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ARTICLE

TRADITIONS OF BELLIGERENT RECOGNITION:

THE LIBYAN INTERVENTION IN HISTORICAL AND THEORETICAL CONTEXT

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I. INTRODUCTION

Who governs Libya? As a practical matter, the answer to that question may remain a mystery for some time. As a legal matter, it became easier to answer on September 16, 2011, when the U.N. General Assembly approved a Libyan delegation presented by Mustafa Mohammed 'Abd al-Jalil, President of the National Transitional Council (NTC). It was similarly easy to answer a year earlier when Col. Muammar Qadhafi controlled the state as he had since 1969.[1] Between February 15 and September 16, 2011, the answer was very much in dispute. Even when the United Nations Credentials Committee[2] accepted the NTC as Libya's representative, seventeen states rejected that decision and fifteen states abstained.[3] Seven months earlier, the NTC was virtually unknown. Even after it was formed, few understood its organization, leadership or intent, other than to overthrow Qadhafi.

Indeed, on March 10, 2011, when France first recognized the NTC as the legitimate representative of the Libyan people, not only had it confused its allies, it had created a precarious legal situation for itself, the NTC, Libya in general as well as the U.N. Security Council. The purpose of this Article is to place the

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1. On July 7, 2012, Libyans participated in their first legitimately democratic elections since 1969, when Qadhafi and other military officers overthrew the constitutional monarch King Idris. Even then, the last national election was held in 1965 during a time when political parties were prohibited. *BBC, Libya Election: High Turnout in Historic Vote*, Jul. 7, 2012 available at http://www.bbc.co.uk/ news/world-africa-18749808

2. U.N. GAOR, 66th Sess., 2d plen. Mtg. at 7, U.N. Doc. A/66/PV.2 (Sept. 16, 2011).

3. *Id.*

transition from Qadhafi-led Libya to NTC-led Libya within the wider theoretical and historical context of an important intersection of international law and international relations theory: how states manage civil wars so as to minimize the effect of conflict on international order.

The Libyan civil war, which commenced with relatively peaceful protests on February 15, 2011, soon deteriorated into an armed confrontation between Libyan military forces controlled by the country's long-time ruler, Muammar Qadhafi,[4] and a combination of civilian dissidents and military defectors.[5] After only eleven days, the United Nations Security Council unanimously adopted Resolution 1970 condemning the measures Qadhafi deployed against the protesters and imposing sanctions on his regime.[6] International lawyers generally agreed on the legitimacy, if not the wisdom, of the multilateral response coordinated by the U.N. Security Council, which asserted that the principal international concern with the Libyan civil war was international humanitarian law, primarily the protection of civilians. Through a second resolution, the U.N. Security Council authorized states and regional organizations to enforce that mandate militarily.[7]

4. Because I am much more familiar with Modern Standard Arabic than Libyan colloquial Arabic, I will refer to "Qadhafi," which I believe is the best transliteration from Arabic to English as opposed to "Gaddafi," although there are numerous variations on the name in the English language press.

5. Anne Barker, *Time Running Out for Cornered Gaddafi*, ABC NEWS, Feb. 24, 2011 available at http://www.abc.net.au/news/stories/2011/02/24/3147195.htm.

6. *See* UN Security Council, Security Council Resolution 1970 (2011), 26 February 2011, 6491st meeting S/RES/1970 (2011), available at: http://www. unhcr.org/refworld/docid/4d6ce9742.html.

7. Anne-Marie Slaughter, *Fiddling While Libya Burns*, N.Y. TIMES, Mar. 13, 2011 (arguing for U.N. Security Council-led action) available at http://www.nytimes.com/2011/03/14/opinion/14slaughter.html; Philippe Sands, *U.N.'s Libya Resolution 1973 is Better Late than Never*, THE GUARDIAN, Mar. 18, 2011 (noting problems with Security Council Resolution 1973 but nevertheless endorsing its legitimacy on the basis of protecting civilians); Richard Falk argued that the Security Council resolution was "legal, but . . . not legitimate, being politically imprudent and morally confused." *Gaddafi, Moral Interventionism Libya, and the Arab Revolutionary Movement,* TODAY'S ZAMAN, Mar. 29, 2011, available at http://www.todayszaman.com/newsDetail_getNewsById.action;jsessionid=6E29A0C962CED36CA72B047C63E46D3C?newsId=239496. Mary Ellen

The international response appeared to be specific, well-supported, and unified behind international humanitarian law enforced by the Security Council. Then, on March 10, 2011, France announced that it would recognize the opposition forces based in Libya's eastern city of Benghazi as the lone legitimate representative of the Libyan people,[8] even though the rebels did not control all of the state. International lawyers noted the legal problems that recognition raised including treaty obligations, populations for which the opposition may or may not be responsible to say nothing of the cohesiveness or even identity of the "new" Libyan government.[9] The Dutch prime minister called the recognition "crazy."[10] Yet Italy, Qatar, the United States, the

O'Connell argued that military intervention would only cause greater loss of human life in an attempt to sustain an inchoate and unviable counter-state. *How to Save a Revolution,* Mar. 17, 2011, available at http://www.e-ir.info/?p=7703. *Compare* Curtis Doebbler, who insisted that the intervention was illegal, in some measure because the Security Council did not exhaust non-military options. *The Use of Force against Libya*: *Another Illegal Use of Force*, JURIST, Mar. 20, 2011, *available at* http://jurist.org/forum/2011/03/the-use-of-force-against-libya-another-illegal-use-of-force.php. ("Paragraph 8 is unusual in that is appears to authorize the use of force under Chapter VII without applying any of the safeguards for the use force that are stated in Article 41. There is no determination made."); Asli Bali & Ziad Abu-Rish, *The Drawbacks of Intervention in Libya*, AL-JAZEERA, Mar. 20, 2011 ("To engage in such coercive strategies without being able to evaluate the full range of consequences amounts to subordinating the interests of the Libyan people to our own sense of purpose and justice.").

8. Patrick Donahue, *France Appoints Envoy to Rebel Libyan City*, SYDNEY MORNING HERALD (Mar. 11, 2011), http://www.smh.com.au/world/france-appoints-envoy-to-rebel-libyan-city-20110310-1bpt9.html.

9. John Bellinger, former legal adviser to the U.S. State Department provided a preliminary treatment of this issue for the Council on Foreign Relations that has been widely reproduced. *See, e.g.*, John B. Bellinger III, *Legal Questions in U.S. Nod to Libya's Opposition*, COUNCIL ON FOREIGN REL. (July 18, 2011), http://www.cfr.org/libya/legal-questions-us-nod-libyas-opposition/p25489?cid=oth_partner_site-atlantic-firstake-legal_questions_in_us_nod_to-071811 ("Recognition by the United States (and other countries) of the NTC as the 'legitimate governing authority' of Libya is especially unusual under international law because the NTC does not control all of Libyan territory, nor can it claim to represent all of the Libyan people. Indeed, as a general rule, international lawyers have viewed recognition by states of an insurgent group, when there is still a functioning government, as an illegal interference in a country's internal affairs.").

10. *See Crazy Move by Sarkozy on Libya: Dutch Premier*, INDIAN EXPRESS

United Kingdom, and others followed, recognizing the Benghazi-based opposition, entering into contracts with the new regime including but not limited to agreements for the use of frozen Libyan assets and exploitation of petroleum resources no longer under Qadhafi's control.[11]

This Article argues that, far from "crazy," these states' decisions to recognize the opposition were largely consistent with historical patterns in the recognition of civil war and how it will be managed by third-party states. While states might extend equal rights to the parties to a civil war before ultimately recognizing a victorious authority, they are just as likely to abruptly switch recognition or otherwise categorize the conflict in a way that advances their interests.[12]

While some international lawyers attempted to synthesize state practice over the nineteenth and early-twentieth century into rules that governed third-party state responses, these rules provided no normative guidance; "even those norms which [were] clearly identifiable [were] frequently breached."[13]

Yet just because states disregarded the rules, such that they were, does not mean that they pursued their interests without

(Mar. 11, 2011), http://www.indianexpress.com/news/crazy-move-by-sarkozy-on-libya-dutch-premie/761224/.

11. *See, e.g.* Jason Ukman, *U.S. Recognition of New Libyan Government Raises Tough Legal Questions*, WASH. POST (July 19, 2011), http://www.washing tonpost.com/blogs/checkpoint-washington/post/us-recognition-of-new-libyan-government-raises-tough-legal-questions/2011/07/19/gIQAb9BdNI_blog.html (interviewing John B. Bellinger who stated,"I suspect that what's going on here . . . is that the policy clients in the State Department and at the White House wanted to provide greater political support for the NTC, particularly given that the U.S. military support has been much more limited.").

12. *See* Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 512 (1969) (noting that "reference to [the notion that states must remain neutral to non-governing rebellions] as 'traditional' is calculated to underline its present flaccidity, a state induced by both casual violation and scholarly flagellation."); *see also* Lawrence Dennis, *Revolution, Recognition and Intervention*, 9 FOREIGN AFF. 204, 206-07 (1931) (criticizing the U.S. government for hastily recognizing new governments in Latin America, purportedly for the purpose of securing favorable assurances from the newly-recognized governments).

13. Rosalyn Higgins, *International Law and Civil Conflict*, *in* THE INTERNATIONAL REGULATION OF CIVIL WARS 169 (Evan Luard ed., 1972).

concern for the broader international order.[14] Indeed, when states recognized revolutionaries as lawful belligerents, they often did so not only out of strategic motives, such as to weaken a rival, but also out of concern with principles that helped govern the broader society of states.[15]

This Article therefore posits a second thesis: while the customary international law that developed to manage civil wars did not, in fact, effectively regulate state behavior, it *did* reflect an underlying tendency for states to balance both individual and collective interests in the creation of new states or the change of regime in existing ones.

I present this argument in two stages. First, I trace the history of belligerent recognition, the customary international law doctrine international lawyers developed to govern states' responses foreign civil wars. While few states adhered to the orthodox rules articulated by international lawyers, the doctrine nevertheless reflected underlying principles of international relations that *did* balance national interests with collective interests in a stable international order. These principles — which I call "traditions" of commercialism, constitutionalism and institutionalism — guided state behavior in ways that mitigated the pursuit of so-called *realpolitik* policies.[16] For example, powerful European states, including Britain and France, viewed the possible division of the United States during the American Civil War as favorable for their interests in the western hemisphere yet did not actively ally themselves with the Confederacy.

14. *See generally* JOHN LEWIS GADDIS, STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY 10-15 (1982) (defining the fundamental purpose of foreign policy).

15. *See generally* HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (2d ed. 1995) for the classic exposition of how states contribute to a general order in the international system through a number of mechanisms including participation in international law.

16. I have found it useful here to employ Karma Nabulsi's conception of tradition, to identify the underlying normative forces with which international lawyers and governments must grapple in order to resolve fundamental objectives in international law-making as described by her in KARMA NABULSI, TRADITIONS OF WAR: OCCUPATION, RESISTANCE, AND THE LAW (1999). For a lucid discussion of *realpolitik* as a foreign policy preference (and how it missed the mark for the Cold War), see JOHN LEWIS GADDIS, WE NOW KNOW 281-95 (1997).

Second, I apply these traditions to the two-level responses states directed toward the Libyan civil war. While most scholarly attention continues to focus on the U.N. Security Council's response,[17] and especially NATO's military engagement,[18] international lawyers and scholars have paid less attention to the parallel development that unfolded between March and September of 2011: recognition of the Libyan opposition as *the* legitimate government of the Libyan people.[19]

That response was consistent with long-standing *traditions* of belligerent recognition. First, states recognizing the opposition in Benghazi not only advanced their own economic and political interests, they also facilitated the securing of Libyan energy resources as part of a global interest in the uninterrupted supply of affordable energy — the commercial tradition. Second, the recognition of the Libyan opposition furthered a broad interest in a legitimate government in Libya that might bring greater stability to North Africa and the Middle East — the constitutional tradition. Finally, recognition of the Libyan opposition advanced the objectives of the U.N. Security Council resolutions which sought to uphold principles of international humanitarian law to protect Libyan civilians — the institutionalist tradition. Recognition of the NTC advanced a final interest, ultimately

17. On March 17, 2011, the U.N. Security Council adopted Resolution 1973 authorizing Member States, acting individually or through regional organizations, to enforce a "no-fly" zone over Libya and to take "all necessary measures" to protect Libyan civilians. 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) [hereinafter Security Council Approves No-Fly Zone], *available at* http://www.un.org/News/Press/docs/2011/sc10200.doc.htm; *see* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

18. *Timeline of NATO Airstrikes on Gadhafi Convoys*, ABC (Oct. 21, 2011 8:37 AM), http://abcnews.go.com/blogs/politics/2011/10/tick-tock-of-nato-airstrikes-on-gadhafi-convoys/.

19. The precise wording of each recognition did vary. Stefan Talmon, Recognition of the Libyan National Transitional Council, ASIL Newsletter July/Sept. 2011 p. 5, 7 (2011). See also WASH. POST, *U.S. Recognizes Libyan Opposition as Legitimate Government of Libya*, July 15, 2011, *available at* http://www.washingtonpost.com/world/middle-east/us-recognizes-libyan-opposition-as-legitimate-government-of-libya/2011/07/15/gIQA1tvyFI_story.html.

realized as a result of both state-level and U.N.-led action: removing Muammar Qadhafi and his associates as agitators and enemies of stability and order generally but specifically with respect to Africa, an interest which shares characteristics with all three traditions.

The argument I present is positive, not normative. Indeed, the juxtaposition of international and state-level responses produced (and is producing) friction between the multilateral focus on Libyans' humanitarian situation and state-level interests not as morally palatable. Opposition forces, like loyalist forces, engaged in conduct that constitutes war crimes or crimes against humanity; it will be difficult for third-party governments now dealing with the new government to come away with clean hands. The NTC leadership remains of a somewhat opaque and anonymous character; it is still not clear it will enjoy the popular legitimacy envisioned by U.N. Security Council Resolutions.[20] While the NTC has promised to transition authority to the new assembly for which elections were held on July 7, 2012, it remains to be seen how its influence may or may not persist.

This Article situates the Libyan intervention in the context of the international law on belligerent recognition. This doctrine, which originated with the need for European powers to recognize (or not) the rebelling American colonies beginning in 1776, incorporates three foreign policy traditions for ensuring

20. Kareem Khader & Michael Holmes, *Libyan Leader Gunned Down in Benghazi*, July 28, 2011, *available at* http://articles.cnn.com/2011-07-28/world/ libya.war_1_libyan-rebel-nafusa-rebel-army?_s=PM:WORLD ("There's a danger of infighting between the various factions of the rebel army . . . There's now a power vacuum within the army that could be an effective military coup within the army at the moment."). Christopher Stephen, *The Lesson of Bani Walid*, FOREIGN POLICY, Jan. 29, 2012, available at http://www.foreignpolicy.com/articles/2012/ 01/27/the_lesson_of_bani_walid?page=full ("The NTC has been doing little to help itself. Formed in the eastern city of Benghazi in the heat of battle, it has morphed into an organization both secretive and inefficient. It refuses to make public its membership list, or its meetings, or its voting records. Nor will it open up the books on what is being done with the country's swelling oil revenues. On top of everything else, earlier this month it bungled the drafting of legislation for a planned June national election, thus feeding the paranoia of Libyans who believe that many of its members are Gaddafi loyalists trying to manipulate the revolution to their own ends.").

international order: (1) in the 19th century, those priorities largely centered around preserving commercial freedom on the high seas ("commercialism"); civil wars threatened that peace because third-party states had to decide which action to take when revolutionaries attempted to condemn prize vessels in a neutral's ports; (2) some states simultaneously or alternatively developed a practice of "constitutionalism" – recognizing revolutionary or rebellious movements when they had established sufficient bureaucratic infrastructure to operate as legitimate sovereign states;[21] and (3) concerts of states coordinated mediation, management or intervention in a civil conflict based on shared interests, or "institutionalism." What these traditions have in common is the balancing of state-level and international-level interests. When states recognized rebelling or revolutionary forces as legitimate belligerents, they did so to satisfy both immediate foreign policy preferences and the overall interest in securing a stable international order. In the commercial tradition of belligerent recognition, this meant realizing that insurgents or revolutionaries had become sufficiently engaged (or threatening) to international commerce so as to necessitate good relations. Stability on the high seas, for example, helped all states reap the fruits of trade and commerce. In the constitutional tradition, states recognized belligerents not only because their success might weaken a rival, but also because the legitimacy of a government in the eyes of its citizens had weakened or failed. A second aspect of the constitutional tradition was that third-party states looked to the constitutional structures of the state experiencing civil war to determine whether or not its own law indicated that a state of war existed. When Great Britain interdicted trade with the thirteen colonies and Lincoln blockaded southern ports, third-party states justifiably asserted those states had, through their own constitutional structures, conceded the existence of war. There emerged, in other words, a multilateral interest in legitimate

21. BBC, *UK Expels Gaddafi Diplomats and Recognises Libya Rebels*, July 27, 2011 ("It follows similar moves by the US and France. The UK previously said it recognised 'countries not governments'. But Mr Hague said it was a 'unique situation"' and said recognising the NTC could help 'legally in the unfreezing of some assets.'").

governments. In the twentieth century, institutional traditions of belligerent recognition became more common both because international institutions, like the United Nations, became both authorized to and, to varying degrees, capable of managing civil wars.[22] More importantly, states viewed it as in their interest to play a role in determining which new governments would be allowed to enter into the community of states, as well as the conditions that would be attached to entry and recognition. Increasingly, humanitarian law — like the treatment of civilians and prisoners of war — gained importance as conditions for entry.

Part II of this Article provides the historical background to the international law on belligerency. Part III fits those historical developments within three traditions of international order: commercialism, constitutionalism and institutionalism. Part IV applies these insights to the civil war in Libya, concluding that while third-party state recognition of the opposition is a legal curiosity it is consistent with past state practice to both use and manage civil wars as they affect individual and collective interests.

II. THE HISTORY AND PURPOSE OF BELLIGERENT RECOGNITION

Writing in 1937 about the "problems raised by the Spanish civil war," Vernon O'Rourke remarked that few "are more interesting than those growing out of the fact that a state of war, in the legal sense, does not exist; belligerent rights have been accorded to neither of the contestants by third Powers."[23] In that conflict, conservative generals led by Francisco Franco launched a military rebellion that quickly captured a significant portion of Spanish territory. Between 1936 and 1939, fascist and loyalist forces engaged in a bloody civil conflict complicated by the

22. *See* James H. Lebovic, *Uniting for Peace?: Democracies and United Nations Peace Operations After the Cold War*, 48 J. CONFLICT RES. 910, 917 (2004) (noting that U.N. peace operations have changed over the years, and describing the commonalities within several "generations" of missions).

23. Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 AM. J. INT'L L. 398, 398 (1937).

machinations of foreign European powers. In the following decades, conduct of hostilities absent formal declarations of war or grant of belligerent recognition became almost commonplace.[24] O'Rourke was just one of many international law scholars who sought to apply the doctrine of belligerent recognition to a conflict in an attempt to govern the actions of third-party states.[25]

International lawyers repeatedly attempted to use belligerent recognition to guide state behavior during violent episodes of civil war. For example, belligerent recognition was examined as a potentially useful doctrine to manage conflicts between France and Algeria,[26] North and South Vietnam,[27] as well as Russia and Chechnya.[28] After the Second World War, calls for belligerent recognition to address civil wars generally waned as international institutions like the U.N. Security Council or other concerts of states largely assumed responsibility for recognizing, mediating, or even intervening in civil conflict using the growing body of international humanitarian law — which applied to

24. Richard Falk, *Janus Tormented: The International Law of Internal War*, *in* INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 218-19 (James N. Rosenau ed., 1964) (claiming that interstate conflict in the post-war era is actually dominated by intrastate warfare, whereby different foreign states attempt to encourage a favorable outcome, muddling the international law of belligerent recognition).

25. *See generally* Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43 (1988); Michael J. Mattler, *The Distinction Between Civil Wars and International Wars and Its Legal Implications*, 26 N.Y.U. J. INT'L L. & POL. 655 (1996).

26. *See* Arnold Fraleigh, *The Algerian Revolution as a Case Study in International Law*, *in* THE INTERNATIONAL LAW OF CIVIL WAR 179, 179-83, 196 (Richard A. Falk ed., 1971) (detailing how the International Committee of the Red Cross ("ICRC") asserted that certain French actions showed an intent to be bound by the Geneva Conventions).

27. *See* Lawrence C. Petrowski, *Law and the Conduct of the Vietnam War, in* THE VIETNAM WAR AND INTERNATIONAL WAR 439, 476-77 (Richard Falk ed., 1969) (discussing scholarly debate as to belligerent recognition in situations with *de jure* governments supported by third-party states and rebel groups, in the context of the Viet Cong).

28. Duncan B. Hollis, Note, *Accountability in Chechnya — Addressing Internal Matters with Legal and Political International Norms,* 36 B.C. L. REV 793, n.135 (1995) (noting Russia's reluctance to grant belligerent status to Chechen insurgents).

internal conflicts — to guide them.[29]

Under the most widely accepted rendering of the doctrine, states could lawfully recognize rebelling parties under certain conditions:

> [F]irst, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[30]

States rarely acknowledged these conditions — save the last — in their formal declarations to other states, nor did state practice precisely coincide with one or more of the criteria.[31]

Despite the frailty of the doctrine as a customary standard, international lawyers nevertheless attempted to apply it to conflicts as varied in time and geography as the Spanish Civil War, American support for the Mujahedeen in Afghanistan and

29. *See* Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949*, 47 INT'L & COMP. L.Q. 337, 353 (1998) (describing the ICRC's efforts to influence the development of international humanitarian law with respect to non-international conflicts in the postwar era).

30. HERSH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176-78 (1947). For scholars who cite Lauterpacht's definition as authoritative, see, for example, Higgins, *supra* note 13, at 170–71; Moir, *supra* note 29, at 338–39, 346–47; ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 219 (1956) .

31. RICHARD A. FALK, THE SIX LEGAL DIMENSIONS OF THE VIETNAM WAR (1968) [hereinafter FALK, SIX DIMENSIONS]. Indeed, this was a more elaborate form of the doctrine as articulated by Vattel originally – that a police action by a state became a civil war subject to international law when third-party states had to deal with it. *See* Wyndham Legh Walker, *Recognition of Belligerency and Grant of Belligerent Rights*, 23 TRANSACTIONS GROTIUS SOC'Y, 177, 189 (1937) ("Of the earlier writers on the topic of civil war I will only say this — there are those who follow the lead of Vattel, who holds that once a civil insurrection has reached a point at which it can be called a civil war, there is a war in fact; and it is open therefore to third States to treat the two belligerents as if they were two contending States, and either to remain neutral or to aid whichever side has the juster [sic] cause.").

the Contras in Nicaragua[32] and, more recently, NATO involvement in the wars accompanying the break-up of the former Yugoslavia.[33] This effort largely failed.[34] States ignored the asserted conditions in favor of policies that advanced a broad range of strategic interests.[35] Yet to say that foreign policymakers ignored "the international law of belligerency" in favor of *ad hoc* policies that advanced national interests does not mean that decision-makers did not share international lawyers' concern with effectively regulating the conduct of states over the long term. States did not extend belligerent rights only when it was convenient for them to do so, or when doing so might disadvantage a geo-political rival, as *realpolitik* critiques of international law might suggest. Rather, states' decisions to recognize rebelling or insurgent populations fit within broader perspectives on the appropriate structure of the international system.

Because the history of internal conflicts and state response to internal war has a long trajectory, this Article will focus on four key episodes contributing to the development of the international law of belligerent recognition: the American Revolution, the Spanish Colonial Wars of Independence, the American Civil War, and the Spanish Civil War. Other incidents will be referred to briefly, including Greece's movement for independence from the Ottoman Empire, Cuba's three wars for

32. *See* Gomulkiewicz, *supra* note 25, at 43.

33. INGRID DETTER, THE LAW OF WAR 40 (2d ed. 2000) (providing that the doctrines of implied belligerency can be seen in NATO action in *Operation Allied Force* where the Kosovo Liberation Army was implicitly acknowledged as a belligerent, since no affirmation of Kosovar independence accompanied international institution-based intervention).

34. Higgins, *supra* note 13, at 170–71 (stating that the traditional approach often does not reflect modern reality as states "do not wish to harness themselves to the legal consequences of a recognition of insurgency or belligerency").

35. *See* Richard Falk, *Introduction*, *in* THE INTERNATIONAL LAW OF CIVIL WAR, *supra* note 22, at 1, 14; *see also* A. C. Bundu, *Recognition of Revolutionary Authorities: Law and Practice of States,* 27 INT'L & COMP. L.Q. 18, 21, 25 (1978) (arguing that in addition to being a legal act, "recognition of revolutionary governments [is also a] political act in the sense that each State enjoys a large measure of freedom in deciding after the legal conditions have been satisfied, whether in a given case it is in its national interest to accord recognition to the revolutionary authority in question").

independence from Spain as well as its civil wars, national liberation wars, and finally the revolutions and other forms of internal war after World War II. Among those investigating this area of international law, there is considerable difficulty in arriving at what is meant by "revolution," "internal war," "wars of national liberation," "civil war," and other variations of, what is declared in Article 3 of the 1949 Geneva Conventions as "armed conflict not of an international character."[36] For purposes of this paper, these distinctions are less important than whether the armed conflict necessitated action by third-party states.

Indeed, international lawyers' main intent in bringing international law to bear upon internal war situations was to regulate the actions of outside states responding to the state undergoing revolution or civil war, although there arose the additional concern of international law in "promoting minimum standards in the conduct of hostilities; and . . . at least some of the rules devised must apply to internal, as well as to international war."[37] International lawyers created gradations of internal conflict (rebellion, insurgency, belligerency) for determining when third-party states could assist the incumbent government and delineated thresholds beyond which the laws of the conduct of war applied.[38] According to Roscoe Oglesby, the modern laws

36. FALK, SIX DIMENSIONS, *supra* note 31, at 18; *see also* Bundu, *supra* note 35, at 21 ("The terms in vogue in popular parlance are "insurrection", "rebellion", "military coup d'etat", "civil war", "civil strife", "revolution", "revolt", "war of national liberation", and so on . . . In international law it is doubtful whether any useful purpose can be achieved by attempting precise distinctions of legal meaning between these terms."). For a thorough analysis of how modern international humanitarian law changed customary laws of war, see ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW (2010).

37. Higgins, *supra* note 13, at 169.

38. *See* Christopher J. Le Mon, *Unilateral Intervention by Invitation in Civil Wars: The Effective Control Test Tested*, 35 N.Y.U. J. INT'L L. & POL. 741, 746–47 (2003); *see also* Kenneth D. Heath, *Could We Have Armed the Kosovo Liberation Army? The New Norms Governing Intervention in Civil War*, 4 UCLA J. Int'l L. & For. Aff. 251, 271 (1999) (providing a useful graph showing when and under which circumstances third-party states could extend military support to incumbent governments). On the other hand, recognition of insurgency is the outcome both of the unwillingness of foreign States to treat the rebels as mere law-breakers and of the "desire of those States to put their relations with the

of internal war originated with the American Revolution and the Spanish Colonial wars for Independence.[39] These conflicts, especially the former, brought to the attention of international lawyers and foreign governments the necessity for developing a set of guidelines to govern the behavior of third-party states in the case of civil war.[40]

A. THE AMERICAN REVOLUTION

When thirteen of Great Britain's North American colonies united in rebellion against the Crown, they broke with her commercially, on April 6, 1776, and politically, on July 4, 1776.[41] Yet even in April, 1776, when the Continental Congress opened colonial ports to foreign commerce, Great Britain had arguably already established that open war existed between herself and the colonies. In late 1775, the British Parliament determined that stronger measures needed to be taken against the self-rule movement spreading among the provinces. Under Prime Minister North, Parliament adopted the American Prohibitory Act which declared

> 'all manner of (the American colonies') trade and commerce is and shall be prohibited;' that any ships found trading 'shall be forfeited to his Majesty, as if the same were the ships and effects of open enemies;' and that 'for the encouragement of the officers and seamen of his Majesty's ships of war' that 'seamen, marines, and soldiers on board shall have the sole interest and property of all ships, vessels, goods and merchandise, which they shall seize and take.'[42]

insurgents on a regular, although clearly provisional, basis." *See* LAUTERPACHT, *supra* note 30, at 270.

39. *See generally* ROSCOE RALPH OGLESBY, INTERNAL WAR AND THE SEARCH FOR NORMATIVE ORDER 1–17 (1971). There were, of course, antecedents. According to Robert R. Wilson, "In peace treaties made by Spain in 1630 and 1659 with England and France, respectively, there were acceptances of the rule that, if either party's subjects were in rebellion, the other should refuse them all types of assistance." Robert R. Wilson, *Recognition of Insurgency and Belligerency*, *31* AM. SOC. INT'L L. PROC. 136, 137 (1937).

40. *See* OGLESBY, *supra* note 39, at 1.

41. *See* Dorothy Burne Goebel, *Congress and Foreign Relations Before 1900*, 289 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (1953).

42. *First Edition of the American Prohibitory Act of 1775*, THE MANHATTAN RARE BOOK CO., http://www.manhattanrarebooks-history.com/

John Adams declared of the act, "It throws thirteen colonies out of the royal protection, levels all distinctions, and makes us independent in spite of our supplications and entreaties . . . It may be fortunate that the act of independency should come from the British Parliament rather than the American Congress."[43]The new state opened ports to foreign commerce, put in place diplomatic missions to lobby foreign governments to recognize the insurgents' independence, issued letters of *marque* to authorize private ships to conduct naval warfare, and generally created the machinery for the conduct of foreign relations.[44] These efforts to obtain aid and recognition from other European powers were largely unsuccessful for the first two years of the revolution, but the conduct of naval hostilities nevertheless forced third-party states to make *ad hoc* determinations of lesser significance.[45]

In 1779, John Paul Jones and privateer Pierre Landais captured three British cargo ships — *The Union*, *The Betsy*, and *The Charming Polly* — and sent the vessels to Bergen, Norway, then under the sovereignty of Denmark.[46] British diplomats in Copenhagen pressed the Danish government to return the prizes as an unlawful attack of rebels and pirates. American demands for the return of the ships (or just compensation) relied upon two arguments. First, the ships were in a Danish port enjoying "rights of humanity" and "hospitality."[47] Second, Denmark had

prohibitory_act. htm (last visited Nov. 12, 2011).

43. Id. *See also* Ben Baack, *Forging a Nation State: The Continental Congress and the Financing of the War of American Independence*, 54 THE ECONOMIC HISTORY REVIEW, 639, 641 (2001).

44. *See* Burne Goebel, *supra* note 41, at 22–23; *see also* Hugh F. Rankin, *The Naval Flag of the American Revolution*, 11 WM. & MARY Q. 339, 340 (1954) (describing the Continental Congress' efforts, "in response to the demands of impatient seamen," to make use of privateers even though there was "no recognized flag under which they could sail").

45. *See* Burne Geobel, *supra* note 41, at 23 (recognizing that despite its best efforts, the Continental Congress' foreign efforts slowly yielded results and, at that, only from countries acting out of self-interest: France and the Netherlands).

46. *See* Letter from Benjamin Franklin to R. Bernstorf (Dec. 22, 1779), *in* 3 THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION 121, 121–22 (Jared Sparks ed., 1829).

47. *Id.* at 123.

neither recognized the independence of the colonies, nor joined with Britain in its efforts against the colonies, and was therefore bound by obligations of neutrality.[48] Denmark responded that it had granted the British request precisely because it had not recognized American independence and that it feared "a powerful neighbor across the North Sea";[49] it allowed Jones, but not the prizes, to return to sea. After this episode, Catherine II of Russia declared a policy of "armed neutrality" under which Russia, as a neutral country, would freely trade with belligerents except for weaponry and military goods.[50] Denmark and Sweden joined this "League of Armed Neutrality," which enforced this policy primarily against Great Britain and was later joined by the other European maritime powers.[51]

Shortly after Jones' experience at Bergen, he captured two British warships, the *Serapis* and HMS *Countess of Scarborough,* accompanying a convoy of British cargo ships which had sailed from the Baltic Sea.[52] He brought the two captured British vessels to Texel Roads, a port in Holland.[53] Again, Britain attempted to force the hosting government to return the vessels, arguing that Jones was a subject of the King who "according to the laws of war and to treaties should be placed in the class of rebels and pirates."[54] The Dutch instead released Jones and the prizes to sea on the basis that to do otherwise would be to "sit in judgment on the validity of their capture."[55]

These episodes began building the framework for determining when and under what circumstances states were permitted to recognize insurgents as legal belligerents. Denmark's and Holland's actions both arguably qualified as legally neutral. The former claimed to have an existing treaty with the United

48. *Id*. at 122–23.
49. OGLESBY, *supra* note 39, at 2.
50. *See* David M. Griffiths, *An American Contribution to the Armed Neutrality of 1780*, 30 RUSSIAN REV. 164, 170–72 (1971).
51. *See id*.
52. *Dictionary of American Naval Fighting Ships*, NAVAL HISTORICAL CTR., http://www.history.navy.mil/danfs/a7/alliance-i.htm (last visited Aug. 23, 2012).
53. *Id.*
54. OGLESBY, *supra* note 39, at 6.
55. *Id*.

Kingdom and did not recognize the new American states as a sovereign;[56] the latter decided that giving in to British pressure would itself constitute judgment on whether or not a "war" existed between Great Britain and her colonies.[57] The British claim was somewhat weakened by its actions in exchanging prisoners of war, interdicting trade with the colonies, military conventions demonstrated by capitulating British generals."[58] Had the American Revolution not caused (or at least been followed by) revolutionary tumult in Europe and South America, these episodes may have raised relatively isolated, obscure questions of international law that might have just as easily gone unanswered. Yet the century that followed gave rise to multiple waves of revolutionary activity which forced third-party states to attempt to delineate between the legitimate authority of states to manage essentially criminal or treasonous insurgencies and the rights of legitimate belligerents who effectively established viable counter-states.[59]

B. THE SPANISH COLONIAL WARS OF INDEPENDENCE

Spain initially refused to openly endorse the American Revolution, in part because it represented a philosophical threat to its dominion over territories in the Americas.[60] The fear was prescient. Rebellions against Spanish authority began in "Colombia . . . in April, 1810, spread to Buenos Aires by May of the same year, to Chile and Paraguay in 1811, to the Provinces of

56. *Id*. at 4, 7.
57. *Id*. at 6.
58. *See id.* at 4.
59. *See, e.g.*, Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 391 (1944) (noting the series of revolts from Spanish authority during the nineteenth century and the ensuing debates regarding recognition of the new states); *see also* Tim Matthewson, *Jefferson and the Nonrecognition of Haiti*, 140 PROC. AM. PHIL. SOC. 22 (1996) (describing an early example of American foreign policy on belligerency in the context of the conflict between Haiti and France).
60. *See* Brian R. Hamnett, *Process and Pattern: A Re-Examination of the Ibero-American Independence Movements, 1808-1826 Process and Pattern: A Re-Examination of the Ibero-American Independence Movements, 1808–1826*, 29 J. LATIN AM. STUD. 279, 286 (1997) (explaining that the spread of independence movements in Latin American came after such movements in North America and Europe).

the Rio de la Plata by 1816, to Peru and Guatemala in 1821."[61] As with the American Revolution, the progress of insurgents in capturing vessels, seeking to open trading routes and managing internal affairs forced third-party states, especially those with extensive ties in the Western Hemisphere, to adapt policies to new geopolitical realities.

In Venezuela, the Junta of Caracas opened its ports to foreign commerce, and offered tariff incentives for foreign trade to encourage recognition.[62] Colombia followed in 1815.[63] The revolutionaries similarly established a foreign policy apparatus to lobby European governments for aid.[64] In response, the Spanish government blockaded Venezuela's ports (although it described the blockade as the enforcement of its laws governing its possessions in the Caribbean and South America).[65] Neutrality emerged as a common foreign policy preference for many of these states.

Britain, for example, did not prevent soldiers from fighting for rebelling forces in Venezuela in part because its law only prevented military service "with a 'foreign prince, state or potentate.'"[66] Thus, Britain could not restrain its officers — as the Spanish Crown insisted — precisely because it would not recognize the insurgents, which would flagrantly violate its commitments to Spain.[67] On the other hand, Britain feared that adopting a posture too accommodating to the Spanish might cause the South American insurgents to exclude British trade to the benefit of the United States.[68] In addition, public opinion

61. OGLESBY, *supra* note 39, at 8.

62. Dorothy Burne Goebel, *British Trade to the Spanish Colonies, 1796–1823*, 43 AM. HIST. REV. HIST. REV. 288, 299-300 (1938) [hereinafter Burne Goebel, *British Trade*] (describing the regime's attempt to attract British support through favorable trade practices).

