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THE MCDOUGAL LECTURE: NATIONAL STRATEGY, COLLECTIVE SECURITY, AND THE GLOBAL COMMON

SENATOR GARY W. HART*

The answer we give to three questions will largely determine whether the United States will flourish or decline in the 21st century. First, will we anticipate events or merely react to them? Second, will we form new alliances to address new realities? Third, how rapidly will we adapt to transformational change? These questions share an assumption: the world is changing and it is changing fast. Our national predisposition, however, has been to rely on traditional institutions and policies and to use them to address unfolding history on our own timetable.

We are also inclined to employ a simple, all-encompassing, central organizing principle as a substitute for a national strategy. During the second half of the twentieth century that principle was "containment of communism." After 9/11 it became "war on terrorism." Unfortunately, the period in between, the largely peaceful and prosperous 1990s, was not used to develop a comprehensive strategic approach to an almost totally different new century that was emerging.

One lone effort represents the exception. In January 2001, the U.S. Commission on National Security for the 21st Century produced a road map for national security for the first quarter of this century. It was almost totally ignored and, one decade later, of its fifty specific recommendations only one—the creation of a Department of Homeland Security—has been adopted.

There are reasons for our lassitude, our false sense of security, and our reliance on reaction. Between 1812 and 2001 our continental home was not attacked. And because we are a large island nation, we have felt ourselves to be invulnerable. Our economic expansion between the end of World War II and the first oil embargo of 1974 created a very large, productive, and secure middle class. We have possessed economic and military superiority for more than half of a century.

For most of our history, strategic thinking and planning, especially on the grand scale, has been an enterprise confined largely to the academy. Instead, our policymakers would deal with events as they arose. Further, as a dominant power

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* Senator Gary W. Hart, a retired U.S. Senator (1975-1987), was a co-chair of the U.S. Commission on National Security for the 21st Century. Since retiring, he has focused on international law and business as a strategic advisor to major U.S. corporations, and as a lecturer at Oxford, Yale, and the University of California. Currently, he is Wirth Chair Professor at the University of Colorado and Distinguished Fellow at the New America Foundation. These remarks substantially follow the McDougal Lecture that Senator Hart gave at the 44th Annual Sutton Colloquium on November 5, 2011 at the University of Denver, Sturm College of Law, but the editors have made some necessary changes for the print version.

in the nation-state era, we could always try to rely on protectionism and tightened borders to keep the turbulent world at bay. No longer. Isolation and a policy of reaction are impossible in the 21st century.

I. HISTORIC REVOLUTIONS AND NEW REALITIES

Multiple revolutions will continue to remake the world for decades to come. Globalization—the internationalization of finance, commerce, and markets—is making national boundaries economically redundant. Notice the mounting, unresolved struggles within the Eurozone. Further, information has replaced manufacturing as the economic base of our nation, and it is furiously integrating global networks. Together, globalization and information are eroding the sovereignty of nation-states. And this erosion has contributed to the transformation of war, and the changing nature of conflict.

As the Arab Spring has demonstrated, the state no longer possesses the ability to control the free flow of information. Also the nation-state no longer possesses the monopoly on violence that was the principal product of the Westphalian settlement in the mid-17th century. On September 11, 2001, the most powerful nation on earth could not guarantee the protection of its citizens. A world accustomed to a two dimensional chess board suddenly found that a third dimension had crystalized. Our nation had organized its international relations on the plane of the nation-state. In a heart-beat we are now forced to recognize the new dimension represented by the stateless nation.

In large part because of these multiple political, economic, and social revolutions, a host of new realities characterize the 21st century. These include: failed and failing states; mass south-north migrations; proliferation of weapons of mass destruction; the rise of ethnic nationalism and religious fundamentalism; the emergence of tribes, clans, and gangs as alternatives to the nation-state; the threat of pandemics; energy interdependence; climate change; and many other new phenomena.

