128. Carlos A. Ball, *The Back-Lash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 *WM. & MARY BILL RTS. J.* 1493 (2006).
129. Jack M. Balkin, *What Brown Teaches Us about Constitutional Theory*, 90 *VA. L. REV.* 1537, 1541–42 (2004); Ruth Gavison, *Legislatures and the Quest for a Constitution: The Case of Israel*, 11 *REV. CONST. STUD.* 345, 356 n.20 (2006).
130. Balkin, *supra* note 129, at 1538–41.
131. Onuma Yasuaki, *International Law in and with International Politics: The Functions of International Law in International Society*, 14 *EUR. J. INT’L L.* 105, 112, 122 (2003); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2603 (1997).

limits either due to a certain non-explicit cooperation dynamic developed in interstate politics¹³² or due to belief in faith values.¹³³ Rooted in something deeper than just the exigencies of parochial interests, international norms and their limits acquire a metaphysical facet. They become internalized in domestic legal conscience¹³⁴ and inherent to state behavior. Eventually, international law's limits become an inherent element of the international system, because they embalm stability, including the restoration of the status quo ante, in cases where global order has been transgressed.¹³⁵

Such restoration can be achieved either through outer military interventions or through the delimitation of the legitimacy of state actions. States must feel there are things they cannot do without facing legal implications, that certain red lines cannot be crossed.¹³⁶ Otherwise, states resort to antagonizing each other. The U.S.-Soviet arms' race during the Cold War,¹³⁷ the nuclear competition between India and Pakistan,¹³⁸ and the nuclear aspirations of the Arab Sunnite world in response to Iran's nuclear ambitions¹³⁹ are all palpable examples.

The cases of Libya and Syria have shown that sometimes outer interventions are not so easy to take place. As such, international law's inherent limits become the ultimate hope for the preservation of global peace and stability, mirroring the *pacta sunt servanda* principle, which holds that international treaties must be enforced and respected.¹⁴⁰

Although the principle does not apply to non-treaty obligations,¹⁴¹ still, it fosters a certain dynamic, with the ability to impact international law. Ultimately, international law's inherent limits become the political manifestations of basic legal principles, such as that of *pacta sunt servanda* or of *bona fides*, obliging international actors to try to reach a negotiable rather than an imposed solution to their disputes.¹⁴²

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132. ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 3, 109 (1995).
133. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 24 (1990); Otto Spijkers, *Global Values in the United Nations Charter*, 59 NETHERLANDS INT'L L. REV. 361 (2012). For the fact that non-legal parameters, such as morality, can limit law, see Lawrence Douglas et al., *At the Limits of Law: An Introduction*, in THE LIMITS OF LAW 1, 7 (Austin Sarat et al. eds., 2005).
134. Koh, *supra* note 131, at 2603.
135. Konrad G. Bühler, *State Succession, Identity/Continuity and Membership in the United Nations*, in LA SUCCESSION D'ÉTATS: LA CODIFICATION À L'ÉPREUVE DES FAITS 187, 200 (Pierre Michel Eisemann & Martti Koskeniemi eds., 2000).
136. See, e.g., K.L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 153 (2005) (discussing such limits in the GATT adjudication system).
137. ANDREW RICHTER, AVOIDING ARMAGEDDON: CANADIAN MILITARY STRATEGY AND NUCLEAR WEAPONS 1950–63, at 120 (2002).
138. T.V. Paul, *The Causes and Consequences of China-Pakistani Nuclear/Missile Collaboration*, in SOUTH ASIA'S NUCLEAR SECURITY DILEMMA: INDIA, PAKISTAN, AND CHINA 175 (Lowell Dittmer ed., 2005).
139. William J. Broad & David E. Sanger, *Eye on Iran, Rivals Pursuing Nuclear Power*, N.Y. TIMES (Apr. 14, 2007), <http://www.nytimes.com/2007/04/14/world/africa/14ihtweb.0415sunnis.5288677.html>.
140. MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 361 (2009).
141. Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 EUR. J. INT'L L. 499, 510–11 (1999).
142. Jean Salmon, *1969 Vienna Convention: Article 26 Pacta Sunt Servanda*, in 1 THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY 659 (Olivier Corten & Pierre Klein eds., 2011). For a discussion on the close relationship between good faith and *pacta sunt servanda*, see VILLIGER, *supra* note 140, at 365 n.26.