63. *See id*. at 301 (noting that the Republic of Colombia declared free commerce after its independence).

64. *See id*. at 300 (stating that, among other factors, the Latin American colonies' solicitation of foreign aid allowed Britain to strengthen its position in the region).

65. *See id*. at 301.

66. D. A. G. Waddell, *British Neutrality and Spanish-American Independence: The Problem of Foreign Enlistment,* 19 J. LATIN AM. STUD. 1, 7 (1987).

67. *See id*.

68. *See* 1 BRITAIN AND THE INDEPENDENCE OF LATIN AMERICA 1812–1830 10

favored the revolutionaries.[69] Britain also led European efforts to mediate between Spain and the revolutionaries on the basis of "armistice for the rebels, political equality and free trade for the colonists."[70]

For its part, the United States had long fostered ties with Caribbean and South American provinces.[71] Commercial ties with Cuba and other Caribbean possessions, for example, predated the American Revolution; geography and agricultural advantages made the United States better able to provide goods to Spanish colonies.[72] Commercial ties with Chile began in the late eighteenth century when "whaling and sealing [opportunities] . . . brought New England ships to the Chilean coast."[73] Commerce between the United States and Latin

(C.K. Webster ed., 1938) (detailing the explosion of Britain's commercial interest in Latin America following the region's decolonization); *see also* Burne Goebel, *British Trade*, *supra* note 62, at 295 ("Probably the greatest obstacle to such a development, however, lay in the competition of the Americans, a circumstance which minimized the importance of the free ports as markets for the Spanish colonies. For the vessels of the United States occupied a peculiarly favorable position.").

69. *See* Waddell, *supra* note 66, at 6, 9 (explaining the political realities in London that set policymakers at odds with public opinion).

70. *Id*. at 6.

71. *See generally* Javier Cuenca Esteban, *Trends and Cycles in U.S. Trade with Spain and the Spanish Empire, 1790–1819*, 44 J. ECON. HIST. 521 (1984) (providing early quantitative history).

72. *See* Burne Goebel, *British Trade*, *supra* note 62, at 295 ("It was the United States alone that could with ease supply [Spain's Caribbean colonies] the requisite thousands of barrels of wheat and flour, and as a result both Spanish creoles and British colonials were forced to turn to the Americans."); *see also* James W. Cortada, *Economic Issues in Caribbean Politics: Rivalry between Spain and the United States in Cuba, 1848-1898*, 86 REVISTA DE HISTORIA DE AMÉRICA 233, 234 (1978) ("Commercial ties between the colony and the United States grew despite Spanish economic policies designed to restrict them while Cuba's slave society linked it closely to the South."); Linda K. Salvucci, *Atlantic Intersections: Early American Commerce and the Rise of the Spanish West Indies* 79 BUS. HIST REV 781, 782 (2005) ("However, it has become increasingly clear that informed contemporaries regarded ports throughout the Spanish Empire, particularly those in Cuba, as desirable and lucrative destinations for American exports and as sources of valuable imports, such as specie. Many American merchants, including Robert Morris, the first superintendent of finance, traded with Spanish imperial ports for public and private gain.").

73. William Neumann, *United States Aid to the Chilean Wars of Independence*, 27 HISP. AM. HIST. REV. 204, 204-05 (1947).

American provinces promised to improve if Spain lost her monopoly on trading routes between South America and trading centers at Cadiz and Barcelona.[74]

The United States and the United Kingdom adopted similar, although not perfectly aligned, trajectories toward neutrality toward the nascent Latin American states.[75] President Madison proclaimed on September 1, 1815 that neither American personnel nor vessels would be permitted to aid the fight against Spain.[76] The declaration, technically a statement of neutrality, effectively extended "belligerent rights to the colonies, as well as a grant of what in later parlance became known as recognition of belligerency."[77] The division between efforts at purely commercial opportunities for gain and active assistance to the revolutionaries became predictably difficult to delineate. Among other goods sent via American ships to Chile early in its rebellion were pistols, rifles, and a printing press — to "be put in the service of the revolutionists."[78]

The British position also followed a gradual course to neutrality.[79] Bound by the Treaty of Madrid to support the Spanish in South America, the British initially attempted to prevent her subjects from providing some forms of military aid to the revolutionaries.[80] Britain later treated the parties equally

74. *See id*. at 205 (noting that American merchants were quick to seize upon new opportunities as they were legalized).

75. *See* JOHN BASSETT MOORE, THE MONROE DOCTRINE: ITS ORIGIN AND MEANING 7 (1895) (noting that English merchants were inclined to deal with new Latin American states despite their government's hesitance to legitimize such states, while the United States had already done so).

76. *See* Greg Russell, *John Quincy Adams and the Ethics of America's National Interest*, 19 REV. INT'L STUD. 23, 34 (1993); *see also James Madison: Proclamation 21 – Warning Against Unauthorized Military Expedition Against the Dominions of Spain, September 1, 1815*, AM. PRESIDENCY PROJECT, *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=65985#axzz1dWgLVeju .

77. OGLESBY, *supra* note 39, at 9.

78. Neumann, *supra* note 73, at 206.

79. *See* Waddell, *supra* note 66, at 1 (describing Britain's methods of remaining neutral).

80. *See, e.g.,* Piero Gleijeses, *The Limits of Sympathy: The United States and the Independence of Spanish America*, 24 J. LATIN AM. STUD. 481, 486 (1992) ("Britain, then, had to prove its good faith to Spain and other European allies, and it did so by enacting a 'formidable array of laws and orders' that made it

with respect to munitions exports and finally granted the revolutionaries belligerent rights on the high seas between 1821 and 1823, when it became clear that Spain could not reclaim her colonies.[81] Although British and American practice differed in some respects, both followed a generally identifiable process toward recognizing Latin American revolutionaries as lawful belligerents:

> [The conception of belligerency] began with the admission of rebel merchant vessels into ports; it continued with the admission of their war vessels and prizes; gradually, it assumed the form of a grant of equal and impartial treatment (subject, at the outset, to existing treaty obligations); the deliberate concession of belligerent rights to both sides on the high seas was the last stage in the process of the hardening of the conception of recognition of belligerency.[82]

By extending belligerent recognition to rebelling Latin American provinces, the United States and the United Kingdom accomplished two objectives. First, it allowed their domestic merchants to participate to a greater degree in trade with these provinces. Second, it opened up the Spanish monopoly generally to trade with all states. What appeared to be a guiding rule of law, neutrality, provided them the ability to further these interests. This is the case for Libya's civil war. As will be argued below, French, Italian, Qatari, British and American recognition of the Libyan opposition not only furthered individual interests in energy exploitation, it also helped minimize the civil war's interruptions to the circulation of affordable energy worldwide.

C. THE AMERICAN CIVIL WAR

While the American Revolution and the Spanish Colonial Wars for Independence oversaw the growth of certain norms governing insurrection and rebellion, the American Civil War

almost impossible for British subjects to render any assistance to the Spanish American rebels.").

81. *See generally* ANDRES BELLO: THE LONDON YEARS 7–24 (John Lynch ed., 1982); WILLIAM W. KAUFMANN, BRITISH POLICY AND THE INDEPENDENCE OF LATIN AMERICA, 1804–1828 (Lewis P. Curtis ed., 1951); CHARLES WEBSTER, THE FOREIGN POLICY OF CASTLEREAGH, 1815–1822, at 405–23 (4th prtg. 1963) (discussing Britain's policy generally).

82. LAUTERPACHT, *supra note* 30v, at 182.

provided the key episode in the development of belligerent recognition.[83] By the mid-nineteenth century, both the industrialized north and the agricultural south had developed extensive trading networks with Europe.[84] Moreover, the increasing influence of the United States in the western hemisphere and elsewhere compelled both European and South American states to consider whether division of the country might be strategically preferable.[85] Geopolitical preferences aside, the conflict quickly required third-party states to adopt policies to manage the competing demands made by Union and Confederate governments.[86]

After the original seven southern governments seceded from the United States of America and attacked Fort Sumter, South

83. *See* OGLESBY, *supra* note 39, at 33.

84. *See generally* 4 JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 383, 383–84 (C. Vann Woodward ed., 1988) ("Britain imported three-quarters of its cotton from the American South . . . British and French officials exchanged worried views about the probable impact of a cotton famine."); DOUGLASS C. NORTH, THE ECONOMIC GROWTH OF THE UNITED STATES 1790–1860 (1966); David G. Surdam, *King Cotton: Monarch or Pretender? The State of the Market for Raw Cotton on the Eve of the American Civil War*, 51 ECON. HIST. REV. 113, 113–32 (1998).

85. *See* Nathan L. Ferris, *The Relations of the United States with South America During the American Civil War,* 21 HISP. AM. HIST. REV. 51, 52 (1941) (demonstrating that both the Union and the Confederacy recognized the relevance of their respective relations with Latin America); Wilbur Devereux Jones, *The British Conservatives and the American Civil War*, 58 AM. HIST. REV. 527, 528 (1953) (claiming that British concern for American interest in Canada steered some to sympathize with the Confederacy); *see also* McPherson, *supra* note 84, at 553 (describing French partisanship for the South because of imperial aims in Mexico and elsewhere); Kathryn Abby Hanna, *Incidents of the Confederate Blockade*, 11 J. S. HIST. 214, 215 (1945) (quoting Napoleon III, "It is to our interests that the United States be powerful and prosperous, but it is not at all to our interest that it should control the entire Gulf of Mexico, should dominate from there the Antilles and South America, and should be the sole distributor of the products of the New World.").

86. *See, e.g.*, Kinley J. Brauer, *British Mediation and the American Civil War: A Reconsideration*, 38 J. S. HIST. 49 (1972) ("During the Fall of 1862 Great Britain seriously considered intervening in the American Civil War. Union defeats in northern Virginia and a Confederate advance toward Washington, coupled with growing domestic economic problems created by the cotton famine, led Lord Palmerston, the prime minister, and Lord John Russell, the foreign secretary, to propose to the Cabinet that Britain in conjunction with other European powers offer mediation to the Americans.").

Carolina, Abraham Lincoln announced a Union blockade of ports from South Carolina to the Rio Grande; this was subsequently amended to include ports in North Carolina and Virginia upon their secession.[87] The blockade itself was of questionable constitutionality; his cabinet was divided on the question of whether Lincoln should dispatch the U.S. Navy to blockade southern ports or simply close ports located in the south to commerce.[88] The former option was well-recognized under international law to be legal only in time of war while the latter was consistent with the stated position of the United States that the attack on Fort Sumter and secession of the southern states constituted an internal police matter.[89] If Lincoln had only closed the ports, commercial ships attempting to dock would have violated only American domestic law.[90] Both options engendered possible conflict with European maritime powers, particularly Britain.

Lincoln instead chose to institute blockade and called out the national militia in response to the fall of Fort Sumter.[91] Just as importantly from the perspective of European powers, Jefferson Davis authorized the issuance of letters of *marque* to Confederate privateers.[92] Since only a belligerent could authorize the sending of privateers to sea, Britain had to decide whether to treat Confederate privateers as legitimate belligerents or as pirates.[93]

On May 13, 1861, three days after American envoy George Dallas officially communicated the blockade to the British government, Great Britain declared a policy of neutrality toward the divided nation and strengthened naval forces near the United

87. *See* Stuart Anderson, *1861: Blockade vs. Closing the Confederate Ports*, 41 MILITARY AFF. 190, 190 (1977).

88. *See id.* (presenting the positions of Lincoln's cabinet members, particularly Attorney General Welles and Secretary Seward).

89. *See generally id*.

90. *See id*.

91. *See* MCPHERSON, *supra* note 84, at 274 ("On April 15 Lincoln issued a proclamation calling 75,000 militiamen into national service for ninety days to put down an insurrection 'too powerful to be suppressed by the ordinary course of judicial proceedings.'").

92. *See* Anderson, *supra* note 87, at 192.

93. *See id.*

States to protect shipping interests.[94] France followed on June 10, while most European maritime powers followed soon after.[95] Americans protested that "British recognition was hasty, that the conditions necessitating such a step were not present, and that in fact British haste in the matter amounted to a hostile act."[96] After the announcement of British neutrality, legal scholars began to question when belligerency should be acknowledged. Two competing arguments emerged: (1) that belligerent rights required an official declaration of neutrality; or (2) belligerency may be inferred from certain acts without an official declaration.[97]

While these views were never perfectly reconciled, the latter view gained substantial support from international lawyers.[98] Under international law, only belligerents could maintain effective blockades and, similarly, the prerogative of official recognition belonged to each sovereign nation.[99] In Britain, Parliament was split over the issue of supporting the South, even before serious contemplation of the international legal dimension was considered.[100] Liberals supported the North on the basis of hostility toward slavery (a position Lincoln was to emphasize later in an effort to build international support), while

94. *SEE* LAUTERPACHT, *supra* note 30, at 177.

95. Anderson, *supra* note 87, at 190.

96. OGLESBY, *supra* note 39, at 34.

97. *See* Wilson, *supra* note 39, at 139 (noting discrepancies between the arguments for what is required in cases of belligerent recognition); *see also* McPherson, *supra* note 84, at 388 (acknowledging that regardless of legal theories and arguments, to some "[t]he question of belligerent rights is one, not of principle, but of fact").

98. *See* Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 75 (2005) ("Prior to [the Geneva Conventions of 1949], traditional international law required that the belligerency of parties to an internal armed conflict be afforded *either* formal *or* tacit recognition before humanitarian obligations could be said to exist") (emphasis added). *See generally* Jill Elaine Hasday, *Civil War as Paradigm: Reestablishing the Rule of Law at the End of the Cold War*, 5 KAN. J.L. & PUB. POL'Y 129 (1996).

99. *See* PHILIP C. JESSUP, A MODERN LAW OF NATIONS 55 (1946) (recognizing that traditionally, "states [are] free to accord or withhold the recognition of new governments").

100. *See* Brauer, *supra* note 86, at 53 (demonstrating that self-interest, not international legal theory, was the driving force behind British policymaking).

pragmatism seemed to favor recognition of the Confederacy.[101] Despite Cabinet discussions on recognizing the Confederacy, Britain maintained a policy of neutrality after "British Governments and Law Officers of the Crown on numerous occasions described the proclamation by the lawful government of a blockade *jure gentium* against the insurgents as a recognition of a state of belligerency."[102]

The position of the U.S. government was particularly ill-timed given the building international consensus on blockades as a subject of international law. After the Crimean War (1853-1856), Britain, France, Prussia, Russia, Turkey, and Austria agreed in the Declaration of Paris to respect neutral commerce during war, effectively changing then customary international norms governing privateering and blockades.[103] The United States was invited to join the treaty – the Declaration of Paris— but refused to do so until the parties included protecting private property at sea.[104] After the Confederacy, dependent on privateers and the hospitality of foreign ports, began issuing letters of *marque*, the United States attempted to accede to the

101. Quincy Wright, *The American Civil War (1861–65), in* THE INTERNATIONAL LAW OF CIVIL WAR, *supra* note 26, at 80 ("cultural, political, economic, legal, military, and moral" considerations favored British recognition of the Confederacy's independence).

102. LAUTERPACHT, *supra* note 30, at 178.

103. The Declaration of Paris provided that: "1. Privateering is, and remains, abolished; 2. The neutral flag covers the enemy's goods, with the exception of contraband of war; 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag; 4. Blockades, in order to be binding, must be effective, that is to say, maintained by a forge sufficient really to prevent access to the coast of the enemy." Declaration Respecting Maritime Law, Apr. 16, 1856, 60 B.S.P. 155 [hereinafter Declaration of Paris], *available at* http://www.icrc.org/ihl.nsf/FULL/105?OpenDocument. The United States was invited to join the treaty — the Declaration of Paris — but refused to do so until an additional term was included which protected private property at sea. *See* CHARLES FRANCIS ADAMS, SEWARD AND THE DECLARATION OF PARIS: A FORGOTTEN DIPLOMATIC EPISODE 7, 8 (1912).

104. *See* ADAMS, *supra* note 103, at 9-10 ("On April 24 Seward instructed representatives abroad, recounting the Marcy proposal and expressing the hope that it still might meet with a favourable reception, but authorizing them to enter into conventions for American adherence to the Declaration of 1856 on the four points alone. This instruction was sent to the Ministers in Great Britain, France, Russia, Prussia, Austria, Belgium, Italy, and Denmark; and on May 10 to the Netherlands.").

treaty in order to take advantage of its anti-privateering provisions.[105] Britain and France refused to extend such favorable treatment to the Union, and indeed, from 1861, coordinated with other European powers on the possibility of mediating the conflict.[106]

Aside from the inferences made by British international lawyers over the use of blockades, the British also relied on implicit recognition of belligerency resulting from the internal American constitutional machinery. First, Congress authorized the President to declare parts of the country "in a state of insurrection."[107] Second, the U.S. Supreme Court decided that the proclamation of a blockade was conclusive evidence that a state of war existed.[108] Earl Russell, who wrangled with U.S. minister Adams over the timing of the British declaration, clearly expressed that the British decision was not only based on international law, but that Judge Dunlop's decision in the case of *The Tropic Wind* "asserted civil war to exist."[109] Other neutral governments adopted a similar position.[110]

D. THE SPANISH CIVIL WAR

The Spanish Civil War of 1936-39 exposed the incoherence of the belligerency doctrine as it related to conditions of revolution or civil war. Although by now it should be evident that the law of

105. *See generally The Declaration of Paris Negotiation*, HISTORIAN.NET, http://historion.net/great-britain-and-american-civil-war/chapter-v-declaration-paris-negotiation (last visited Nov. 12, 2011) (stating that Seward instructed his representatives abroad to continue pursuing agreement on the protection of private property but, failing that, allowed them to "enter into conventions for American adherence to [the Declaration of Paris] on the four points alone").

106. *See generally* Brauer, *supra* note 86 (discussing the British theories behind mediation of the U.S. Civil War).

107. *See* OGLESBY, *supra* note 39, at 41.