It might be argued that this plethora of new realities dictates a wholly pragmatic, case-by-case response. It might better be argued, however, that now more than ever the United States requires a grand strategy that seeks to consistently apply its powers and resources to the achievement of its large purposes over time. That was the definition of grand strategy provided by Basil Liddell Hart following World War II. A new grand strategy is required because the new realities I have listed share two qualities: first, they cannot be adequately addressed by military means; and, second, they cannot be solved by one nation alone.

Further, as events accelerate, response times shorten. Once a threat is immediate, deliberation formation of ad-hoc responses and coalitions, and sifting through alternatives all become luxuries. In this century events and their repercussions will not wait for us to organize ourselves and our allies. A strategy of ad-hoc reaction will not work. This being true, deduction alone dictates a strategy that is internationalist, one that appeals to the common interests of the like-minded, that is to say democratic-nations; one that anticipates, and one that

requires burden-sharing among those who occupy a global commons. For it is the notion of a global commons, both actual and virtual, that must characterize America's 21st century grand strategy. National goals now can be achieved only through increased international integration and collaboration.

II. ELEMENTS OF A NATIONAL STRATEGY: THE GLOBAL COMMONS

Three guiding principles might structure such a U.S. strategy: economic innovation, networked sovereignty, and integrated security. First, the United States cannot play a constructive global leadership role in organizing the virtual global commons without a fundamentally restructured economy. Global diplomatic engagement and international security cannot be financed with borrowed money. Neither true security nor leadership can be founded on debt. The only way for the United States to reliably pay for its international engagement and its security is by revenue it generates through its own creative economic activity.

For the time being, the United States will remain superior in economic, political, and military terms. But we can maintain our leadership position over time only through economic innovation and creativity. We cannot continue to finance our military establishment with its far-flung operations—including in two current wars—by borrowing money from the Chinese and from future generations.

Though it is becoming a somewhat worn theme, it is nonetheless true: we must invest public funds and private capital in science and technology, our universities and laboratories, corporate research, and multiple facets of innovation both to drive our own economic expansion and to market our innovations to the world. Through the realignment of fiscal incentives and disincentives, the United States must transform itself from a debtor, consuming nation to a creditor, producing nation. Governments and peoples around the world will find an economically creative U.S. an attractive model to follow. That attraction ensures U.S. international leadership. That leadership can organize the security of the global commons.

Second, founding America's role in the world on the notion of a global commons requires identifying common threats *before* they become toxic, and it means identifying common interests requiring common pursuits in advance of those threats. The primary resistance to the notion of a global commons is located in the concept of national sovereignty. But, as NATO prosed following World War II and throughout the Cold War, shared security is not a threat to national identities and notions of self-governance.

There are a number of illustrations of how the security of the commons might work. First, the public health services of advanced nations can be networked through common databases and communications systems to identify and quarantine viral pandemics before they spread, and can be used to organize medical response teams and regional stockpiles of immunization agents to facilitate containment. Second, an international constabulary force can be created, possibly under NATO auspices, to manage failing states and tribal conflicts while diplomats negotiate restructuring agreements. Rwanda, Darfur, and Kosovo in the

past, and Somalia, Sudan, and Libya today all suggest conflicts that could have been anticipated and might be managed with much less loss of life.

Third, the existing International Atomic Energy Agency could be strengthened to become the indispensable agency for inspection of suspected manufacturing and stockpiling of weapons of mass destruction. Its mandate should be enforced and expanded, as it was not in Iraq, by the U.S. and the international community. Fourth, it is not too soon to design an administrative and enforcement mechanism for an international treaty on carbon reduction: a climate treaty will not be self-enforcing.

Fifth, the most unstable region of the world, the Persian Gulf, is the source of one quarter of U.S. oil imports and a substantial amount of the importing world's supplies. Currently, the U.S. is the *de facto* guarantor of those oil supplies as well as of the broader sea lanes of communications. As a loose consortium of nations with shipping interests now seeks to control piracy off the Somali coast, so a more tightly-knit consortium should share responsibility for policing the Persian Gulf and guaranteeing all importing nations' oil supplies.