Of course, non-positivist limits are hard to trace.¹⁴³ Yet, paradigms of their manifestation exist. First, they can be asserted on a cost-benefit analysis, tied to the cost certain policy decisions entail.¹⁴⁴ For example, a country can voluntarily denounce a common currency it shares with other countries.¹⁴⁵ Still, such a decision has disastrous financial consequences for all the countries sharing the common currency¹⁴⁶ to the extent that in the case of Greece and the Euro zone, other member countries have done everything they can to avert such a scenario.¹⁴⁷

Second, they can stem from political parameters.¹⁴⁸ Thus, Belgium dropped war crimes charges against former U.S. Minister of Defense, Donald Rumsfeld, once the U.S. threatened to move the NATO seat from Brussels.¹⁴⁹ Third, they can just constitute a negating pole to a new legal reality. States like Belgium and the United Kingdom altered their universal jurisdiction laws once they felt that this legislation had become the vehicle for foreign warring parties to begin bringing lawsuits against one another.¹⁵⁰ But fourth and more importantly, the limits of international law are more clearly felt once legal mechanisms and balances do not transmit the essence of omnipotence.¹⁵¹ The importance of this will be discussed in the next section.

B. The Systemic Placement of International Laws' Inherent Limits in the International Legal System

The question is what is the practical utility of acknowledging international law's inherent limits? The answer is simple: it systemizes international law. Limits bring order. States do

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143. See P. WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 86 (Hyperion reprint ed. 1979) (1956).
144. Tom Ruys, *When Law Meets Power: The Limits of Public International Law and the Recourse to Military Force*, in *FACING THE LIMITS OF THE LAW*, *supra* note 121, at 253.
145. Jan Strupczewski, *Greece Could Not Exit Euro without Leaving E.U.*, REUTERS (Nov. 3, 2011), <http://www.reuters.com/article/2011/11/03/us-greece-eu-eurozone-idUSTRE7A25H820111103>.
146. Anders Aslund, *Why Greece Must Not Leave the Euro Area*, ECONOMONITOR (Mar. 12, 2012), <http://www.economonitor.com/pie/2012/03/12/why-greece-must-not-leave-the-euro-area>; Kal Raustiala, *Rethinking the Sovereignty Debate in International Economic Law*, 6 J. INT'L ECON. L. 841, 851 (2003).
147. Claire Davenport & Luke Baker, *E.U. Urges Greece to Stay in Euro, Plans for Possible Exit*, REUTERS (May 24, 2012), <http://www.reuters.com/article/2012/05/24/us-eurozone-greece-idUSBRE84MOP420120524>.
148. These political parameters find expression in the contemporary tendency of states to bridge their differences through international quasi-judicial commissions. For the example of Turkey and Israel on account of the Gaza flotilla incident, see Rep. of the U.N. Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (Sept. 2011), *available at* http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.
149. Andreas Fischer-Lescano, *Global Constitutional Struggles: Human Rights between Colère Publique and Colère Politique*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 13, 22 (Wolfgang Kaleck et al. eds., 2007).
150. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888 (2003); Sarah Williams, *Arresting Developments? Restricting the Enforcement of the U.K.'s Universal Jurisdiction Provisions*, 75 MOD. L. REV. 368 (2012).
151. Helen Keller, *Codes of Conduct and Their Implementation: The Question of Legitimacy*, LEGITIMACY IN INTERNATIONAL LAW 219 (Rüdiger Wolfrum & Volker Röben eds., 2008). See also Hans Köchler, *The United Nations Organization and Global Power Politics: The Antagonism between Power and Law and the Future of World Order*, 5 CHINESE J. INT'L L. 323, 329 (2006) (explaining how the United States' hegemonic role influenced its stance towards the U.N. Security Council in the second Iraq war).