108. The Brig Army Warwick (Prize Cases), 67 U.S. 635, 670 (1863).

109. United States v. Tropic Wind, 28 F. Cas. 218, 221 (C.C.D.D.C. 1861).

110. *See* T. S. Woolsey, *The Consequences of Cuban Belligerency*, 5 YALE L.J. 182, 183 (1896) ("Thus, early in our Civil War, the *Sumter* put in at Curacao, Holland, having recognized the belligerency of the Confederacy."). *See generally* LYNN M. CASE & WARREN F. SPENCER, THE UNITED STATES AND FRANCE: CIVIL WAR DIPLOMACY (1970) (noting that Foreign Secretary Lord John Russell informed American minister Dallas on May 1 that France intended to follow British actions toward the United States).

belligerency as articulated by Lauterpacht enjoyed little support in the official statements of governments, a small note on the origins of the traditional doctrine will help understand the broader picture.[111] Belligerency as a status in international law remained largely dormant—Cuba's war for independence excepted—until its revival during the Spanish Civil War and to the subsequent explosion of internal wars during the Cold War. The Spanish Civil War caused a robust debate among international lawyers, some of whom somewhat abruptly suggested that the "international law of belligerency" had a long past informed by relatively consistent state practice.[112] Indeed, it

111. *See, e.g.,* Mayo W. Hazeltine, *What Shall Be Done about Cuba*, 163 THE NORTH AMERICAN REVIEW 731, 733 (1896) (noting that despite resolutions from Congress (and other European powers) for recognition of belligerency in Cuba, President Cleveland refused).

112. O'Rourke, *supra* note 23, at 399 ("But, once an insurrection acquires sufficient force and permanency, and the interests of third Powers are affected thereby, recognition of belligerency is perfectly justifiable in the eyes of international law. It would be futile to attack the propriety of this principle."); Robert Wilson, *Recognition of Insurgency and Belligerency*. *31* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AT ITS ANNUAL MEETING (1921-1969) 136 (1937) ("When [revolution] does happen, other States may be affected in such a way that there is need of fixing the course which they propose to take with respect to the contending parties. To the extent that the possible courses to be followed can be made the subject of rules previously agreed upon, situations arising will be regularized and the possibilities of international friction lessened. What has been done in the past about recognition of insurgency and belligerency has therefore more than mere historical significance."); *Compare* James W. Garner, *Questions of International Law in the Spanish Civil War*, 31 AJ.I.L. 105 (1937) ("Adverting to Mr. Noel-Baker's statement that it was the traditional policy of the British Government-which policy, he said, was in accord with the practice of other states and with the rules of international law-to refrain from recognizing the belligerency of insurgents, Sir John stated that he could not accept this statement of British policy as correct. In fact, he asserted, it had always been the policy of the British Government to regard itself as free to recognize or to refuse to recognize a state of belligerency as it might judge to be in its own interests and, in the language of Westlake, 'the general political good of the world.'");Walker *supra* note 31 ("The present conflict in Spain has forced into prominence the question of what is spoken of as the granting of belligerent rights to the parties to a civil war-the topic of recognition of belligerency. In recent correspondence in the Times a number of writers whose names entitled their views to some consideration put forward somewhat divergent views upon the matter, and supported their opinions by the giving of certain information as to past history. It may, however, be that even following that correspondence there remained some, like myself, who still felt themselves

is at this point that Lauterpacht acknowledged a "duty" to recognize belligerency, even if the more concrete definition appeared later in his seminal *Recognition in International Law.*[113] But, Lauterpacht himself asserted the claim based only upon what he perceived to be agreement among international lawyers at the time of a general right to recognition.[114]

In any event, the Spanish Civil War broke out on July 17, 1936 led by an army in Spanish Morocco, the most effective and well-trained garrison of the Spanish military.[115] The Spanish Civil War fit the view of belligerent recognition as Lauterpacht asserted it to be under international law, yet no government did so until late in the conflict.[116] The facts, as relevant to international lawyers writing at the time, were relatively clear. First, the Spanish government was legitimately established, "in conformity with the constitution and laws . . . and as a result of free popular elections."[117] Second, shortly after the outbreak of hostilities, the legitimate government of Spain requested assistance from France.[118] Third, one week after the outbreak of the war, Italy had provided military transport planes to transport Franco's forces to the mainland and Hitler promised to send transports, fighters, bombers, advisers and technicians.[119] Fourth, external

with those of whom the poet sang- 'the hungry sheep look up and are not fed '".).

113. *See* Hersh Lauterpacht, *Recognition of Insurgents as a De Facto Government,* 3 THE MODERN LAW REVIEW 1-2 (1939) ("In the first instance, while there were present most of the requirements imposing upon third States the duty to recognise a status of belligerency, Great Britain and other countries were prevented from granting belligerent rights owing to the circumstance that the struggle had ceased from its very commencement to be a civil war in the established sense of the term. The result was that the rebellious forces, while denied the exercise of belligerent rights on the high seas, were in other respects treated as a community engaged in lawful warfare.").

114. LAUTERPACHT, *supra note 30*, at 175-77, 240-43. Even then, Lauterpacht conceded that at least 9 prominent international law scholars disagreed with him. *Id*. at 241.

115. *See* Ann Van Wynen Thomas & A. J. Thomas, Jr., *International Legal Aspects of the Civil War in Spain, 1936–39, in* The INTERNATIONAL LAW OF CIVIL WAR, *supra* note 24, at 111.

116. *See* OGLESBY, *supra* note 39, at 104.

117. Garner, *supra* note 112, at 67.

118. Van Wynen Thomas & Thomas, *supra* note 115, at 114.

119. *Id*. at 113.

powers, mostly European powers, agreed by August 21 to a policy of non-intervention signed by Britain, Belgium, Holland, Poland, Czechoslovakia, France, Portugal, Germany and Italy.[120] The three additional powers signed, but with important omissions and provisos.[121]

The primary debate at the time was how, given the undeniable state of belligerency between the Nationalists and the Loyalists in Spain, governments could justify withholding belligerent recognition. The Madrid government had, in fact, declared a blockade on August 9 and 10, historically a clear invitation for third parties to extend belligerent rights to both sides.[122] The American Civil War had treated the issue of belligerent recognition as one of fact; international law could be derived from realities on the ground. This right to recognition is what Lauterpacht referred to in his treatise on recognition, and there was apparent agreement among "probably the majority" of international lawyers at the time that there existed a right to recognition and a corresponding duty from outside states.[123] The actions of outside powers during the Spanish Civil War, therefore, seemed inconsistent with customary international law of belligerency.

The explanation for the discrepancy, wrote O'Rourke, was a historical shift in the nature of armed conflict:

> The time may have arrived when the latter view [that a state of legal war . . . is entirely contingent upon specific recognition by outside states], based upon the applicability of the principle of sovereignty in international relations, should give way to the practice of collective action and collective decision. Left to individual determination, belligerency, despite its existence in fact, may be refused because of the inconveniences thereby thrust upon the merchant vessels of the recognizing Power. This principle, carried to its logical conclusion,

120. *Id*. at 115-16.
121. *See id.* at 117 (referring to Russia, the United States, and Mexico).
122. O'Rourke, *supra* note 23, at 412.
123. LAUTERPACHT, *supra* note 30, at 240 ("The considerations, based both on practice and on principle, in favour of the legal character of recognition of belligerency – i.e. in particular, in favor of the legal right of the insurgents to recognition – are so cogent that, notwithstanding the contrary tendency in matters of recognition generally, the legal view of the recognition of belligerency is supported by what is probably the majority of writers.").

> might conceivably result in the refusal of foreign Powers to recognize a legal state of war when the conflict is between two independent nations.[124]

O'Rourke's premonition was correct in the sense that the latter half of the twentieth century was defined by undeclared wars, "police" actions and intervention outside of the traditional belligerent framework.

After World War II, internal wars, revolutions and guerrilla warfare dominated the landscape of armed conflict and produced confusion for the customary norms of international law.[125] For example, the Algerian conflict (1954-1962) saw repeated attempts by the Algerian National Liberation Front ("FLN") to "arrive at an understanding with the French on the applicability of the Geneva Conventions . . . the French maintained that the FLN had no right to take any prisoners, since it had no right to institute an armed attack against the French government in Algeria."[126] Thus, even the establishment of the United Nations in 1945 and the conclusion of the Geneva Conventions regulating the laws of war in 1949 did not resolve the historical dilemma for international law regarding belligerents: where the incumbent government insists that third-party states treat rebel groups as criminals within the police power of the governing state, even though the circumstances at hand almost clearly demanded treatment as lawful belligerents. Although Article 3 of the Geneva Conventions called for adherence in cases of "armed conflict not of an international character," the French still balked at their invocation anticipating the possibility of recognition of belligerency.[127] To be sure, in that conflict and others the sides eventually agreed on the application of international humanitarian law, but many of the

124. O'Rourke, *supra* note 23, at 413.

125. *See* Bundu, *supra* note 35, at 19 (listing at least thirty civil wars, revolutions or similar events in Africa alone from 1945 to the time of writing); *see also* Howard J. Taubenfeld, *International Actions and Neutrality*, 47 AM. J. INT'L. L. 377, 384–96 (1953) (explaining how the U.N. Charter changed customary norms although conceding that the points remain disputed).

126. Fraleigh, *supra* note 26, at 194–95.

127. *Id.* at 195.

old dilemmas unresolved by custom persisted.[128] With the increasing occurrence of civil war, "wars of liberation" and revolution, international institutions and collective decision-making started to play a greater role.

III. TRADITIONS OF BELLIGERENT RECOGNITION

It should be clear through these episodes that the customary international law norm articulated by Lauterpacht did not enjoy particularly strong historical support. Consider again his formulation of the requirements for belligerent recognition:

> [F]irst, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[129]

Of these criteria, only the last, "circumstances which make it necessary for third parties to define their attitude by acknowledging the status of belligerency," could be said to have meaningfully motivated third-party states like Denmark and Holland during the American Revolution, or Britain and other neutrals during the American Civil War. The existence of "widely spread armed conflict, occupation of territory and conduct of hostilities in accordance with the rules of war" showed some significance in how neutral states defined their interests, but not how they responded. Indeed, the announcement of a blockade, a feature of each of the episodes described above as well as several others, was not explicitly included although it might be extrapolated from one requirement or another.

For example, the ability to conduct hostilities within the established rules of war (*jus in bello*) did not appear to play a

128. LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 80–81 (2002) (noting that in the Nigerian Civil War, the Nigerian government issue a Code of Conduct stating that the Geneva Conventions applied to the conflict, and both the government and the belligerents generally observed this in practice).

129. LAUTERPACHT, *supra* note 30, at 176.

significant role in determining whether or not states recognized insurgents or revolutionaries as belligerents. Certainly, the American Revolutionaries did observe customary rules regarding the conduct of warfare as well as fighting, by and large, under the command of a properly constituted military.[130] The Confederate States of America similarly observed customary laws of war, although they rejected the Lieber Code — founding principles of modern international humanitarian law — for somewhat technical reasons.[131] In any case, "conducting hostilities in accordance with the rules of war" did not appear to influence British deliberations over policy toward the Confederacy. Certainly, when Gladstone made his controversial speech at Newcastle supporting the independence of the Confederacy, he mentioned that the Confederacy had an army and a navy when declaring that Jefferson Davis had "made a nation."[132] The wider diplomatic literature, however, shows that Britain focused primarily on balancing strategic interests in division of the United States with the risk of war with the Union swayed in part by domestic antipathy for Southern slavery.[133]

The historical evidence, therefore, does not strongly support the customary international law standard asserted by

130. *See* Fred W. Anderson, *The Hinge of the Revolution: George Washington Confronts a People's Army*, 1 MASS. HIST. REV 21, 24 (1999) (quoting the Continental Congress's general orders establishing the Continental Army); Daniel E. Sutherland, *Guerilla Warfare, Democracy, and the Fate of the Confederacy*, 68 J. S. HIST. 259, 266 (2002) (noting that modern scholars believe that the disciplined Continental Army — and not military irregulars — deserved credit for the defeat of the British).

131. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT'L L. 213, 217 (1998) (citing to Confederate Secretary of War James Seddon's statement that Lieber's doctrine of military necessity was insufficient justification for the atrocities committed during the American Civil War). While the Confederacy generally abided by norms prevalent at the time, an important exception was the vicious treatment of black prisoners of war. *See* MCPHERSON, *supra* note 84, at 566.

132. HARRY HANSEN ET AL., THE CIVIL WAR: A HISTORY 54 (2002); *see also* Sutherland, *supra* note 130, at 276 (noting that though irregular warfare was popular during the civil war, Jefferson Davis and Robert E. Lee insisted on warfare through an organized military).

133. *See generally* Brauer, *supra* note 86 (arguing that the Union victory at the Battle of Antiem was one of several factors the British took into account in deciding to stay neutral rather than mediate during the Civil War).

Lauterpacht and other international lawyers. This was clear from the declarations of foreign policy makers, executive determinations of state interest, and the consensus (however limited) generated by concerts of states coordinating responses.[134] By outlining the three traditions of belligerent recognition below, one theory for this discrepancy will be forwarded. Namely, state practice and subsequent legal codification represented varying ideas of how to balance individual versus collective interests in international relations.[135] Lauterpacht had essentially used the customary international law of statehood (population, territory, government) to craft a doctrine by which to recognize when rebels had formed a state — and therefore had a right to declare one — and a corresponding duty for third-party states to recognize it.[136] This was a typical task of the international lawyer, to identify rules that applied to all sovereign states in the interest of maintaining international order and limiting the occurrence and effect of war. Yet the criteria he articulated did not actually derive from customary sources — state practice and *opinio juris*. The reality was that states often responded to civil wars because their interests demanded it.[137] The interesting part of that question is *how* they defined their interests.

134. In a particularly biting critique of Lauterpacht's RECOGNITION, Josef L. Kunz stated that "under positive international law there is no right to recognition by new states or de facto governments, nor is there a legal duty to recognize them," and that Lauterpacht's "assertion of a right to recognition and a duty to recognize, is certainly entirely untenable as not being in accord with positive international law." *See* Josef L. Kunz, *Critical Remarks on Lauterpacht's, "Recognition in International Law"*, 44 AM. J. INT'L L. 713 (1950).

135. *See generally* MICHAEL W. DOYLE, WAYS OF WAR AND PEACE 205–314 (1997) (providing a comprehensive taxonomy for intellectual traditions that guided foreign policy decision making and diplomacy).

136. Lauterpacht, *supra* note 59, at 385 (inferring that some revolutionaries, in effect, "fulfill[ed] the conditions of statehood as required by international law").

137. For the classic exposition of Classical Realism, *see* HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE (5th ed., rev. 1978), and KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (modifying Classical Realism by arguing that states may not, as Morgenthau proposes, inherently seek more power, but that the anarchical international system of states explains why states seek to maximize relative gains and have difficulty cooperating).

This Article argues below that they often chose policy trajectories that advanced both individual state interests *and* collective interests in commercial freedom, stable governments and, where possible, coordinate responses toward civil wars with other third-party states. States deciding when they would recognize "war" in revolutionary situations contemplated, at some level, how they perceived war in the international system generally. In the context of belligerent recognition, these states acknowledged a place for war that was distinctly subordinate to support of legitimate governments, the primacy of high seas commercialism,[138] and, in later years, to the broader legitimacy that institutions could provide. So, while Lauterpacht and other international lawyers were wrong as to the nature and normative force behind the "duty" to recognize belligerents, the standard they articulated did reflect the tendency of states to adhere to underlying policies that promoted better order in the international system.[139] To analogize to the prisoner's dilemma, state decisions to recognize insurgents as legitimate sovereign participants in the international system took into account both individual and collective gain.

A. THE COMMERCIAL TRADITION OF BELLIGERENT RECOGNITION

In the commercial tradition, states recognize belligerents primarily for the protection of commercial trade on the high seas and the attempt to minimize the effect that internal conflict has on commercial interests. Commercialism represented a source of national wealth, but access to the seas was more importantly a

138. *See* Taubenfeld, *supra* note 125, at 378 ("A neutral also had the right to trade with a belligerent except as prevented by an effective blockade.").

139. The most recent, seminal critique of international lawyers' tendency to overestimate the normative force of international law, particularly customary international law, is Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999) ("Our theory suggests that international behavioral regularities associated with [customary international law] may reflect coincidence of interest or coercion. These cases have no normative content, for states independently pursue their self-interest without generating gains from interaction. The theory also suggests that some international behavioral regularities associated with CIL will reflect cooperation or coordination, but these regularities will arise in bilateral, not multilateral, interactions.").

key free good which all nations should enjoy.[140]

Revolutionaries established openness toward commerce with foreign powers, understanding that continuity of trade and economic exchange figured prominently in the diplomatic calculations of third-party states.[141] In the context of belligerent recognition, Benjamin Franklin phrased the international interest in commercial freedom this way:

> All the neutral States of Europe seem at present disposed to change what had before been deemed the law of nations, to wit; that an enemy's property may be taken wherever found; and to establish a rule that free ships shall make free goods. This rule is itself so reasonable, and of a nature to be so beneficial to mankind, that I cannot but wish it may become general[.][142]

This principle, to minimize the effect of war on trade, enjoys support in the episodes involving John Paul Jones at Bergen in Denmark (Norway) and Texel in Holland. Both Denmark and Holland released Jones back to the seas without acknowledgment of the British claim that Jones was a pirate and subject to the criminal jurisdiction of the King.[143] The two states adhered to the Grotian axiom, "or first principle, the spirit of

140. Commerce as a fundamental international interest was derived from enlightenment principles articulated best by Adam Smith, who argued that liberalization of commerce would lead to ever higher levels of well-being in all countries. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 181 (J.R. M'Culloch ed., 4th ed. 1850) ("Commerce and manufactures gradually introduced order and good government, and with them, the liberty and security of individuals, among the inhabitants of the country, who had before lived in a continual state of war with their neighbors, and of servile dependency upon their superiors."). *But see* Andrew Wyatt-Walter, *Adam Smith and the Liberal Tradition in International Relations*, 22 REV. INT'L STUD. 5 (1996) (suggesting that Smith believed that even under a regime of liberalized trade, the ultimate aim was aggrandizement of the state).

141. PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814 104 (1993) (noting that revolutionaries "understood that their true interest lay in promoting a more peaceful, lawful and prosperous international system. This meant perfecting, not rejecting, the principle of national sovereignty").

142. Letter from Benjamin Franklin to an "Agent of American Cruisers" (May 30, 1780), *in* 3 THE DIPLOMATIC CORRESPONDENCE OF THE AMERICAN REVOLUTION, *supra* note 46, at 142.