All these issues, and many more, represent the world of the 21st century, much more a global commons than a hodge-podge of fractious nations and percolating conflicts in constant tension. Stable nations will increasingly find common cause in reducing and where possible eliminating local conflicts through threat reduction and confinement—*before* they mutate and become toxic.

The central principle at work here is "networked sovereignty," the willingness of participating nations to link their governing agencies and institutions with those of other friendly nations. Nations, especially powerful nations, will continue to arm themselves. But they will find it appealing, politically and financially, to network their military assets in pursuit of common security interests. As NATO represents the triumph of collective security in a Cold War century, new realities now require new alliances beyond the capabilities that NATO represents.

Forming new alliances with emerging regional power centers offers several advantages. Regional powers—China, India, Russia—should be made responsible partners rather than antagonists or rivals. Identifying mutual and collective security interests with the U.S. and formalizing a collective approach to securing these interests empowers regional leaders further, and signals that the U.S. respects their legitimate concerns.

Formal regional security alliances create diplomatic and administrative structures that anticipate, rather than react to, new realities and threats in their respective regions. Thus, a third pillar of America's 21st century strategy is integrated security. While a creative economy provides the resources, we pursue our global security in and through the global commons which we lead. A strong consortium of twenty to thirty nations can anticipate and minimize threats from non-military realities and can confine local conflicts before they become viral.

Nations not sharing democratic principles and institutions will find it profitable to begin to adopt these principles and institutions as the price of shelter under the security umbrella of the global commons. Political accommodation to enter the commons will more than pay for itself in enhanced shared security,

including protection from pandemics, control of dangerous weapons, climate stabilization, isolation of terrorism, guaranteed oil supplies, and stabilization of disintegrating states.

For example, there is every reason to create what I have called a "zone of international interest" in the Persian Gulf whereby a collection of major oil importing nations guarantees continued distribution of petroleum resources from the region regardless of almost inevitable instability within and among producing states. There are many reasons for having an international rapid deployment force to intervene in failing states both to prevent civil wars and, if necessary, to create a security environment in which diplomats can manage a peaceful restructuring of nations. Likewise, if climate damage creates massive dislocations due to increased coastal water levels, decreased water supplies, and crop dislocations—as predicted by senior retired military officers—the United States should now take leadership to create international institutions and capabilities to anticipate and limit the disruptions and instability these conditions will create.

A strategy of the global commons is anticipatory rather than reactive, appreciating that major disruptions will occur globally so rapidly that reliance on extended time to react is unrealistic. Diplomatic exchanges that took six months to transit between the United States and Europe at our founding, or six weeks a century ago, now take fewer than six seconds.

III. NATIONAL SECURITY IN THE 21ST CENTURY

Within the context of organizing the global commons as a diplomatic platform and security establishment, the United States will find it necessary to make several unilateral adjustments to its security policy to account for the new realities of the 21st century. The United States is an island nation not a continental power. As an island nation we will require greater maritime assets, both for increased open-ocean operations as well as closer-to-shore conflict resolution and rapid-insertion operations.

To achieve these and other security objectives, however, we must acknowledge the political limits represented by organizing our security operations on an outdated statutory base. The Cold War national security state was established by the National Security Act of 1947 that unified the Army, Navy, and the Marine Corps under a new Department of Defense, and added a new service, the U.S. Air Force. It established the Central Intelligence Agency and created the National Security Council. For sixty-four years, with some notable exceptions, that legislation has served us well.

But, as Thomas Jefferson famously wrote, to expect each generation to govern itself with the laws and policies of previous generations is to expect a man to wear the coat he wore as a lad. Times change, and laws and policies—as well as institutions and the human mind—must keep pace.