not act arbitrarily whenever they want and in whatever way they want. They take into consideration also other states' reactions.¹⁵² Deterrence is being achieved not through military means and nuclear armament, but through emphasis on international law's limits. For example, once rumors became more intense that Syria's Assad was about to use chemical weapons against his people, the international community did not try to deter such use by taking any military actions or any sanctions against the Syrian regime.¹⁵³ Instead, the United States, the United Kingdom, Russia, France and NATO simply reminded Assad that any use of chemical weapons would mean the crossing of red lines.¹⁵⁴ Consequently, once deterrence is achieved through cognizance of international law's limits, resort to other more coercive methods, bearing either military or diplomatic cost, is minimized.¹⁵⁵

This is also true for the U.N. Security Council veto power, which has been deemed anachronistic and undesirable¹⁵⁶ and has led the five permanent members to be negatively portrayed in the eyes of the rest of the international community.¹⁵⁷ While it is expected that permanent members would continue to exert the veto in order to prevent measures that could harm the interests of their ideological and political allies,¹⁵⁸ this discretion could be curtailed

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152. Amir Oren, *Israel Has Responsibilities as a U.S. Ally*, HAARETZ (Dec. 4, 2011), <http://www.haaretz.com/print-edition/opinion/israel-has-responsibilities-as-a-u-s-ally-1.399387>; Choi Kang, *A Changing East Asia and U.S. Foreign Policy*, COUNCIL ON FOREIGN REL., <http://www.cfr.org/south-korea/changing-east-asia-us-foreign-policy/p28385> (last visited Apr. 2, 2013).
153. Ashley Deeks, *Syria, Chemical Weapons, and Possible U.S. Military Action*, LAWFARE BLOG (Dec. 10, 2012, at 8:36 PM), <http://www.lawfareblog.com/2012/12/syria-chemical-weapons-and-possible-u-s-military-action/>.
154. David E. Sanger & Eric Schmitt, *U.S. Shifting Its Warning on Syria's Chemical Arms*, N.Y. TIMES (Dec. 6, 2012), <http://www.nytimes.com/2012/12/07/world/middleeast/syrias-chemical-weapons-moves-lead-us-to-be-flexible.html?>; Dominic Evans, *Syria Chemical Weapons: NATO Warns Assad against Use of Chemical Warfare*, HUFFINGTON POST (Dec. 4, 2012), http://www.huffingtonpost.com/2012/12/04/syria-chemical-weapons-nato_n_2236842.html; Samia Nakhoul, *Insight: Assad Chemical Weapons Plans Blocked by Moscow*, REUTERS (July 24, 2012), <http://www.reuters.com/article/2012/07/24/us-syria-crisis-chemicals-idUSBRE86N11Z20120724>; William Hague Confirms 'Evidence' of Syrian Chemical Weapons, GUARDIAN (Dec. 8, 2012), <http://www.guardian.co.uk/world/2012/dec/08/syria-william-hague-chemical-weapons>.
155. ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 41–42, 211–12 (2008) (arguing that the more the cost of the violation is increased, the more compliance is promoted).
156. THE U.N. SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 641 (David M. Malone ed., 2004); Köchler, *supra* note 151, at 324.
157. *Security Council Members Should Consider Limited Veto Right, New Zealand Tells U.N. Debate*, U.N. NEWS CENTRE (Sept. 29, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43148&Cr=General+Debate&Cr1#UM1oJuRg-8A>; Sebastian Moffett & Stephen Brown, *Arabs, Turkey Criticize Veto of Syria Resolution*, REUTERS (Feb. 5, 2012), <http://www.reuters.com/article/2012/02/05/us-syria-mideast-idUSTRE8140B120120205>.
158. This has been particularly stressed regarding U.S. and Israel, but it is also the case with China and Russia concerning their allies, such as Burma. See Zvi Bar'el, *West Does Not Have Monopoly on Veto Morality*, HAARETZ (Feb. 8, 2012), <http://www.haaretz.com/print-edition/opinion/west-does-not-have-monopoly-on-veto-morality-1.411637>; *China and Russia Veto US/UK-Backed Security Council Draft Resolution on Myanmar*, U.N. NEWS CENTRE (Jan. 12, 2007), <http://www.un.org/apps/news/story.asp?NewsID=21228#UVuYuqKiYbQ>.