143. OGLESBY, *supra* note 39, at 6 (citing BARON CHARLES DE MARTENS, NOUVELLES CAUSES CELEBRES DU DROIT DES GENS 370 (1843)).

which is self-evident and immutable, to wit: every nation is free to travel to every other nation, and to trade with it."[144]

It is possible to interpret the Danish and Dutch decisions as calculated to serve a number of foreign policy interests. At the time, the British had already established commercial and military hegemony on the high seas. An international relations theorist[145] or an international law skeptic[146] may therefore argue that their actions were two variations on attempting to "balance" the broader British threat. Indeed, it seems that part of the failure of British diplomacy to find any friends in Europe regarding the American revolt was in part because of "their heavy-handed treatment of the shipping of neutral states like Denmark and the United Provinces . . . ."[147]

Yet that explanation raises more questions than it answers. If Denmark sought to weaken its "powerful neighbor across the North Sea,"[148] then why did it return the prizes while Holland decided to release Jones and the prizes? [149] Why did neither choose that point to ally themselves with the Americans as had France (and which, according to Wheaton, was one possible legal action)?[150] If, on the other hand, Denmark truly feared British retaliation, why did it not then turn Jones over? [151]

The simplest explanation is that both powers viewed freedom

144. W. E. Butler, *Grotius and the Law of the Sea*, *in* HUGO GROTIUS AND INTERNATIONAL RELATIONS 213 (Hedley Bull et al. eds., 1990). The Dutch specifically referred to this "axiom" in their response to the British. *See* OGLESBY, *supra* note 39, at 6.

145. STEPHEN M. WALT, REVOLUTION AND WAR 270 (1996) (noting that France and Spain viewed the revolution in terms of their own economic and political self-interests vis-à-vis the British).

146. Goldsmith & Posner, *supra* note 139, at 1123 ("States independently pursuing their own interests will engage in symmetrical or identical actions that do not harm anyone, simply because they gain nothing by deviating from those actions.").

147. PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 117 (1989).

148. OGLESBY, *supra* note 39, at 4.

149. *Id*. Roscoe Oglesby, in comparing the two cases, suggests that the conduct of Denmark "was not that of a neutral, whereas that of Holland was more nearly so."

150. STEPHEN M. WALT, REVOLUTION AND WAR 270 (1996).

151. PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS 150 (1989) (noting evidence that the British navy and economy were "eroded in these years.").

of the seas as a policy solution that fit both national and collective interests. Neither held Jones as a pirate because he did not pose the threat to broader interests in commercial shipping that *actual* pirates did. Both powers released him with nothing "except those necessary for sailing."[152] In other words, when vessels arrived at port, the principle of free trade on the seas was to be respected, while the military use of the seas was to be highly regulated.[153] Even if one adopts the *realpolitik* explanation for both of these states' actions as well as the formation of the First League of Armed Neutrality, it may be read simply to mean that the broader community of European states punished Britain for not respecting a fundamental multilateral interest: commercial freedom on the high seas.[154]

No doubt, the Americans exploited this principle during their contest with the British, but that does not mean the principle lacked merit or force. The Americans argued to the Danish that the success of the American Revolution meant a breaking of the English monopoly on trade, that the separation of the colonies would reduce the threat of the larger British Empire, and that the law of nations demanded hospitality be granted to nations who

152. OGLESBY, *supra* note 39, at 6 (citing MARTENS, NOUVELLES CAUSES CELEBRES DU DROIT DES GENS).

153. *See* William Cullen Dennis, *The Right of Citizens of Neutral Countries to Sell and Export Arms and Munitions of War to Belligerents*, 60 ANNALS AM. ACAD. POL. & SOC. SCI. 168, 170–71 (1915) (commenting that international law permits neutral states to ship arms to belligerents on the high seas). The rules regarding the rights of neutrals became highly codified in U.S. domestic law. *See, e.g.,* Norman J. Padelford, *Neutrality, Belligerency, and the Panama Canal*, 35 AM. J. INT'L L. 55, 56 (1941) (listing the various prohibitions on citizens for violating neutrality including "taking part in hostilities, and observing the statutes and treaties of the United States, as well as the law of nations."); Albert H. Washburn, *The American View of Neutrality*, 2 *Va. L. Rev.* 165, 166 (1914) ("The immediate result of this attempt to exercise belligerent privileges, inconsistent with neutrality, was the passing by Congress in the following year of the law of June 5, 1794, forbidding within the territory or jurisdiction of the United States the acceptance and exercise of a commission, the enlistment of men, the fitting out and arming of vessels and the setting on foot of military expeditions in the service of any foreign prince or state with which the United States was at peace.").

154. *See* LAUTERPACHT, *supra* note 30, at 177, 187 (observing that states rarely express their recognition of belligerents through proclamations but may do so through other means, such as recognizing the right to blockade).

had made no offense to the receiving nation.[155] The United States adopted the "free ships . . . free goods" position in 1780 when deciding that no more neutral vessels would be apprehended or English goods expropriated unless specifically marked for war-making with the Americans.[156] Ultimately, the United States *did* become a principal champion of the neutral free commerce idea after independence.[157]

Commercialism played a significant role in the British and American positions toward rebelling South American provinces during the Spanish Colonial Wars for Independence. Originally bound by treaty to "prohibit the export of arms and war material to the rebellious Spanish colonies in America,"[158] Britain eventually reversed policy on the basis of a "disinclination to intervene in the struggle and by the prospects of economic advantages from the growing trade with the South American States."[159] The original British position can be partly justified on the recent completion of the Napoleonic Wars and distaste for revolutions.[160] British merchants, however, successfully persuaded the Foreign Ministry that maintaining treaty commitments to Spain would undermine present and future

155. *See* DAVID ARMSTRONG, REVOLUTION AND WORLD ORDER 48 (1993) (noting the American view at the time that free trade principles would foster more peaceful relations between states).

156. Letter from Benjamin Franklin to "Agent American Cruisers," *supra* note 142, at 142.

157. Daniel G. Lang & Greg Russell, *The Ethics of Power in American Diplomacy: The Statecraft of John Quincy Adams*, 52 REV. POL. 3, 13 (1990) (quoting John Quincy Adams as President, "the principles of justice, humanity and Christianity demanded, in particular, that free or neutral ships should make free goods and the neutral goods should be safe in enemy ships").

158. LAUTERPACHT, *supra* note 30, at 186.

159. *Id*. at 187; *see also* Walker, *supra* note 31, at 182 ("But at any rate by the beginning of 1815 it seems clear that the insurgents were in fact interfering with British shipping, and the British Government were avoiding awkward questions by advising naval officers to use their own discretion, to protect lawful trade as far as possible, but not to commit acts of hostility against the commissioned insurgent cruisers.").

160. *See* HENRY KISSINGER, DIPLOMACY 84 (1994). Most governments at least seemed to adopt the outlook of Austrian Chancellor Clemens von Metternich, who saw revolution, and the French Revolution in particular, as a dangerous aberration threatening the more reliable ancient doctrine that international decision-making was best left to like-minded sovereigns.

trading opportunities.[161] Britain therefore chose to accord belligerent rights to the new Latin American states not least because doing so "was also economically advantageous to both [the U.S. and the U.K.] to have the erstwhile Spanish colonies achieve their statehood, and thus to open up trade" but also because "an influential liberal element in both countries favored the independence movements."[162]

For the United States, the questions surrounding belligerent recognition were not just the effect of insurgent vessels on the high seas,[163] but to the commercial availability of American ports to both insurgent vessels and Spanish loyalist vessels.[164] The use by the United States of neutrality and recognition not only served the purposes of advancing commercialism, but, indeed, as Justice Story noted, the purpose of privileging "proprietary" interests during the Spanish Colonial Wars for Independence was to minimize the disruptions to commerce.[165] As with Britain, the domestic opinion decidedly favored the revolutionists.[166]

The policy of the United States regarding Spanish vessels and those of the insurgent vessels was, as in the American revolution, a policy of privileging availability of hospitality and trade.[167]

161. OGLESBY, *supra* note 39, at 15–16.

162. *Id*. at 16.

163. *See* United States v. Palmer, 16 U.S. 610, 635 (1818) (affirming that ships on the high seas belonging to belligerents must be able to identify themselves in the same way as ships of an established government would).

164. President Monroe's first annual message read in part "[The United States] have regarded the contest not in the light of an ordinary insurrection or rebellion, but as a civil war between parties nearly equal, having as to neutral powers equal rights. Our ports have been open to both." OGLESBY, *supra* note 39, at 12.

165. Santissima Trinidad, 20 U.S. 283, 337 (1822) ("The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse.").

166. *See* Gleijeses, *supra* note 80, at 481.

167. As with many episodes herein described, the national governments could not always enforce military prohibitions, even when earnestly trying to do so. *See* Neumann, *supra* note 73, at 204 (1947) ("In Chile at least, the aid given in the form of men, ships and supplies from the United States comprised a very substantial contribution to the cause of independence, and must be weighed in any evaluation of the role of this country as compared to Britain.").

British neutrality toward the Union and Confederacy is consistent with these previous episodes.[168] Despite divided internal opinion on which side to favor after the events of Fort Sumter, the British clung to a policy of strict neutrality.[169] This was consistent with an outlook that favored the maintenance of commercial trade, yet highly regulated the ability of belligerents to wage war. Thus, the British passed regulations upon belligerent cruisers or privateers but which "did not apply to belligerent merchant vessels, which were free to enter and leave."[170]

The most famous case contravening the general policy involved the *Alabama*, a Confederate cruiser built in Liverpool. However, the record is reasonably clear that once Lord Russell discovered the nature of the ship being built (it was supposed to be for France or Egypt), he attempted to prevent its sail.[171] In any case, Britain agreed to compensate the United States for commercial losses of $15,500,000.[172] Other neutral states, notably France, followed the British lead on neutrality.[173]

168. *See* Arnold D. McNair, *The Law Relating to the Civil War in Spain*, 53 L.Q. REV. 471, 484 (1937). Interestingly, in their analysis of customary international law, Goldsmith and Posner do not focus on the actions of third-party states toward civil war, but rather on the position of the incumbent belligerent, the United States. It is fair to say that when a state is waging war, it is more likely to interpret international law in ways that lean toward its individual, as opposed to, multilateral interests, as indeed the United States did. *See* Goldsmith & Posner, *supra* note 139, at 1140–44.

169. Wright, *supra* note 101, at 81.

170. *Id.* at 86.

171. *Id.* at 87–88. In fairness, historians, diplomats and partisans have long traded barbs over whether and to what extent Britain allowed its manufacturers to build war ships for the Confederacy. *See* MCPHERSON, *supra* note 84, at 546–49 (remarking that the Palmerston government "shut its eyes" to the building of Confederate commerce raiders in pro-Confederacy Liverpool); *see also* CHARLES S. C. BOWEN, THE 'ALABAMA' CLAIMS AND ARBITRATION CONSIDERED FROM A LEGAL POINT OF VIEW 5 (1868) (noting the "swarming" Confederate agents in Liverpool that attempted to acquire ships for blockade running as well as for war-making).

172. Wright, *supra* note 101, at 88.

173. Brauer, *supra* note 86, at 55–56 (recounting that after the Union defeat at the Second battle of Bull Run, Palmerston, Russell, and Gladstone advocated a joint European mediation to push for an armistice or, if the Union rejected it, recognition of the Confederacy; however, several other British Cabinet members rejected the plan in favor of a "wait and see" approach, as did

While commercialism continued to play some part in decisions to grant belligerent status later in the nineteenth century and up until the Spanish Civil War, the international perspective on what should regulate the progress of the international community shifted. As the nineteenth century progressed, concerns with constitutional and institutional paradigms of international order began to complement commercialism.

B. THE CONSTITUTIONAL TRADITION OF BELLIGERENT RECOGNITION

In the constitutional tradition of belligerent recognition, third-party states acknowledged belligerency through the actions of the incumbent government, as well as extending greater recognition to revolutionaries that put in place governmental or constitutional structures as their efforts met with increasing success.[174] Constitutionalism did not, *per se*, require a written constitution, but rather proceeded upon the internal actions of government machinery to determine when belligerency had occurred or whether revolutionaries had obtained legitimacy both domestically and internationally. With regard to the former, the Act of Parliament, 16th, of King George III (the Prohibitory Act) during the American Revolution, and the decisions issued by President Lincoln, Congress, and the U.S. Supreme Court during the American Civil War demonstrated to outside states that those governments were at war with their own citizens.[175] Exemplifying the latter, President Grant refused belligerent recognition to Cuban revolutionaries in 1875, partly on the grounds that the revolutionaries did not demonstrate the ability to properly conduct governmental affairs domestically or internationally.[176] Similarly, Britain and France acknowledged

Thouvenel, the French foreign minister).

174. Dennis, *supra* note 12, at 206 ("[F]ull recognition as a de jure government should be withheld until the armed issue has been resolved conclusively in favor of the permanency of the new government. Only the fact of control and acceptance by the people is vital, not the formalities of establishment.").

175. *See generally* Walker, *supra* note 31, at 200 (stating "the parent State itself could announce to the world the existence of a civil war and its intention to exercise those war rights derived both from its own statehood and from the fact of the existence of war.").

176. Ulysses S. Grant, State of the Union Address (Dec. 7, 1875) [hereinafter

Confederate belligerency in part because all aspects of an effective government and bureaucracy administered the secessionist state.

The notion of constitutionalism as a desirable norm for the securing of stable, legitimate regimes emerged toward the end of the Enlightenment with Jean Jacques Rousseau and Immanuel Kant.[177] During the late-eighteenth century and nineteenth century, the increasing appearance of liberal democracies alongside or instead of monarchical governments steepened the importance of domestic administrative order at the international level. Attention to the internal deliberative process in these democracies followed logically from the underlying principles of international law.[178] Even at the beginning of the American Revolution — when the "law of nations" still fit firmly within the natural law tradition — *opinio juris*, or the tendency for states to act out of a sense of legal obligation, mattered. [179]

State of the Union 1875] ("Applying to the existing condition of affairs in Cuba the tests recognized by publicists and writers on international law, and which have been observed by nations of dignity, honesty, and power when free from sensitive or selfish and unworthy motives, I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own people and to other states, with courts for the administration of justice, with a local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection or occasional skirmishes and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it.").

177. *See* DOYLE, *supra* note 135, at 138–39 (noting that unlike Hobbes and Machiavelli, Rousseau saw war as symptomatic of "variations in the constitution of the state").

178. The term "international law" is attributed to Bentham who meant to distinguish this term from "the law of nations" as explored by Blackstone; in doing so, Bentham sought to highlight that international law involves transactions between sovereigns, rather than just the comparative laws of all nations. *See* M. W. Janis, Commentary, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 408–09 (1984).

179. Blackstone, Commentaries, Book 4, Chapter 5 ("The law of nations is a system of rules, deductible by natural reason, and established by universal consent among the civilized inhabitants of the world . . . And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom . . ."); *See also* Tom J. Farer, *Harnessing Rogue*

For example, through the Act of Parliament interdicting trade and commerce with the American colonies during the American Revolution, the British government signaled belligerency to third-party European states. Prior to that, British activity against the rebelling Americans amounted to no more than a police action against those resisting governmental authority. While that Act permitted the interdiction of trade and commerce, its significance is not necessarily for its commercial nature, but because the incumbent government had legislated the rebels from criminals to actors that deserved the acknowledgment of

Elephants: A Short Discourse on Foreign Intervention in Civil Strife, 82 HARV. L. REV. 511, 513 (1969) ("Today, as in the eighteenth century, the primary rules of international society can be induced from treaties, the practice of states (i.e. tacit agreements about appropriate behavior under defined circumstances), from the ubiquity of certain norms in domestic law, from the writings of scholars and propagandists, and from the public declarations of foreign policy decision makers."); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L LAW, 757-91 (2001); *compare* Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law,* 66 U. Chicago L. Rev. 1113, 1118 (1999) (arguing that customary international law is not driven by a sense of obligation). Goldsmith and Posner are almost certainly correct that international lawyers overstate the extent to which sovereign states are driven by *opinio juris*, however, they themselves may overstate the extent to which international law represents more than just interest convergence on narrow issues. For example, in Goldsmith and Posner's analysis of customary international law regulating the Union blockade, they argue that the Union's blockade was not effective under then-understood principles of customary international law. It is certainly true that Frank Owsley, a civil war historian, wrote that the Union blockade was "scarcely a respectable paper blockade" and "old Abe's . . . practical joke on the world." But, James McPherson, for example, citing a Confederate naval officer notes that the blockade "shut the Confederacy out from the world, deprived it of supplies, weakened its military and naval strength" and concluded that "historical opinion leans toward [the blockade's effectiveness]," *supra* note 84, at 381. Russell declared of the blockade: "The fact that various ships may have successfully escaped through it . . . will not of itself prevent the blockade from being an effective one by international law" so long as it was enforced by a number of ships "sufficient really to prevent access to [a port] *or to create an evident danger of entering or leaving it*." (emphasis in original) *Id.* at 385*; see also* Robert Hunt Sprinkle, *Two Cold Wars and Why They Ended Differently*, 25 REVIEW OF INTERNATIONAL STUDIES 623, 631 (1999) ("We know that the international cotton market became glutted in the early 1860s and that Southern production, first embargoed and then blockaded, proved easier to replace than expected.").

international law.[180] The British Parliament acknowledged war with the colonies through their legislation just as Congress recognized war with the Confederacy through its authorizations to Lincoln; neither could validly claim to third-party states that their acts applied with the force of law domestically, but, internationally, were without legal consequence.

During the American Civil War, President Lincoln's proclamation of a blockade of southern ports, Congressional vindication of Lincoln's wartime declarations, and a Supreme Court opinion that verified the condition of war between the North and South provided the clearest example of constitutional machinery establishing the sufficient conditions for belligerent recognition. As a result, Lord Russell, defending the British decision to recognize the Confederates as legitimate belligerents, was able to marshal support from statements from every branch of the U.S. government. Additionally, the Confederacy had formed an effective and popularly legitimized government. As a practical matter, that government also issued letters of *marque*, creating a necessity for Britain and other maritime powers to respond to the situation in the United States — Confederate privateers must have been declared either pirates or legitimate belligerents.

Constitutionalism did not just matter because it forced states

180. *See* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 693–94 (1863) (Nelson, J., dissenting) ("In the breaking out of a rebellion against the established Government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the Government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their co-operation in putting down the insurgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of 1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the Government. This was the character of the war of our Revolution till the passage of the Act of the Parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted and all ships and cargoes belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations.").

to admit when rebellion had reached an internationally significant level; it mattered because third-party states viewed legitimate governments as more stable for the international order.[181] Popular legitimacy (if not popular sovereignty) better ensured international stability.[182] Because "uncertainty generated in international relations forces citizens to depend emotionally and politically on their leaders," unpopular or illegitimate ruling authorities posed wider threats to both domestic and international order.[183] Gladstone's speech at Newcastle (which he later admitted regretting) that the Confederacy had formed a nation went beyond mere rhetoric. Similar to British action relative to the Greek insurrection, the importance of the formation of a legitimate government affected British decisions "supporting popular and liberal principles abroad."[184]

The point in recognizing the concern with constitutionalism, or responsible government, is meant to show that there existed a standard in the international community: a nascent form of self-determination that heavily influenced belligerent recognition.[185]

181. *See* Walker, *supra* note 31, at 183 ("It must be noticed, too, that the stability of some of the insurgent Governments varied considerably from time to time. In certain provinces Spanish power had a moment of recovery, and it was not until after 1819 that the hopes of Spain had definitely waned. In view both of the general political situation in Europe and the uncertainties attending the position in South America there were sound reasons for caution, and the consequent delay is entirely politically understandable.").