Historic nation-state wars, though always plausible, are declining. Irregular, unconventional warfare involving dispersed terrorist cells, stateless nations, insurgencies, and tribes, clans, and gangs are increasing dramatically. Pakistan—whose instability imperils regional and possibly global security—is threatened by

indigenous religious fundamentalists. Mexico is endangered by indigenous drug cartels that are *de facto* private armies. Iraq's and Afghanistan's ancient tribal and sectarian conflicts will continue for decades. Our massive military superiority cannot resolve these and a number of other conflicts by its sheer size and power.

Extended discussion on future security within the broader security community and public at large should encompass at least these questions: (1) what is the nature of the threats we face, and which of these require military response; (2) is the intelligence community properly coordinated and focused on emerging realities; (3) are new international coalitions needed for non-military concerns—such as failed states, radical fundamentalism, pandemics, climate degradation, energy dependence, and resource competition; and, (4) does our government require new legislative authority to achieve national security under dramatically changing conditions? All of these considerations, and more, should lead us to debate and adopt a new National Security Act for the 21st century. Oddly, no discussion of this necessity is taking place.

VI. CONCLUSION: A LONG-OVERDUE STRATEGY PROJECT

To summarize, a new century characterized by a host of new realities requires us to think anew—in other words, to think as creatively as the great statesmen who organized the post-World War II world between 1945 and 1948. Our new national strategy requires an economy based on innovative investment and creative productivity that will finance the diplomatic initiatives involved in organizing a 21st century global commons composed, at the outset, of democratic nations. That consortium's principle objective will be to anticipate non-military threats and unconventional conflict, and reduce their impacts. The United States will qualify to lead this new era of internationalism by revitalizing its economy and by strategically adapting its own statutory and institutional systems to the world of today and not the one of yesterday.

The net result of the comprehensive undertaking proposed here will be a 21st century grand strategy for the United States, underwritten by a new statutory base, that matches our economic, political, and military powers to the achievement of the large purposes embodied in our continued international leadership. The principal product of this strategy will be the establishment of a 21st century global commons to provide stability to the international community in this turbulent new century.

THE ARAB SPRING, THE RESPONSIBILITY TO PROTECT, AND U.S. FOREIGN POLICY—SOME PRELIMINARY THOUGHTS

VED P. NANDA*

I. INTRODUCTION

By the autumn of 2012 the euphoria accompanying the heady days of the Arab Spring was replaced by uncertainty and unease.[1] The uprisings in the Middle East and North Africa that toppled several oppressive regimes in the region began in Tunisia in December 2010 in the wake of the self-immolation of fruit vendor Mohamed Bouazizi, and spread to Egypt and Libya in January and February 2011, respectively. Within a month, Hosni Mubarak in Egypt and Zine el-Abidine Ben Ali in Tunisia, who had long ruled their countries with an iron hand, were gone. Yemen and Bahrain faced similar protests and demands for change, followed by Libya in February 2011, where Colonel Muammar Qaddafi used brute force to suppress dissent.

The U.N. Human Rights Council, U.N. Security Council, and the Arab League condemned the gross and persistent violation of international human rights law and international humanitarian law by the Qaddafi regime. These condemnations and demands for the Qaddafi regime not to use force against peaceful demonstrators were met by total defiance. The Security Council imposed sanctions, and in response to calls for a no-fly zone and intervention to protect civilians NATO intervened, and after protracted civil war Colonel Qaddafi was overthrown and subsequently killed by rebels. The Syrian conflict continues, resulting in death and destruction in the country and the fear that the conflict—which is spilling over into the neighboring countries—will destabilize the region.

Almost two years have passed since the initial Tunisian protests. With governments in transition in Egypt, Libya, Tunisia, and Yemen, the ongoing civil war in Syria, and continuing unrest in several other countries, an appraisal of the outcome of these dramatic changes in the region is warranted.

Writing in the November 8, 2012 issue of the New York Review of Books, two keen observers stated:

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* John Evans University Professor, University of Denver and Thompson G. Marsh Professor of Law, and Director, International Legal Studies Program, University of Denver Sturm College of Law. I extend my deep gratitude to Dean Marty Katz and the Sturm College of Law for the summer research grant that supported this work.