in major crises where, as aptly put, the international community “could not . . . opt for passivity.”¹⁵⁹

States, ultimately interested in safeguarding their interests,¹⁶⁰ would be more ready to forego their veto power if they were reassured that these interests would not eventually be harmed.¹⁶¹ Positivist law cannot provide such assurances. Rather, they have to be provided by international law’s non-positivist, inherent limits. Only such limits can guarantee that states will not appear unrestrained in their actions, in cases where any positivist burdens and constraining rules do not apply.

In essence, international law’s inherent limits politically epitomize *mutatis mutandis* the view held by the International Court of Justice that an international organization can have implied powers as long as these powers do not change the distribution of functions inside the organization’s realms.¹⁶² Initiatives by states should meet implied assertions by the rest of the international community as long as they are taken in tandem with the U.N. Charter provisions and procedures¹⁶³ and do not aspire to change the distribution of regional or global balance. This is particularly true in self-determination quests, which by definition entail the element of change.

The limits of international law aspire to balance between such change and the will of states to see their interests preserved. As such, the limits of international law are based on a deeply balancing concept, totally necessary in the general international constitutional structure. International constitutionalism¹⁶⁴ is built along the pattern of domestic constitutions. International constitutionalism is thematic.¹⁶⁵ The international constitution must be envisioned as a document, where instead of different articles and provisions, whole legal fields are subject to harmonization.¹⁶⁶

159. Martti Koskeniemi, *Kosovo Etc.—Beyond the Limits of International Law?*, 10 FINNISH Y.B. INT’L L. 177, 185 (1999).

160. ERIC A. POSNER & ALAN O. SYKES, ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW 103 (2013); Margaret E. McGuinness, *Exploring the Limits of International Human Rights Law*, 34 GA. J. INT’L & COMP. L. 393, 394 (2006); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 16 (1994); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 479 (2005) (arguing that this is partially correct).

161. See Moffett & Brown, *supra* note 157 (citing a statement made by Turkey’s Foreign Minister’s regarding the Syrian, Chinese and Russian veto that “Russia and China did not vote based on the existing realities but more a reflexive attitude against the West.”).

162. Niels Blokker, *Is the Authorization Authorized? Powers and Practice of the U.N. Security Council to Authorize the Use of Force by ‘Coalitions of the Able and Willing’*, 11 EUR. J. INT’L L. 541, 548 (2000).

163. T.D. Gill, *Legal and Some Political Limitations on the Power of the U.N. Security Council to Exercise its Enforcement Powers under Chapter VII of the Charter*, 26 NETHERLANDS Y.B. INT’L L. 33, 72 (1995).

164. International constitutionalism has been defined as the attempt to form a new normative, internationalist framework. See Thomas Kleinlein, *Non-State Actors from an International Constitutional Perspective: Participation Matters!*, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 41 (Jean d’Aspremont ed., 2011).

165. Solon Solomon, *The Dynamic Law of Occupation: Inaugurating International Thematic Constitutionalism*, 54 HARV. INT’L L. J. ONLINE 59, 77–78 (2012), available at <http://www.harvardilj.org/wp-content/uploads/2012/12/Solomon-to-publish.pdf>.

166. *Id.* at 77.