182. *See id.* at 186 ("Insurgents backed by a stable political organisation had been treated as being what they were in fact, and there had been no interference with the maritime operations of such insurgents when carrying on their operations according to the ordinary usages of war, even though their actions involved the seizure by unrecognised authorities of the ships and goods of British subjects."); *see also* Ulysses S. Grant, Special Address (June 13, 1869) (remarking with regard to the Cuban insurrection: "The existence of a Legislature representing any popular constituency is more than doubtful.").

183. David P. Fidler, *Desperately Clinging to Grotian and Kantian Sheep: Rousseau's Attempted Escape from the State of War*, *in* CLASSICAL THEORIES OF INTERNATIONAL RELATIONS 125 (Ian Clark & Iver B. Neumann eds., 1996); *see also* Howard Williams & Ken Booth, *Kant: Theorist Beyond Limits*, *in* CLASSICAL THEORIES OF INTERNATIONAL RELATIONS 77 (1996) ("Thus a constitution has to be created which reins in the ruler who is also at the same time regulating (coercively, if necessary) the activities of citizens.").

184. OGLESBY, *supra* note 39, at 19.

185. Indeed, this nascent form developed into well-established law after the

Constitutionalism is set beside commercialism in order to show that during the nineteenth century, there were points of convergent interests among most of the European and American countries for acknowledging legitimate efforts at succession to the international community.[186]

For example, during the Greek insurrection of 1821, Britain, then possessing a protectorate over the Ionian islands, shifted policy when the Greeks became both militarily and constitutionally established.[187] While the specific details of the conflict will not be explored here, it is important to note that the defining shift in policy of Great Britain followed closely the formation of a national assembly at Epidauros that "proclaimed the independence of Greece, promulgated a Constitution and set up the framework of a general government."[188] While indecision marked British opinion on international law up to the point that a Constitution was formed,

> It became necessary to put aside all indecision when on March 25, 1822, the Greek provisional government established by the terms of the Constitution promulgated at Epidauros on January 13, 1822,

ascendancy of the United Nations as a norm-creating organization. *See* Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L. L. 705, 737 (1988) ("Similarly, the legal adviser to the Secretary-General prepared a memorandum explaining the rules applicable to accepting or rejecting the credentials of a delegation when there is doubt about their validity, for example, during a civil war when there may be two adversary claimants. In such situations, too, UN members should be guided by Charter Article 4, the legal adviser said. Moreover, '[w]here a revolutionary government presents itself as representing a State, in rivalry to an existing government, the question at issue should be which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfillment of the obligations of membership. In essence, this means an inquiry as to whether the new government exercises effective authority within the territory of the State and is habitually obeyed by the bulk of the population.'").

186. *See* Dennis, *supra* note 12, at 204, 205 (arguing that Jefferson's view — that political realities, not theories ought to drive international relations — may have been one of the United States' most important contributions to international law).

187. *See* OGLESBY, *supra* note 39, at 19. For a good summary of both internal and external U.S. perspectives on the Greek conflict, see Angelo Repousis, *"The Cause of the Greeks": Philadelphia and the Greek War for Independence, 1821-1828*, 123 PENN. MAG. HIST. & BIOGRAPHY 333 (1999).

188. OGLESBY, *supra* note 39, at 19.

> proclaimed a blockade of certain Turkish ports, and the Greek victory of Kemeris at Chios on the following June 18, gave to the insurgents the command of the seas.[189]

Indeed, the importance of internal political stability went hand in hand with commercial concerns. "Commercial pacifists" had long argued that "representative government contributed to peace — when the citizens who bear the burdens of war elect their governments, wars become impossible — for them, the deeper cause of peace was commerce."[190]

The Spanish Civil War represented not only the unraveling of European stability prior to World War II, but also the emergence of institutionalism as a force in belligerent recognition. The glaring inconsistencies of the Spanish Civil War with any prior understanding of belligerent recognition are manifold. First, the elected, incumbent government of Spain, lawfully requesting assistance from France, was confronted with a deferral to limited transfers from private arms dealers, and then the proposal for an international conference to manage the conflict. The Spanish Civil War represented a shift in third-party states response to civil wars — before, states determined whether they had to accord rights to revolutionaries, but after, no belligerent rights would be accorded unless third-party states agreed to do so.[191] This clearly "limited what [the Republican government] regarded as their legitimate right, as a properly constituted government, to buy arms where they wished."[192] Second, the powers seeking (or claiming) to enforce non-intervention had recognized different governments as legitimate. Thus, Italy, Germany, Portugal, El Salvador, and Albania had accepted the Franco regime as the legitimate government of Spain. Third, despite the declaration of blockade by the parent government, the most recognized form of belligerent acknowledgment, third-party states steadfastly refused to declare neutrality. Britain and France pursued their attempts at non-intervention; Russia briefly supplied the Loyalist

189. *Id.* at 20–21.

190. DOYLE, *supra* note 135, at 231.

191. *See* Walker, *supra* note 31, at 208–09 (asserting that Britain never intentionally recognized belligerency in Spain).

192. Hugh Thomas, *The Spanish Civil War*, *in* THE INTERNATIONAL REGULATION OF CIVIL WARS, *supra* note 13, at 30.

government; and Germany, Italy, and Portugal funneled enormous amounts of arms and aid to Franco's forces. As will be argued below, the reliance of France and Britain on policies of non-intervention revealed the ascent (problematic in the case of Spain) of institutionalism as the new conduit for the international community's values of what methods would ensure orderly succession of legitimate regimes.

C. THE INSTITUTIONALIST TRADITION OF BELLIGERENT RECOGNITION

During the development of belligerent recognition in the nineteenth century, international institutions were fleeting and not highly influential. During the American Revolution, the First League of Armed Neutrality represented an extraordinarily attenuated form of institutionalism — it might be safely said that the formation of the league extended belligerent rights to the Americans, but it otherwise coordinated little action toward the American-British conflict. Institutions eventually would become important sources of international law and the establishment of international norms upon which customary law might be made.

In the institutionalist tradition of belligerent recognition, concerts of states or international organizations both recognize and manage internal conflict, civil war, or revolution. Institutionalism as a method of promulgating international peace and order is found in the writings of Kant, Locke, and Bentham,[193] but was articulated most forcefully and persuasively by Woodrow Wilson after World War I. He saw international institutions as the method by which universal principles governing the law of nations would be established and overseen:

> Our object now, as then, is to vindicate the principles of peace and justice in the life of the world as against selfish and autocratic power and to set up amongst the really free and self-governed peoples of the world such a concert of purpose and of action as will henceforth ensure the observance of those principles.[194]

For example, Europeans, led by the British, made overtures

193. *See* DOYLE, *supra* note 135, at 211, 213–29.

194. DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS 34–35 (1990) (citing President Woodrow Wilson, Address to a Joint Session of Congress (April 2, 1917)).

toward mediation between belligerents during the Spanish Colonial Wars for Independence and the American Civil War. Institutions or concerts of states experienced limited success in affecting the course of the civil war in the nineteenth century although their role steadily increased after the Spanish Civil War.

During the American Civil War, when the United States attempted to accede to the Declaration of Paris, for example, it was an institutional response — from the European maritime powers — that decided it would not be allowed to do so. Similarly, European powers unsuccessfully attempted to mediate between the Union and the Confederacy. Lincoln rebuffed French offers to mediate in 1862 and 1863 ultimately stating that, in its words, "Congress would be obliged to look upon any further attempt in the same direction as an unfriendly act which it earnestly deprecates."[195] The importance of the European efforts to mediate lies not so much in evaluating its success or failure but in the motivations of the powers to end "'the innumerable calamities and immense bloodshed' which attended the war and evils which it inflicted upon Europe."[196] This motivation — the desire to minimize the effect of war on civilians — underscored the future ascent of institutionalism as the preferred method by which third-party states recognized and managed civil wars.

Indeed, institutionalism clearly drove British and French policy toward the Spanish Civil War; not only could the conflict be recognized through international institutions, but could be managed by them. The policy confused international lawyers since the conditions thought necessary for extending neutral rights to the contestants existed, but third-party states refused to acknowledge the civil war. This effectively denied shipment of arms to the Loyalists while Germany, Italy, and Portugal acted in concert to support the rebels. British and French policy may have been driven by the initial successes of the League of Nations

195. Concurrent Resolutions of Congress (March 4, 1863) in 2 PAPERS RELATING TO FOREIGN AFFAIRS, ACCOMPANYING THE ANNUAL MESSAGE OF THE PRESIDENT TO THE FIRST SESSION OF THE THIRTY-EIGHTH CONGRESS 813 (1864).

196. MONTAGUE BERNARD, A HISTORICAL ACCOUNT OF THE NEUTRALITY OF GREAT BRITAIN DURING THE AMERICAN CIVIL WAR 467–68 (1870) (quoting M. Drouyn de Lhuys of France in an address to the British Government).

from 1925-30,[197] under which it appeared that both civil and international wars *could* be managed by international institutions. When war broke out in Spanish Africa in 1936, Britain and France, "shaken by Hitler's remilitarization of the Rhineland, were interested in trying to achieve some kind of general stabilization in Europe by means of . . . an international instrument whereby the war in Spain should so far as possible be insulated."[198]

It has already been noted that the attempts at orchestrated non-intervention failed. Italy, Germany, and Portugal violated the terms that were meant to regulate international management of the Spanish Civil War. What is more interesting about the Spanish Civil War is the effect of favoring this "international instrument" over the international law of belligerent recognition, such as it was. Skeptics of international law have often lamented its "legalistic-moralistic approach to international problems. . . ."[199] So far as the Spanish Civil War goes, the opposite case seems more persuasive: the *abandonment* of international law allowed the excesses of Mussolini, Hitler, and Salazar to precipitate Franco's success. Belligerent recognition would have resulted in a policy of neutrality by third parties, rather than the debilitation of the incumbent Loyalist regime.

The conduct of third-party states should not, in any case, be seen as suggesting anything normative about institutionalism — sometimes it works; sometimes it does not. Certainly it is more likely to work when participants agree on the interests involved.[200] Indeed, after the Spanish Civil War, institutions have

197. P. M. H. BELL, THE ORIGINS OF THE SECOND WORLD WAR IN EUROPE 35–36 (1986).

198. Thomas, *supra* note 192, at 30.

199. *See* George F. Kennan, *Diplomacy in the Modern World*, *in* INTERNATIONAL RULES: APPROACHES FROM INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 99, 101 (Robert J. Beck et al. eds., 1996).

200. *See, e.g.*, ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 101 (1984) (emphasizing the importance of interest convergence in the establishment and sustainability of international institutions). *See generally* ORAN R. YOUNG, INTERNATIONAL COOPERATION: BUILDING REGIMES FOR NATURAL RESOURCES AND THE ENVIRONMENT (Peter J. Katzenstein ed.,1989) (discussing interest convergence in the context of international environmental law).

been increasingly used as mechanisms for recognition and maintenance of civil war hostilities.[201] During the conflicts discussed where institutions played a role in hostilities, it is evident that the institutions were lent varying levels of weight toward specific purposes. The resolution of France and Britain not to permit the Declaration of Paris to be legally available to the United States during the American Civil War was an instance of agreed-upon interests made in the shadow of the previously discussed tradition of commercialism. Conversely, British and French faith in the international response to the Spanish Civil War was mistaken given that the states recognized at the time that the participants in the multilateral response did *not* share sufficient interests.

After the end of World War II, the major powers established the United Nations as the chief institution for orchestrating the international response to rebellion, insurrection, and civil war.[202] Of course, the organization's structural features, especially the Security Council, limited its ability to act in many of these civil conflicts during the twentieth century since the Cold War and colonial legacies caused one of the veto-holding members to prevent collective action.[203] In the many conflicts where the

201. The role of the International Red Cross as well as the United Nations in civil conflicts has grown substantially. *See generally* Oscar Schachter, *The United Nations and Internal Conflict*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 401–44 (John Norton Moore ed., 1974) (discussing the role of the United Nations in internal conflicts during its first twenty-five years).

202. *See* Taubenfeld, *supra* note 125, at 384 (citing JAMES LESLIE BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 93 (1944) ("The details of such a minimum obligation would require careful consideration, but at the least it would mean that every state [party to the United Nations Charter] would be bound to deny to an aggressor the rights that neutrals have traditionally been expected to accord to belligerents."); *see also* U.N. Charter art. 2, para. 5 ("All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."). *But see* Taubenfeld, *supra* note 125, at 385 (recognizing that regardless of the strength of the international legal language giving effect to the United Nations, its impact remains subject to comity).

203. Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1, 18 (1994) ("One example is the central importance of the veto in the Security Council. The veto (or principle of unanimity) is a legal rule embodied in the Charter for political reasons and used (or, some would say, abused) by the permanent members primarily in their national interests."); Keith L. Sellen, *The United*

United Nations could not effectively intervene, concerts of states nevertheless played important roles in recognizing and managing internal conflict.[204]

IV. LIBYA AND THE TRADITIONS OF BELLIGERENCY

Returning to the puzzle presented at the beginning of the Article, why would states like France, Italy, Qatar, the U.S. and the United Kingdom, which all agreed to the multilateral intervention based on international humanitarian law, simultaneously pursue a policy of unilateral recognition of the opposition in Benghazi?

Recognition of the Libyan opposition facilitated both national and multilateral interests in uninterrupted flow of energy; created the conditions for a pluralistic Libyan republic; and, helped stabilize both Africa and the broader region by facilitating the exit of Muammar Qadhafi.[205]

A. THE FACTUAL BACKGROUND

While the exact and immediate causes of the Libyan civil war are manifold — certainly including allegations of government ineptitude, corruption, and inspiration from protests in neighboring Egypt and Tunisia — it is well-documented that the

Nations Security Council Veto in the New World Order, 138 MIL. L. REV. 187, 224 n.224 (1992) ("Interested members, however, also may vote on questions under Chapter VII, which involve Security Council sanctions . . . .").

204. *See* Eleanor Lumsden, *An Uneasy Peace: Multilateral Military Intervention in Civil Wars*, 35 N.Y.U. J. INT'L L. & POL. 795, 796–97 (2003) (identifying some of these episodes: (1) Belgium and the United States in the Democratic Republic of Congo ("D.R.C.") in 1964; (2) the U.S. and Organization of American States ("OAS") in the Dominican Republic in 1965; (3) France and Belgium in Zaire in 1978; (4) the United States and Allied Forces in Iraq in 1991; and (5) NATO in Kosovo in 1998).

205. It is probably not consequential, for this thesis at least, that the form of exit was death. The U.N. Security Council's referral of Qadhafi to the International Criminal Court, or even the probable outcome of a trial in Libya, would be his effective removal from influence nationally, regionally and internationally. *Timeline: Moammar Gadhafi's Final Moments*, CNN (Oct. 20, 2011), http://articles. cnn.com/2011-10-20/africa/world_africa_libya-death-timeline_1_national-transitional-council-officials-moammar-gadhafi-sirte?_s=PM:AFRICA.

protests began in Benghazi on February 15, 2011.[206] The government's response, which began with tear gas, crowd dispersal, and arrests, quickly escalated to the use of live ammunition.[207] Typical of the events leading to outbreak of civil war, the government claimed that the protesters were an "armed rebellion," to be dealt with under domestic criminal law.[208] On the ground, soldiers and government personnel up to high levels defected to the inchoate opposition movement.[209] While the

206. Vivienne Walt, *How Libya's Second City Became the First to Revolt*, TIME (Feb. 22, 2011), http://www.time.com/time/world/article/0,8599,2052980,00.html (detailing the origins of the Libyan unrest); *see also* Kareem Fahim, *In the Cradle of Libya's Uprising, the Rebels Learn to Govern Themselves*, N.Y. TIMES, Feb. 24, 2011, http://www.nytimes.com/2011/02/25/world/africa/25benghazi.html (explaining that rebels and average citizens in Benghazi set up their own informal system of law, order, and governance within days of the initial uprising); *Libya: At Least 370 Missing From Country's East*, HUMAN RIGHTS WATCH (Mar. 30, 2011), http://www.hrw.org/ en/news/2011/03/30/libya-least-370-missing-countrys-east ("The Libyan government has released no information about the number or location of people it has arrested across the country since anti-government protests began on February 15 in eastern Libya and then devolved into heavy fighting between the government and armed opposition groups.").

207. The report of deaths and injured vary widely by source, many of which admit they cannot confirm exact numbers or events. *See, e.g.*, Douglas Birch, *U.S. Condemns Crackdowns on Mideast Protests*, WASH. POST, Feb. 20, 2011, http:// www.washingtonpost.com/wp-dyn/content/article/2011/02/20/AR2011022001049.html ("Libyan forces fired machine-guns at mourners marching in a funeral for anti-government protesters in Benghazi Sunday, a day after commandos and foreign mercenaries pummeled demonstrators with assault rifles and other heavy weaponry. A physician in Benghazi told The Associated Press that at least 200 had been killed in demonstrations against the regime of Moammar Gadhafi.").

208. *Gaddafi Defiant as State Teeters*, ALJAZEERA, http://english.aljazeera.net/news/africa/2011/02/20112235434767487.html (last modified Feb. 23, 2011).