1. *See generally* MARC LYNCH, THE ARAB UPRISING: THE UNFINISHED REVOLUTIONS OF THE NEW MIDDLE EAST (2012); MARWAN BISHARA, THE INVISIBLE ARAB: THE PROMISE AND PERIL OF THE ARAB REVOLUTIONS (2012).

> Darkness descends upon the Arab world. Waste, death, and destruction attend a fight for a better life. Outsiders compete for influence and settle accounts. The peaceful demonstrations with which this began, the lofty values that inspired them, become distant memories. Elections are festive occasions where political visions are an afterthought. The only consistent program is religious and is stirred by the past. A scramble for power is unleashed, without clear rules, values, or endpoint. It will not stop with regime change or survival. History does not move forward. It slips sideways.[2]

Paul Richter said on September 14, 2012, in the *Los Angeles Times*: "The cascade of anti-American protests in the Middle East this week is a jolting reminder to the White House of a dangerous dimension of the 'Arab Spring' revolutions: Freedom for long-suppressed Islamist groups that weak elected governments can't manage and that America can't control."[3]

What follows in Section II is a brief look at the major recent developments in selected countries in the region. Section III highlights the Responsibility to Protect ("R2P"), a concept endorsed by the 2005 World Summit of Heads of State and Government to protect civilians from genocide, war crimes, crimes against humanity and ethnic cleansing,[4] its invocation and application in Libya, and the failure of the international community to apply it in Syria. Section IV introduces the contribution of the 44th Annual Sutton Colloquium participants in this issue, preceding the concluding remarks in Section V.

II. RECENT DEVELOPMENTS IN SELECTED COUNTRIES

A common feature of all these countries in transition is their ailing economies. A long period of unrest, coupled with uncertainty about the political and economic direction of these countries, has taken a heavy toll. Selected developments of note follow.

A. Egypt

The Muslim Brotherhood was not actively involved during the struggle against Hosni Mubarak as demonstrations and liberal and secular forces primarily led protests in Tahrir Square. However, as the only cohesive organization, the Brotherhood galvanized the electorate and won the elections with Mohamed Morsi

2. Hussein Agha & Robert Malley, *This is Not a Revolution*, THE NY REVIEW OF BOOKS (Nov. 8, 2012), http://www.nybooks.com/articles/archives/2012/nov/08/not-revolution/?pagination=false [hereinafter *Not a Revolution*].

3. Paul Richter, *"Arab Spring" Shows its Thorns*, L.A. TIMES, Sept. 14, 2012, at A1.

4. 2005 World Summit Outcome, G.A. RES. 60/1, ¶¶ 138-40, U.N. Doc. A/RES/60/1 (Sept. 16, 2005).

officially recognized on June 24, 2012—the winner of Egypt's first competitive presidential election.[5] He was "the first Islamist elected as head of an Arab state."[6]

Notable developments since then include the selection of the cabinet ministers by Morsi and his consolidation of power;[7] accusations that the Muslim Brotherhood is stifling dissent;[8] the attack on the American embassy by an angry mob;[9] a trial of workers for foreign nongovernmental organizations ("NGO") for being part of unregistered organizations, and hence accused of receiving illegal funding;[10] drafting of the new constitution;[11] and response to Israeli strikes on the Gaza Strip.[12]

In early August, Morsi selected five ministers from the Brotherhood, excluding selection from other political parties and choosing only two women, one of whom was also the only Christian member,[13] leading to the perception that the Brotherhood was seeking to dominate Egypt's politics. Subsequently, he consolidated power by forcing the retirement of his defense minister, the Army chief of staff, and several senior generals.[14]

On November 22, 2012, he asserted new powers, unilaterally decreeing greater powers for himself, exempting all his decisions from judicial review, and barring the courts from dissolving the constituent assembly that is drafting the new constitution.[15] He also ordered the retrial of Mubarak and top aides on charges of

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5. David D. Kirkpatrick, *Named Egypt's Winner, Islamist Makes History*, N.Y. TIMES (June 24, 2012), http://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html.