In this interpretational quest and similar to domestic constitutions, the concept of human dignity serves as a guiding torch.¹⁶⁷ Human dignity indicates both under which lens action should be undertaken in the international field, as well as its limits.¹⁶⁸ Yet, human dignity does not always apply to all international law fields.¹⁶⁹ International law needs an explicit notion that will be autonomous and serve solely the purpose of halting state action in cases where this infringes on other states' rights and interests. In this aspect, domestic law can again provide useful insights.

In domestic jurisdictions, limitation clauses ordain to the State up to which point it can infringe a certain constitutional right.¹⁷⁰ This way the balancing and harmonization of the different constitutional provisions is achieved and constitutional rights are not infringed beyond a reasonable extent.¹⁷¹

Thus for example, Canada's Charter of Rights and Freedoms states in Section 1 that it guarantees these rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.¹⁷² South Africa's constitution contains a similar provision,¹⁷³ while Israel's Basic Law of Human Dignity and Liberty, which is deemed to have a constitutional status, prohibits any violation of the contained rights except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required.¹⁷⁴

In Germany, in absence of a limitation clause, the Federal Constitutional Court has held that the unity of the Constitution and the values protected by it dictate constitutional rights to be limited.¹⁷⁵ In South Africa, Chief Justice Chaskalson eloquently stated that the Supreme Court should wage a balance of interests and in this process the nature of the right limited as well as its importance to a free and democratic society should be taken into consideration.¹⁷⁶

Courts use limitation clauses in order to, or not to, curtail certain practices according to the convictions and beliefs prevalent in their respective societies.¹⁷⁷ Any law that questions constitutional rights is considered acceptable as long as it does not end up questioning the

167. *Id.* at 69.

168. *Id.* at 68.

169. *Id.* at 74–75.

170. AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 427 (2012).

171. *Id.* at 136.

172. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, § 1, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

173. S. AFR. CONST., § 36, 1996.

174. Basic Law: Human Dignity and Liberty, 5752-1992, SH No. 1391 (Isr.), *available at* <http://www.unhcr.org/refworld/docid/3ae6b52618.html>.

175. Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] May 26, 1970, 28 BVERFGE 243 (Ger.), *available at* <http://www.servat.unibe.ch/dfr/bv028243.html>.

176. *State v. T. Makwanyane and M. Mchunu* 1995 (3) SA 1 (CC) at 199 ¶ 391 (S. Afr.), *available at* <http://www.saflii.org/za/cases/ZACC/1995/3.html>.

177. For the different treatment of the same issues in Canada and South Africa through resort to the similar-phrased limitations clause, see Andrea Lollini, *The South African Constitutional Court Experience: Reasoning Patterns Based on Foreign Law*, 8 UTRECHT L. REV. 55, 68, 72 (2012).

constitution's ideological structure. The normative framework is guided by constitutionally prescribed values, interpreted by courts.¹⁷⁸

For example, coming to assess the urgency and importance of an initiative which overrides constitutionally protected rights, the Canadian Supreme Court looks at whether the initiative addresses concerns that are pressing and substantial in a free and democratic society.¹⁷⁹ Ultimately, limitation clauses are an attempt of the lawmaker to safeguard the existing constitutional and consequently socio-political status quo.¹⁸⁰

On an international level, the inherent limits of international law have the task of maintaining the global status quo. As such, they function in a way similar to that of limitation clauses. They dictate to states up to which point they can take action that can be deemed as intrusive to other states' interests, similar to domestic law on state intrusiveness in individual affairs.

It is this antithesis, or, in other words, the pulses created by the consecutive contraction and expansion of state action, which fills in and perfects the international constitutional pattern.¹⁸¹ In the limitation clause function of international law's limits, the interpretational guide torch of human dignity finds its nemesis, and international constitutionalism gets more systemically complete. Ultimately, international law reaches its catharsis.