209. *Id.* ("Libyan diplomats across the world have either resigned in protest at the use of violence against citizens, or renounced Gaddafi's leadership, saying that they stand with the protesters. Late on Tuesday night, General Abdul-Fatah Younis, the country's interior minister, became the latest government official to stand down, saying that he was resigning to support what he termed as the 'February 17 revolution' . . . Mustapha Abdeljalil, the country's justice minister, had resigned in protest at the 'excessive use of violence' against protesters, and diplomats at Libya's mission to the United

extent and severity of the government's crackdown was not (and still is not) clear, foreign governments quickly asserted that the response amounted to possible crimes against humanity.[210] Incumbent and opposition forces divided control of the country.[211] On February 26, 2011, the U.N. Security Council unanimously adopted Resolution 1970 which aimed to "impose immediate measures to stop the violence [perpetrated by Muammar Qadafi], ensure accountability and facilitate humanitarian aid."[212]

The measures in the resolution referred the situation to the International Criminal Court; imposed an arms embargo on Libya; leveled sanctions on key Qadhafi regime participants; ensured that "frozen assets will be made available to benefit the people of Libya"; provided for the facilitation of humanitarian assistance; and, committed the Security Council to review of the situation.[213]

The text of the resolution was relatively clear: the principal international concerns guiding multilateral intervention in the Libyan civil war were the perpetration of violence against civilians and the importance of bringing perpetrators of that violence to account. While Resolution 1970 did not explicitly

Nations called on the Libyan army to help remove 'the tyrant Muammar Gaddafi'. A group of army officers has also issued a statement urging soldiers to 'join the people' and remove Gaddafi from power.").

210. *See, e.g.*, Birch, *supra* note 207 ("State Department spokesman Philip Crowley said the U.S. has received a number of credible reports that hundreds of people have been killed and injured in the unrest, although the extent of the violence is unknown because Libya has denied access to international media and human rights groups. Crowley said the U.S. has raised "strong objections to the use of lethal force against peaceful protesters. The European Union also denounced the Libyan government's response to the protests, with the EU's foreign policy chief calling for an end to the violence.").

211. Sarah Margon & Jessica Kahlenberg, *The State of Play in Libya*, CTR. FOR AM. PROGRESS (July 15, 2011), http://www.americanprogress.org/issues/2011/07/ libya_state_of_play.html (noting that as of July 15, Libya was effectively divided between the opposition in the east and Gaddafi's regime in the west).

212. *Fact Sheet: UN Security Council Resolution 1970, Libya Sanctions*, U.S. MISSION TO THE U.N. (Feb. 26, 2011), http://usun.state.gov/briefing/statements/ 2011/157194.htm (citing S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011)).

213. *Id.*

declare that a state of civil war existed in Libya, it did refer to principles of international humanitarian law, generally applicable to limit the effects of armed conflict.[214] Between February 26 and March 10, 2011, protests expanded and militarized while the government's response became more heavy-handed; both sides began committing atrocities that might be prosecuted as war crimes.[215] The conflict created tens of thousands of refugees.[216]

On March 10, 2011, France declared that it would recognize the "Libyan National Council" — a largely anonymous group — as the legitimate representative of the Libyan people.[217] The decision not only surprised many of France's allies and joint participants in the U.N.-led efforts, but also many of its high-ranking diplomatic personnel.[218]

214. *See generally What is International Humanitarian Law?*, INT'L COMM. OF THE RED CROSS (July 2004), http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf ("International humanitarian law applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence. The law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting.").

215. *See* Ian Black & Owen Bowcott, *Libya Protests: Massacres Reported as Gaddafi Imposes News Blackout*, GUARDIAN.CO.UK (Feb. 18, 2011), http://www.guardian.co.uk/ world/2011/feb/18/libya-protests-massacres-reported ("Umm Muhammad, a political activist in Benghazi, told the Guardian that 38 people had died there . . . 'This is a bloody massacre — in Benghazi, in al-Bayda, all over Libya. They are releasing prisoners from the jails to attack the demonstrators. The whole Libyan people want to bring down this regime' . . . '[and on that day] a number of conspirators were executed. They were locked up in the holding cells of a police station because they resisted, and some died burning inside the building.'").

216. *See Libya: Barack Obama Announces Gaddafi Sanctions*, BBC NEWS (Feb. 26, 2011), http://www.bbc.co.uk/news/ world-africa-12585949 ("Secretary General Ban . . . said that 22,000 people had fled Libya via Tunisia, and a further 15,000 via Egypt").

217. France Recognizes Libya Opposition as Legitimate Representatives of the People, HAARETZ.COM (Mar. 10, 2011), http://www.haaretz.com/news/inter national /france-recognizes-libya-opposition-as-legitimate-representatives-of-the-people-1.348338. The group has been called the "Libyan National Council," the "Interim Governing Council," the "Interim Governing Council," and the "Transnational National Council." *See, e.g.*, *id.*; James Blitz, *Libyan Opposition Wins Wider Recognition*, FIN. TIMES, http://www.ft.com/intl/cms/s/0/678bd348-ae38-11e0-8752-00144feabdc0.html#axzz1azFAmNhG (last updated July 15, 2011).

218. *See Sarkozy's Libyan Surprise*, ECONOMIST (Mar. 14, 2011), http://www.

On March 17, 2011, the Security Council revisited its February 26 mandate. Determining that the "deteriorating situation, the escalation of violence, and the heavy civilian casualties," justified stronger intervention, it adopted a "no-fly zone" over Libya to be enforced "nationally or through regional organizations or arrangements," which were further authorized "to take all necessary measures to enforce compliance" with the mandate.[219] While Security Council Resolution 1973 enjoyed less support, with ten authorizing votes and five abstentions,[220] it repeated that the key international concerns were "to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, *including Benghazi*, while excluding a foreign occupation force of any form on any part of Libyan territory."[221] Resolution 1973 also stressed "the need to intensify efforts to find a solution to the crisis which responds to the legitimate demands of the Libyan people and *notes* the decisions of the Secretary-General to send his Special Envoy to Libya and of the Peace and Security Council of the African Union to send its ad hoc High-Level Committee to Libya with the aim of facilitating dialogue to lead to the political reforms necessary to find a peaceful and sustainable solution."[222] The new resolution authorizing the use of force not only stepped closer to acknowledging an open civil war — through reference to Benghazi — but also to the importance of international management of Libya's transition to a popularly legitimate government.

Stating that the "Libyan system has lost its legitimacy," on March 27, 2011, Qatar recognized the "transitional council" after concluding an agreement for Qatar Petroleum to market crude oil no longer controlled by Muammar Qadhafi.[223] Qatar's

economist.com/blogs/newsbook/ 2011/03/france_and_libya.

219. S.C. Res. 1973, U.N. Doc., ¶ 8, S/RES/1973 (Mar. 17, 2011).

220. Security Council Approves No-Fly Zone, *supra* note 17.

221. S.C. Res. 1970, *supra* note 6, ¶ 4 (emphasis added).

222. *Id.* at ¶ 2.

223. *Qatar Recognises Libyan Rebels After Oil Deal*, ALJAZEERA, http://english.aljazeera.net/news/middleeast/2011/03/201132814450241767.html (last modified Mar. 28, 2011) (quoting the outgoing Gulf Co-Operation Council Secretary General, Abdulrahman al-Attiyah).

recognition was supported by the Gulf Cooperation Council members Bahrain, Kuwait, Oman, Saudi Arabia, and the United Arab Emirates.[224] On April 4, 2011, Italy recognized the "National Transition Council" as the "only legitimate interlocutor on bilateral relations", promising an aid package underwritten by energy company ENI and Italian bank UniCredit.[225] On July 15, 2011, the United States recognized the National Transitional Council after obtaining promises it would uphold Libya's international obligations, pursue a democratic reform agenda and use funds for the benefit of Libyan people.[226] The United Kingdom declared its recognition of the NTC on July 27, 2011.[227] Other states rapidly followed. [228]

B. RECOGNITION OF THE NATIONAL TRANSITIONAL COUNCIL MINIMIZED DISRUPTIONS IN GLOBAL ENERGY FLOWS

Energy security is a fundamental and global commercial

224. *See id.*

225. Sherine El Madany*, Italian FM Pledges Financial, Fuel Aid to Libyan Rebels*, Reuters, May 31, 2011 available at http://af.reuters.com/article/libyaNews/ idAFLDE74U15820110531?pageNumber=1&virtualBrandChannel=0 ("In that memorandum, Italy not only confirmed its recognition of the council as the only representative of the Libyan people but also we took a commitment (from) the Italian company Eni and an Italian bank UniCredit to provide the council for the needs of the Libyan people.").

226. Scott Peterson, *U.S. Recognition of Rebels Could Bring More Funds*, July 15, 2011 available at http://www.csmonitor.com/World/Middle-East/2011/0715/ US-recognition-of-Libya-rebels-could-bring-more-funds. ("Adhering to those assurances may not be easy, judging by issues that have recently dogged the TNC. 'Life's too comfortable in Benghazi. No real leadership. And too much suspicion and posturing by the individuals in and around the Council,' says one European analyst in Benghazi who asked not to be named. The result is an 'astonishing lack of urgency from Benghazi in the last few weeks.' The renewed statements of support from the contact group – and pledges of several hundred million more dollars for the opposition – came as rebel forces fighting on both eastern and western fronts have found it difficult to solidify military advances.").

227. *Hague Says UK to Recognize Libyan Opposition*, July 27, 2011 available at http://www.reuters.com/article/2011/07/27/us-britain-libya-hague-idUSTRE76Q27720110727

228. Matthew Lee and Selcan Hacaoglu*, Italy: Libyan Opposition Will Be Recognized*, FORBES, July 15, 2011 available at http://www.forbes.com/feeds/ap/ 2011/07/15/general-libya-diplomacy_8566680.html.

priority. While free maritime passage remains an important multilateral interest, the regime governing the ocean — based on the U.N. Charter, the U.N. Convention on the Law of the Seas and well-developed customary international law — has minimized the chance that civil wars will affect maritime commerce in the way they did between 1776 and 1939.[229] Indeed, while ocean-going commerce remains critical, commercial and military use of airspace has emerged as a new frontier in facilitating movement of goods and people. Moreover, as industrialization has expanded across the globe, energy has become a key good the movement of which ties together the commercial and economic interests of a significant majority of states.[230] Oil remains the most important source for global energy production and nearly two-thirds of that resource lies in the Middle East.[231] Civil wars now potentially threaten these and other important multilateral interests. In the case of Libya, preserving the global supply of uninterrupted, affordable energy was an explicit or implicit foreign policy interest of a significant number of states, and certainly those with historical and presently high levels of energy consumption.[232] Libya holds the largest known oil reserves in

229. Blockades as a measure to restore international peace and security are specifically allocated to the U.N. Security Council under Article 42 of the U.N. Charter. U.N. Charter art. 42.

230. Agilika Ganova, *European Union Energy Supply Policy: United in Diversity?*, INSTITUT EUROPÉEN DES HAUTES ETUDES INTERNATIONALES 4 (2007), http://www.iehei.org/bibliotheque/memoires/MemoireGANOVA.pdf ("Energy is crucial for the economic development, social stability and geopolitical security of every country. It has become even more important with the growing competition for the access to the limited energy resources as dynamic economic growth and population increase are bringing about a rise in energy demand. Energy policy is regarded as a strategic policy area as first, it has influence on national economies; whether energy will be available at reasonable prices influence's a state's economic competitiveness and power . . . . Energy security, in terms of secure supply and stable prices is increasingly related to geopolitics and international relations.").

231. BP, QUANTIFYING ENERGY: BP STATISTICAL REVIEW OF WORLD ENERGY 6 (2006), *available at* http://www.bp.com/liveassets/bp_internet/russia/bp_russia_english/STAGING/local_assets/downloads_pdfs/s/Stat_Rev_2006_eng.pdf (noting that at the end of 2005, the Middle East controlled 61.9 percent of the world's proven oil reserves; on top of that, 9.5 percent was in Africa with Libya controlling the greatest share of the reserves).

232. *See Libya Analysis Brief*, U.S. ENERGY INFO. ADMIN.,

Africa and approximately 3.34 percent of global reserves,[233] although there is a consensus that its petroleum resources are probably much greater.[234] Moreover, its oil is relatively easily extracted and needs little refining.[235] A substantial part of Libya's extraction, transportation, and refining infrastructure is located in the eastern half of the country that was controlled by the Libyan opposition.[236] Third-party states quickly acknowledged the threat that the civil war posed to global energy markets.[237]

http://www.eia.gov/EMEU/cabs/Libya/pdf.pdf (last updated Feb. 2011) ("According to the International Energy Agency (IEA) the vast majority (around 85 percent) of Libyan oil exports are sold to European countries namely Italy, Germany, France, and Spain. With the lifting of sanctions against Libya in 2004, the United States has increased its imports of Libyan oil. According to EIA January through November estimates, the United States imported an average of 71,000bbl/d from Libya in 2010 (of which, 44,000 bbl/d was crude), up from 56,000 bbl/d in 2005 but a decline from 2007 highs of 117,000 bbl/d."); *see also* Nadia M. Abbasi, Energy Security and Europe, INST. STRATEGIC STUD., http://www.issi.org.pk/old-site/ss_Detail.php?dataId=486 (last visited Nov. 12, 2011) ("According to the World Energy Council, energy security means reduced vulnerability to transient or long-term physical disruptions to import supplies as well as the availability of local and imported resources to meet the growing demand for energy over a period of time and at affordable prices. Energy security is also defined as an uninterruptible supply of energy, in terms of quantities required to meet demand at affordable prices."); Michael T. Klare, *The Futile Pursuit of "Energy Security" by Military Force*, 13 BROWN J. WORLD AFF. 139 (2007) (quoting then-President George W. Bush, "The goals of this strategy are clear, to ensure a steady supply of affordable energy for America's homes and businesses and industries.").

233. BP, *supra* note 231.

234. *See Libya Analysis Brief*, *supra* note 232.

235. Clifford Krauss, *Why the Disruption of Libyan Oil Has Led to a Price Spike*, N.Y. TIMES (Feb. 23, 2011), http://www.nytimes.com/2011/02/24/business/energyenvironment/24oil.html?pagewanted=all (explaining that other sources of crude oil may not effectively replace Libya's product because of its higher sulfur content).

236. *See* Javier Bias et al., *Qatar Boost for Libyan Rebel Council*, FIN. TIMES (Mar, 28, 2011, 7:32 PM), http://www.ft.com/intl/cms/s/0/936c8ff2-5965-11e0-bc39-00144feab49a,s01=1.html#axzz1TzJfBekU ("Over the past two days rebels have seized control of the bulk of Libya's oil industry — including the country's largest oilfields in the so-called Sirte basin and the main terminals — as they have pushed back Muammar Qadhafi's forces with the assistance of NATO air strikes.").

237. Damian Kahya, *Arab Protests Pose Energy Threat*, BBC NEWS (Feb. 22, 2011), http://www.bbc.co.uk/news/business-12534961 ("The world's 12th-

Just as in the nineteenth century commercialism drove belligerent recognition out of a need to preserve maritime trade, states recognized the opposition in Benghazi out of a need to ensure that the conduct of hostilities between the incumbent regime and the opposition cause minimal disruptions to the participation of Libya in the global energy supply.[238] While the precise details behind France's initial recognition remain somewhat opaque, there are strong indications that it followed some guarantee of access to French energy firms.[239] Qatari recognition on March 28, 2011 allowed the Libyan opposition to facilitate exploitation of oil resources under their control.[240] Italian recognition on April 4 was part of an effort to secure the flow of oil from Libya to Italy – the main conduit through which Libya's oil supplied Europe.[241] Indeed, recognition itself allowed Libyan petroleum exports to circumvent the sanctions regime imposed by the U.N.[242] In its broader, historical context, the

largest oil exporter with the largest reserves of oil in Africa — according to BP's Energy Statistics Bulletin for 2009 — Libya is the most important from an energy viewpoint . . . If there is a disruption, it could be particularly sensitive just because of the very short distance involved," warns Richard Swann from Platts. If you have a long-term contract to buy Libyan crude which comes to you regularly, it would be hard to replace quickly.").

238. Bias, *supra* note 236 ("A Libyan opposition leader said that Qatar had also agreed to sell oil on its behalf in international markets – although Qatari officials were on Monday unavailable to comment on any such deal. But Washington has made clear that opposition oil sales need not be subject to the sanctions imposed on Libya.").

239. Julian Borger and Terry Macalister, *The Race is On for Libya's Oil, with Britain and France Both Staking a Claim*, The Guardian, Sept. 1, 2011 available at http://www.guardian.co.uk/world/2011/sep/01/libya-oil.

240. Clifford Krauss, *Libyan Rebels Aim to Revive Oil Exports*, NEW YORK TIMES, Mar. 28, 2011 available at http://www.nytimes.com/2011/03/29/business/ global/29oil.html?_r=1.

241. *Italy Recognizes Libyan* Opposition, UPI.COM, April 4, 2011, http://www.upi.com/Top_News/Special/2011/04/04/Italy-recognizes-Libyan-opposition/UPI-33171301939103/ ("Frattini said the recognition was part of an effort in Rome to start discussing oil operations with rebel leaders in Libya. Italy was Libya's largest trading partner.").

242. *Id*. *See also* Patrick Donahue and Alaric Nightingale, *Libyan Opposition Prepares to Export Oil as Rebels Push Forward*, Apr. 5, 2011 *available at* http://www.firstenercastfinancial.com/news/story/42508-libyan-opposition-prepares-export-oil-rebels-push-forward ("The European Union's embargo on Libyan oil and gas exports only targets the Qaddafi regime, Michael Mann, spokesman for European Union foreign policy chief Catherine

somewhat curious decision to recognize the Libyan opposition makes more sense. Recognition of the opposition facilitated both individual interests of the states that did so—France, Qatar, Italy, the U.S., the U.K. – as well as collective concerns about the movement of Libyan oil. Rebels, in turn, opened areas under their control to foreign commerce as a way to facilitate recognition.[243]

C. RECOGNITION OF THE NATIONAL TRANSITIONAL COUNCIL (ARGUABLY) FACILITATED THE FORMATION OF A PLURALISTIC LIBYAN REPUBLIC

When the civil war broke out, Qadhafi quickly called it an "armed rebellion" and asserted that "Islamists" had taken small towns in the east.[244] In a lengthy televised address, Qadhafi's son Saif expanded the ranks of the rebels to include "drunkards and thugs."[245] Official governmental representatives repeatedly asserted that the protests constituted an internal Libyan matter, although those statements often explicitly referred to a civil war already under way.[246] However, just as third-party states viewed the imposition of blockades in the 19th century as evidence that a government had acknowledged a state of war (Qadhafi, in fact,

Ashton, told reporters in Brussels today. Mann said the 27-nation bloc had 'no issue' with commercial dealings in Libyan gas and oil as long as the revenue didn't reach Qaddafi and his supporters. The United Nations imposed sanctions on Libya which the EU adopted and expanded.").

243. *See* DAVID ARMSTRONG, REVOLUTION AND WORLD ORDER (1993). Armstrong's analysis emphasizes that revolutionary regimes take advantage of international law to "gain benefits" from the international system.