6. *Id.*

7. Kareem Fahim & Mayy el Sheikh, *New Egyptian Cabinet Includes Many Holdovers*, N.Y. TIMES (Aug. 2, 2012), http://www.nytimes.com/2012/08/03/world/middleeast/new-egyptian-cabinet.html.

8. Kareem Fahim & Mayy el Sheikh, *Egypt's Islamist Leaders Accused of Stifling Media*, N.Y. TIMES (Aug. 15, 2012), http://www.nytimes.com/2012/08/16/world/middleeast/egypts-islamists-accused-of-limiting-press-freedom.html.

9. David D. Kirkpatrick, *Anger Over Film Furls Anti-American Attacks in Libya and Egypt*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/world/middleeast/anger-over-film-fuels-anti-american-attacks-in-libya-and-egypt.html.

10. Scott Shane & Ron Nixon, *Charges Against U.S.-Aided Groups Come with History of Distrust in Egypt*, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/world/middleeast/in-egypt-a-history-of-distrust-of-us-aided-groups.html.

11. David D. Kirkpatrick, *Egyptian Islamists Approve Draft Constitution Despite Objections*, N.Y. TIMES (Nov. 29, 2012), http://www.nytimes.com/2012/11/30/world/middleeast/panel-drafting-egypts-constitution-prepares-quick-vote.html.

12. David D. Kirkpatrick & Jodi Rudoren, *Israel and Hamas Agree to a Cease-Fire, After a U.S.-Egypt Push*, N.Y. TIMES (Nov. 21, 2012), http://www.nytimes.com/2012/11/22/world/middleeast/israel-gaza-conflict.html.

13. Fahim & el Sheikh, *supra* note 8.

14. Kareem Fahim, *In Upheaval for Egypt, Morsi Forces Out Military Chiefs*, N.Y. TIMES (Aug. 12, 2012), http://www.nytimes.com/2012/08/13/world/middleeast/egyptian-leader-ousts-military-chiefs.html.

15. David D. Kirkpatrick & Mayy el Sheikh, *Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial*, N.Y. TIMES (Nov. 22, 2012), http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html.

killing protesters during the uprising and appointed a new Prosecutor General.[16] Among several prominent Egyptian political leaders who opposed this move, Mohammed ElBaradei, a former presidential candidate and former head of the International Atomic Energy Agency, wrote on his Twitter account: "Morsi today usurped all state powers and appointed himself Egypt's new pharaoh. A major blow to the revolution that could have dire consequences."[17] A prominent jurist, Saleh Eissa, wrote on the website of the state newspaper, *Al Ahram*, urging citizens "to take to the street and die, because Egypt is lost," and added that "immunizing the decisions of the president with a constitutional declaration is a forgery and a fraud."[18] A senior U.S. State Department official is reported to have said in Washington: "We are seeking more information about President Morsi's decisions and declaration today, which have raised concerns."[19]

The next day, President Morsi's opponents were reported to have burned his party's offices in several cities—including Suez, Port Said, and Ismailia—and thousands of people gathered to protest his power grab in Tahrir Square in Cairo, while his supporters massed outside the presidential palace where Morsi said he had taken this action to achieve political, social, and economic stability.[20] The government has also been criticized for using tactics to stifle dissent.[21]

On September 12, Egyptian demonstrators breached the fortified walls of the U.S. Embassy in Cairo, in protest of the American-made anti-Muslim video, "Innocence of Muslims," that had been shown on Cairo television by local Islamist broadcasters to whip up sentiment against the United States. The mob replaced an American flag with the black banner of jihad. Egyptian riot police did not use force against protesters.[22] Morsi issued only a mild rebuke of the rioters and

16. *Id.* For the English text of Morsi's constitutional declaration, see *English text of Morsi's Constitutional Declaration*, AHRAM ONLINE (Nov. 22, 2012), http://english.ahram.org.eg/News/58947.aspx [hereinafter *Constitutional Declaration*] (appointing new prosecutor-general; immunizing Constituent Assembly and Shura Council from dissolution).