IV. Conclusion

The right to self-determination holds a conspicuous place in contemporary international law and constitutes the normative platform for all other rights. Still, it is subject to inherent limits which stem from the dialectic approach amongst state and other global actors.¹⁸² Unilateral approaches, where the international community intervenes in order to configure the right to self-determination according to its dicta and convictions, and without first opening a dialogue with all interested parties is sometimes essential in cases where gross human rights

178. FRANCOIS VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATE 190 (2000); DAVID ROBERTSON, THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW 299 (2010); Richard J. Goldstone, *The South African Bill of Rights*, 32 TEX. INT'L L.J. 451 (1997).

179. *R. v. Oakes*, [1986] S.C.R. 103, 138 (Can.); See Errol P. Mendes, *Democratic Pluralism: The Foundational Principle of Constitutionalism in Canada*, in SHAPING NATIONS: CONSTITUTIONALISM AND SOCIETY IN AUSTRALIA AND CANADA 39, 50–51 (Linda Cardinal & David Headon eds., 2002) (supporting the assertion that Canada's Supreme Court has broadly or narrowly interpreted this objective depending on whether or not it wants to uphold specific legislation).

180. *See, e.g.*, CONSTITUTION OF THE REPUBLIC OF KAZAKHSTAN Aug. 30, 1995, art. 39, available at <http://www.akorda.kz/en/category/konstituciya>; KONSTITUTSIJA ROSSIJSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 51 (Russ.) (stipulating that rights and freedoms can be limited for the protection of the constitutional system). These limitations differ partly from the role limitation clauses play in international human rights instruments where their purpose is to limit protected rights under certain circumstances and not to change the existing international framework into which states interact with each other. For some international human rights limitations clauses, see, e.g., ICCPR, *supra* note 120, arts. 12, 19, 21, 22. *See also* Eur. Conv. on Human Rights, *supra* note 74, art. 8.

181. *See also* Roza Pati, *Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective*, 23 BERKELEY J. INT'L L. 223, 226 (2005) (quoting Eckart Klein who argues *inter alia* that the constitutionalization of a community means solidification of its structures).

182. Adam G. Yoffie, *The Palestine Problem: The Search for Statehood and the Benefits of International Law*, 36 YALE J. INT'L L. 497, 501–02 (2011).

violations occur. Yet equally essential is the striking of balance between unilateralism and bilateralism.

Undoubtedly this is not easy.¹⁸³ Nevertheless, if the unilateral approach to self-determination is pursued with indiscretion, it can ultimately have negative rather than positive effects. These negative effects are bound to have an impact both on the people vindicating their right to self-determination as well as on the international decision making system.

A self-determination quest imposed with no subsequent emphasis and international supervision of the international community can easily lead to equally despotic or fragile regimes. Apart from the cases of Egypt and Tunisia, the current note referred also to the cases of Kosovo and South Sudan. Moreover, as the case of the Libya military intervention has demonstrated, international community efforts to drastically intervene and solve issues of self-determination and governance can be successful in the short term. Yet, in the long term, such action can weaken the international community's ability to intervene, even in cases of gross human rights violations, like the case of Syria.

This reluctance of international law to show omnipotence in the securing the right to self-determination can be compared to similar arteriosclerotic tendencies perceived in domestic law. Considering examples of pivotal cases in U.S. and Israeli jurisprudence that failed to make the aspired difference on their own, I argued that in essence these limits in the exercise of the right to self-determination should be deemed as inherent to international law. In that sense, they parallel the limitation clauses in domestic constitutions that indicate the point up to which state action is sanctioned. Thus, international thematic constitutionalism is rendered complete and stability is instilled in the international arena.

This stability is greatly craved-for in a world in turmoil. Eventually, either through the gradual relaxing of the veto recourse or through the continuation of the constitutionalization process, cognizance of international law's inherent limits can further entrench trust for the international system and its major players: the states. If this is done, the inherent limits will not have chained, but liberated international law and the international community at large.

183. Jochen A. Frowein, *Self-Determination as a Limit to Obligations under International Law*, in MODERN LAW OF SELF-DETERMINATION 211, 214–15 (Christian Tomuschat ed., 1993).