244. Al-Jazeera, *supra* note 208 ("Qadhafi, who termed the protests an 'armed rebellion,' said that security cordons set up by police and the military would be lifted on Wednesday, telling his supporters to 'go out and fight [anti-government protesters].' He blamed the uprising in the country on 'Islamists,' and warned that an 'Islamic emirate' has already been set up in Bayda and Derna, where he threatened the use of extreme force.").

245. BBC, *Libya Protests: Gaddafi's Son Warns of Civil War*, Feb. 21, 2011, *available a*t http://www.bbc.co.uk/news/world-middle-east-12520586.

246. Al-Arabiyya.net, *France Says Qaddafi Could Stay in Libya if Quits Politics*, July 19, 2011 (quoting Libyan ambassador to Russia); BBC, *Libyan leader ready for ceasefire, warns NATO against four main issues*, May 4, 2011 (quoting Qadhafi's Libyan state television address, "Was it Security Council resolution 1973 which was passed, despite the fact that the Security Council is totally incompetent to deal with this matter, because it is an internal matter which absolutely does not concern the Security Council?").

tried to mine and prevent use of rebel-held ports), Qadhafi's relatively quick use of warplanes in the east seemed determinative that a state of war existed.[247]

More importantly, the rebelling populations and defectors from the government appeared to start forming governance structures to run the eastern towns and provinces.[248] On March

247. Nick Meo, *Libya Protests: 140 "Massacred" as Gaddafi Sends in Snipers to Crush Dissent*, DAILY TELEGRAPH, *available at* htt://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8335934/Libya-protests-140-massacred-as-Qadhafi-sends-in-snipers-to-crush-dissent.html ("Snipers shot protesters, artillery and helicopter gunships were used against crowds of demonstrators, and thugs armed with hammers and swords attacked families in their homes as the Libyan regime sought to crush the uprising."); John Nyaradi, *Libya's Deputy Ambassador Calls for "No-Fly Zone Over Libya"; Crude, Gold, Silver Futures Spike, Equities Hit; Oil Companies Prepare Exit*, Benzinga.com, Feb. 22, 2011 ("In a decidedly different tone to the revolts in Egypt and Tunisia, Libyan authorities shot at demonstrators from war planes and helicopters"); The Press Trust of India, *UNSC Deplores Repression Against Peaceful Libyan Demonstrators*, Feb. 23, 2011 ("Following the ouster of leaders in Tunisia and Egypt, large-scale protests have erupted in several countries in the region including Bahrain, Yemen and Libya. Libya, however, has responded with an extreme show of force. International censure against Qadhafi escalated after reports that the regime was firing at the protesters from war planes. UN Secretary-General Ban Ki-moon has described this as 'outrageous.'"); http://www.nytimes.com/2011/05/05/world/africa/05nations.html?_r=3&ref=world (noting the use of force to prevent entry of ships); Al-Jazeera, *supra* note 208 ("Witnesses in Tripoli and other cities have reported that foreign mercenaries have been patrolling the streets, firing indiscriminately on those they encounter in a bid to keep people off the streets. In addition, air strikes have also been reported against civilian targets. The government claims that while warplanes have been used in recent days, they were targeting arms depots and that the targets were not in residential areas.").

248. Al-Jazeera, *supra* note 208 ("On Wednesday morning, Kharey, a local resident, told Al Jazeera that "normal traffic" was flowing on Benghazi's streets, but that demonstrations may take place later in the day near court buildings. He said that people in Benghazi were forming committees to manage the affairs of the city, and that similar committees were being set up in the towns of Beyda and Derna."). *Compare* Ken Stier, *The Libyan Civil War: Qadhafi's Strategies for Victory*, Mar. 15, 2011, available at http://www.time.com/time/ world/article/0,8599,2058832,00.html ("One of the most remarkable aspects of the rebellion is the utter lack of military leadership demonstrated by the roughly half a dozen senior officers who defected from Qadhafi — as well as the almost complete absence of the 12,000 troops in the east who laid down their arms at the beginning of the uprising. The most visible rebel fighters were volunteers, citizen guerrillas who took their own weapons, many raided from police and army depots, into battle and

5, 2011, former Qadhafi regime Justice Minister Mustafa 'Abd al-Jalil announced that the "national council – the opposition's newly formed government – held its first formal meeting in the eastern rebel stronghold of Benghazi and declared itself the sole representative" of Libya.[249] Former Interior Minister Abdel Fatah Younes coordinated the military organization of loosely affiliated civilians and professional soldiers that defected from the Libyan Army until he was assassinated. The National Transitional Council formed a diplomatic corps comprised in significant part by diplomats who defected from the Libyan regime.[250]

Beginning with France's recognition on March 10, 2011, the National Transitional Council earned the recognition of the key military and strategic players affecting the Libyan intervention and eventually the U.N. General Assembly. While it has for some time been doubtful that the National Transitional Council is as well-organized, unified or representative as it suggests, third-party states accepted that it enjoyed greater legitimacy, and therefore greater promise for stability.[251] Indeed, by all accounts

had to learn to man heavy weaponry on the job. If anything, the military officers seem to have devoted themselves more to political maneuvering than prudently preparing for the defense of the uprising. "This is basically how all revolutions turn out — revolutions never belong to the people that fight them, they belong to the people who manage to exploit the situation towards their own interest — and Libya is no different in that regard," says McGregor.").

249. *Ferocious Battles in Libya as National Council Meets for First Time*, Mar. 6, 2011 available http://www.news.com.au/world/ferocious-battles-in-libya-as-national-council-meets-for-first-time/story-e6frfkyi-1226016536676.

250. THE GUARDIAN, *A Vision of a Democratic Libya*, Mar. 29, 2011 *available at* http://www.guardian.co.uk/commentisfree/2011/mar/29/vision-democratic-libya-interim-national-council.

251. Chris Stephen, *Abdel Fatah Younis assassination creates division among Libya rebels*, THE GUARDIAN, July 29. 2011 ("The killing of Younis came a day after Britain said that it had extended official recognition to the National Transitional Council. It is likely to have caused consternation in Whitehall after William Hague praised the 'legitimacy and competence' of the rebels. The Foreign Office is now faced with the spectre of serious divisions within the rebels leading the five-month uprising against Qadhafi . . . In the besieged city of Misrata, too, the death sparked consternation. Misrata's military spokesman joined the city's ruling council in emphasising that its army units did not take orders from Benghazi. And security was stepped up amid fears of attacks by pro-Qadhafi elements, the fabled 'fifth column' that is an anxiety across rebel-held areas."); Thai Press reports, *US Says Few Answers in Slain Libyan Leader's Death*, August 2, 2011("He is a senior figure, and they've lost

the national elections for an interim legislative assembly held on July 7, 2012 were legitimate by international standards and the NTC has promised, as of August, 2012, to transition authority to it to oversee the drafting of a new constitution.[252]

D. RECOGNITION OF THE LIBYAN NATIONAL TRANSITIONAL COUNCIL WAS CONSISTENT WITH U.N. SECURITY COUNCIL RESOLUTIONS 1970 AND 1973

In the institutionalist tradition of belligerent recognition, third party states coordinate the recognition, mediation and management of a civil war. International condemnation of Qadhafi's response to the protests in Benghazi began as early as February 21, 2011 and the U.N. Security Council unanimously adopted its first sanctions resolution on February 26, 2011. In addition to the actions coordinated by the Security Council, the African Union repeatedly attempted to broker cease-fires and longer-term solutions to the conflict.[253]

The rapidness of the international response was directly related to the level of consensus among third-party states on two primary interests: the protection of civilians under international humanitarian law and the interest in removing the Qadhafi regime which continuously and repeatedly undermined international order generally and African order specifically. As explored above, the institutional tradition for managing civil

both his military expertise and his leadership, and again, it's very unclear who was at fault here. We've seen reports that this was an internal matter," said Toner. "We've reached no conclusions yet. I don't think any conclusions have been reached yet."). At the end of April, conflicting reports emerged that the NTC had fired the interim Libyan cabinet for incompetence and that the cabinet would remain in place until legislative elections scheduled for June, 2012. Ladane Nasseri, Libya's National Council Denies Reports of Cabinet Firing, Bloomberg, Apr. 27, 2012, *available at* http://www.bloomberg.com/news/2012-04-27/libya-s-national-council-denies-reports-of-cabinet-firing.html.

252. Rana Jawad, Libyan Election a Success for Jibril's Secularist Bloc, BBC, July 18, 2012, *available at* http://www.bbc.co.uk/news/world-africa-18880908.

253. *A. African President: Gadhafi Accepts Terms of Agreement*, CNN.COM, April 10, 2011, http://articles.cnn.com/2011-04-10/world/libya.war_1_libyan-rebel-moammar-gadhafi-embattled-libyan-leader?_s=PM:WORLD.

wars is appealing because concerts of states or international institutions are able to agree upon interests at stake in a civil war and then apply a collective response; national interests and collective interests theoretically dovetail. Indeed, this is one reason why international humanitarian law has become such a motivating force for collective action during the twentieth and twenty-first centuries – third-party states have reached agreement that all states, and all people, benefit from separating, and protecting, non-combatants from combatants in warfare, even for "internal" armed conflict.[254] As James Turner Johnson noted:

> The shift from 'law of war' to 'law of armed conflicts' is more than simply one of nomenclature; substantively, it signifies the effort of the international community to extend to all armed conflicts, whether domestic or between states, whether formally declared wars or not, the same rules for conduct earlier imposed on states formally at war with each other. Other important elements in the new conception include broader responsibility for the international community to enforce the rules for right conduct in armed conflict and a shift toward understanding violations of these rules as crimes of war for which individuals may be prosecuted.[255]

This consensus is not only reflected in multilateral treaties like the Geneva Conventions and the Rome Statute of the International Criminal Court, but also in the reformation of military codes, the training of military personnel and the means by which governments may ensure domestic order.[256] Qadhafi's use of helicopters and warplanes on the initial protests far exceeded the outer limits of those means and led to the effective declaration that a civil war existed by the U.N. Security Council

254. Ban Ki-Moon called Security Council Resolution 1970 "a clear expression of the will of a united community of nations." Press Release, Security Council, In Swift, Decisive Action Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187 (Feb. 26, 2011), http://www.un.org/News/Press/docs/20 11/sc10187.doc.htm.

255. James Turner Johnson, *Maintaining the Protection of Non-Combatants,* 37 JOURNAL OF PEACE RESEARCH, 421, 430-448 (2000).

256. Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949*, 47 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 337, 351 (1998).

which acted to enforce international humanitarian law. If the protests were, as Qadhafi claimed, merely civil unrest, then use of warplanes on civilians was "outrageous"; if, on the other hand, Qadhafi used the warplanes – as he claimed – only on opposition arms depots, then he could hardly deny the existence of an armed conflict and therefore the applicability of international humanitarian law.

Certainly, recognitions by third-party states were consistent with the U.N. Security Council Resolutions calling for states "acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures" to achieve resolution objectives. Yet these states were likely motivated by another interest: removal of Qadhafi from power altogether. Indeed, the U.N. Security Council Resolutions specifically sanctioned Qadhafi, members of his family and associates for their participation in unlawfully targeting civilians. If it is true, as this article has argued, that third-party states respond to civil wars in ways that advance both national interests and international order, then unilateral recognitions made sense because they delegitimized the Qadhafi regime.

The national interests in doing so were not difficult to identify: Qadhafi and his agents were tied to multiple small-scale attacks on civilians including the 1986 bombing of a German nightclub frequented by U.S. soldiers, the 1988 bombing of a Pan Am passenger plane that killed nationals of 21 states and the hijacking of a passenger plane in Karachi, Pakistan. On a larger scale, Qadhafi's regime regularly provoked conflicts with its neighbors including Egypt and Sudan, invaded neighboring Chad four times (conducting, in essence, a proxy war with France), "trained, armed and dispatched . . . Charles Taylor and Foday Sankoh to take power in West African countries," actively participated in the blood diamond trade and, until 2003, built up a clandestine nuclear weapons program in violation of its treaty obligations.[257] While it remains unclear whether the succeeding

257. Massimo Calabresi, *Gaddafi's Blood-Soaked Hands*, TIME, Feb. 22, 2011 available at http://swampland.time.com/2011/02/22/gaddafis-blood-soaked-hands/

governing persons and structures will cause fewer problems, states that extended unilateral recognition to the forces in Benghazi had sufficient reason to believe that their success would benefit both African and international stability.

V. CONCLUSION

States which extended unilateral and total recognition to the opposition forces in Benghazi demonstrated, again, that international lawyers could probably never have formed practical or coherent rules to govern the conduct of foreign states toward internal wars.[258] In the case of civil wars, third-party states' response could not be said to be driven explicitly by revolutionaries' "occupation of territory" or their proper conduct of warfare. At the end of the day, recognition is well-recognized under international law to be the prerogative of the granting state, and it has long been used in curious ways.[259]

258. *See* Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 512 (1969) ("Reference to this norm [rebellion graduating to insurrection becoming belligerency which required neutral treatment] as 'traditional' is calculated to underline its present flaccidity, a state induced by both casual violation and scholarly flagellation."). Indeed, during the third, final and successful Cuban revolution, both international lawyers and the U.S. Congress were exasperated at the Executive's refusal to extend belligerent recognition. *See* Hazeltine, *supra* note 104, at 739 ("It is well-known that the revolutionists have organized a *de facto* government. They have adopted a constitution; they have assumed a national name; they possess a national flag, and they have dispatched a delegate plenipotentiary to treat with the government of the United States. It is true they possess no navy and no seaport, but in this respect they are not much worse off than were the thirteen American colonies when their independence was recognized by France. They are quite as well off as were their Spanish-American kinsmen when the independence of the Peruvian and Colombian Republics was recognized by the United States, for at that time the mother country retained control of all the principal seaports on the Spanish Main and on the seacoast of Peru."). *Compare* T.S. Woolsey, *The Consequences of Cuban Belligerency*, 5 YALE L.J. 182 (1896) ("The recognition of Cuban belligerency should be governed by the interests of this country which are involved; by the ascertained existence of a civil and military organization, responsible for its own acts and conforming to the rules of war; and by the gravity or character of the contest.").

259. Many states maintain a "one-China" policy under which either the People's Republic of China, the Republic of China (Taiwan), neither or both may be recognized by a third state. *See, e.g.*, Lung-chu Chen, *Taiwan's Current International Legal Status*, 32 NEW ENG. L. REV. 675, 682 (1998) ("There are

Yet, that does not mean that the customary international norms they articulated did not reflect underlying principles of decision-making that sought to balance national with international interests.[260] During the episodes described above, third-party states showed a distinct commitment to minimize the effect of a civil war on international commerce and trade; scrutinized the legitimacy and sustainability of revolutionary governments; and, attempted, where possible, to reach agreement with similarly affected states to determine the appropriate course of action.

French, Italian, Qatari, American and British recognition of the NTC in the early and middle stages of the conflict can be reasonably interpreted to have minimized the effect of the civil war on global energy interests,[261] acknowledged, however

many different perceptions about what 'one China' really means. One popular view holds that 'China' means the PRC. Another view maintains that 'China' refers to the ROC. A third view asserts that 'China' refers neither to the PRC nor to the ROC, but to a China that is free, democratic and prosperous, which is to be created in a remote future. The fourth view maintains that 'China' represents a long Chinese cultural heritage, rather than a particular political entity. Finally, there is a view stating simply 'one China, but not now' without defining China. Thus, the so-called 'one China' policy appears to be, at least, a 'four Chinas' policy full of ambiguity and confusion."). *See also* Dennis, *supra* note 12, at 207 (detailing episodes where the United States hastily, and inconsistently, recognized regimes in the Dominican Republic and Mexico).

260. *See* Anne-Marie Slaughter, *International Law and International Relations Theory: a Dual Agenda*, 87 AM. J. INT'L L. 205, 206 (1993) ("Notwithstanding the logic and intellectual appeal of this vision, interdisciplinary efforts fell victim for most of the postwar era to the 'Realist challenge': the defiant skepticism of Political Realists such as George Kennan, Hans Morgenthau and, more recently, Kenneth Waltz, that international law could ever play more than an epiphenomenal role in the ordering of international life."); Anthony D'Amato, *Is International Law Really Law?*, 79 N.W. L. REV. 1293 (1985) ("Many serious students of the law react with a sort of indulgence when they encounter the term 'international law,' as if to say, 'well, we know it isn't really law, but we know that international lawyers and scholars have a vested professional interest in calling it law.' Or they may agree to talk about international law as if it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?").

261. Ruth H. Santini, *The Libyan Crisis Seen from European Capitals*, June 1, 2011 available at http://www.brookings.edu/papers/2011/0601_libya_santini.aspx. ("In

preliminarily, the existence of a counter-government there; and, advanced the U.N. Security Council's interest in protecting civilians. The swiftness and strength of action within the United Nations system, the Arab League as well as other international organizations is attributable to Qadhafi's practice of destabilizing large parts of the world, especially Africa. This may also explain why states were interested in recognizing the National Transitional Council: to facilitate his permanent ouster from political and military influence.

As it happens, Qadhafi's demise did not precipitate an immediate restoration of order in Libya nor does the National Transitional Council appear to have forged the national, popular legitimacy envisioned by Security Council Resolutions 1970 and 1973. Militarily, Libya is now divided into a "bewildering array of grassroots military formations."[262] Former Qadhafi regime participants in the National Transitional Council have weakened its legitimacy in the eyes of many Libyans as has its secrecy.[263] Leaders in Libya's oil-rich eastern Barqa province have called for greater political independence from Tripoli, raising fears that the state will fracture along tribal, religious or other historical lines.

Yet whichever situation ultimately results in Libya,[264] it was certainly not "crazy" for third-party states to recognize the opposition in Benghazi as a legitimate government, even *the* only legitimate government. This is true as a matter of historical state practice, the interests of the states involved and the society of states generally.

particular, 22% of Italian, 16% of French and 13% of Spanish crude consumption comes from Libya. French and British long-term energy interests will especially benefit from a more structured and advantageous presence in Libya facilitated by their military engagement and their pro-National Transition Council (TNC) stance.").

262. Christopher Stephen, *The Lesson of Bani Walid*, Foreign Policy, Jan. 29, 2012 available at http://www.foreignpolicy.com/articles/2012/01/27/the_lesson_of_bani_walid?page=full.

263. *Id*.

264. Omar Ashour, *Libya After Gadhafi*, CNN, July 16, 2011, http://globalpublicsquare.blogs.cnn.com/2011/07/16/libya-after-gadhafi/.