17. *See* Sam Dagher, *Egypt's President Solidifies Power: After Forging a Halt to Israel-Hamas Hostilities, Morsi Takes Steps to Blunt the Authority of Secular-Leaning Judiciary*, WALL ST. J., Nov. 23, 2012, at A8.

18. David D. Kirkpatrick & Mayy el Sheikh, *Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial*, N.Y. TIMES (Nov. 22, 2012), http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html.

19. *Id.*

20. Kareem Fahim & David D. Kirkpatrick, *Clashes Break Out After Morsi Seizes New Power in Egypt*, N.Y. TIMES (Nov. 23, 2012), http://www.nytimes.com/2012/11/24/world/middleeast/amid-protest-egypts-leader-defends-his-new-powers.html.

21. Lina El-Wardani, *Interior Ministry Aims to Recreate Mubarak-era Emergency Law: Rights Activists*, AHRAM ONLINE (Oct. 22, 2012), http://english.ahram.org.eg/NewsContent/1/64/56117/Egypt/Politics-/Interior-ministry-aims-to-recreate-Mubarakera-emer.aspx; Fahim & el Sheikh, *supra* note 8.

22. David D. Kirkpatrick, *Anger Over Film Fuels Anti-American Attacks in Libya and Egypt*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/12/world/middleeast/anger-over-film-fuels-anti-american-attacks-in-libya-and-egypt.html.

waited twenty-four hours before issuing his statement against those who had stormed the embassy, and only after a blunt phone call from President Obama.[23]

Forty-three employees from five international NGOs face jail sentences for being part of unregistered organizations and having received part of $150 million of U.S. aid grants to promote "democracy and good governance."[24] Under the prior Egyptian law, Law 84 of 2002, this constitutes receiving illegal funding.[25] Under the law, all NGOs must be registered with Egypt's ministries. Although a new draft law relaxes the government's control on local NGOs, the situation for foreign NGOs remains unchanged.[26]

The makeup of the constituent assembly charged with drafting Egypt's new constitution has been challenged by critics on the ground that the Islamist majority on the committee is endeavoring to create Egypt as an Islamic state. The criticism relates to draft articles including those on women's rights, Islamic law, minority rights, the role of the judiciary, and the powers of the president. In late October 2012, a court declined to rule on the legality of the assembly, which, the critics claim, is unrepresentative as it is dominated by Islamists.[27] The court instead referred the case to the Supreme Constitutional Court, but this would not have stopped the drafting committee from completing its task, as the assembly is to finish its work, including the drafting of the constitution, by December 12.[28] But President Morsi's Constitutional Declaration of November 22 states that "[n]o judicial body can dissolve the Shura Council [upper house of parliament] or the Constituent Assembly."[29]

As Israel struck the Gaza Strip in November 2012, Mr. Morsi was torn between loyalty for the Palestinian militant group Hamas and Egypt's landmark peace treaty with Israel. His response included recalling his Ambassador to Israel, sending his prime minister to Gaza to support Hamas, and calling President Obama, the United Nations, the European Union, and the Arab League for support.[30] He took the lead in mediating a ceasefire between the warring parties,

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23. David D. Kirkpatrick et al., *Egypt, Hearing from Obama, Moves to Heal Rift From Protests,* N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/world/middleeast/egypt-hearing-from-obama-moves-to-heal-rift-from-protests.html.

24. Bel Trew, *The Trial: Egypt's NGO Staffers Speak Up About Political Dogfight,* AHRAM ONLINE (Oct. 20, 12012), http://english.ahram.org.eg/NewsContentPrint/1/0/55888/Egypt/0/The-Trial-Egypts-NGO-staffers-speak-up-about-polit.aspx.

25. *Id.*

26. *Id.*

27. Kareem Fahim & Mayy el Sheikh, *Egyptian Court Declines to Rule on the Legality of Drafting a New Constitution,* N.Y. TIMES (Oct. 23, 2012), http://www.nytimes.com/2012/10/24/world/middleeast/egypt-court-wont-halt-drafting-of-constitution.html.

28. *Id.*

29. *Constitutional Declaration, supra* note 16, art. V. Egyptians adopted the Constitution on December 23, 2012, and opposition to it continued. David D. Kirkpatrick & Mayy El Sheikh, *As Egypt Constitution Passes, New Fights Lie Ahead,* N.Y. TIMES (December 23, 2012), http://www.nytimes.com/2012/12/24/world/middleeast/as-egypt-constitution-passes-new-fights-lie-ahead.html.

30. *See* Kirckpatrick & Rudoren, *supra* note 12.

which was reached on November 21, after eight days of conflict, through an American diplomatic push.[31]

B. Tunisia

Instability, tensions between Islamists and secular and liberal forces, and an ailing economy followed the revolution in Tunisia known as the "Jasmine Revolution." The first free elections were held in October 2011 to elect an assembly to draft a constitution and shape a new Tunisia.[32] The moderate Islamist party, Ennahda ("the renaissance" in Arabic), was victorious, and said that it would not try to impose a Muslim moral code on the society and would respect women's rights.[33] A doctor and politician, Moncef Marzouki, elected as interim president in December 2011, appointed the Ennahda party's secretary-general as prime minister.[34]

A year after the elections, Souhir Stephenson, who had voted for the first time as a Tunisian citizen, wrote an op-ed piece in the New York Times:

> A year later, we have no democracy, no trust in elected officials, no improved constitution. Human rights and women's rights are threatened. The economy is tanking . . . . We have one thing left from our revolution: free speech . . . . There is nothing moderate or democratic about the Islamists. They played the moderate and democratic game to gain power. Now, in office, they keep postponing elections to entrench themselves in the fabric of government and judiciary by brute force.[35]

Two major developments are noteworthy. First, on September 14, mobs attacked the U.S. embassy in Tunis as part of the protests against the anti-Islam video, looting and burning several buildings, including the American school.[36] Tunisian authorities arrested several people and have sought the death penalty for many.[37]

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31. *Id.* Before the cease-fire was brokered between Israel and Hamas, President Obama and President Morsi had spoken three times within twenty-four hours and six times over the course of several days. Peter Baker & David D. Kirkpatrick, *Egypt's Leader is Crucial Link in Gaza Deal*, N.Y. TIMES (Nov. 22, 2012), http://cn.nytimes.com/article/world/2012/11/23/c23obama/en/?pag]emode =print.

32. David D. Kirkpatrick, *Moderate Islamists Party Heads Toward Victory in Tunisia*, N.Y. TIMES (Oct. 24, 2011), http://www.nytimes.com/2011/10/25/world/africa/ennahda-moderate-islamic-party-makes-strong-showing-in-tunisia-vote.html.

33. *Id.*

34. Reuters, *Tunisia Installs Moncef Marzouki as President*, THE GUARDIAN (Dec. 13, 2011), http://www.guardian.co.uk/world/2011/dec/13/tunisia-moncef-marzouki-president.

35. Souhir Stephenson, Op-Ed., *Tunisia, a Sad Year Later*, N.Y. TIMES (Oct. 31, 2012), http://nytimes.com/2012/11/01/opinion/tunisia-a-sad-year-later.html.

36. Rick Gladstone, *Anti-American Protests Flare Beyond the Mideast*, N.Y. TIMES (Sept. 15, 2012), http://www.nytimes.com/2012/09/15/world/middleeast/anti-american-protests-over-film-enter-4th-day.html [hereinafter *Anti-American Protests*].

37. Associated Press, *Authorities in Tunisia Seek Death Penalties in Embassy Attacks*, N.Y. TIMES (Oct. 4, 2012), http://www.nytimes.com/2012/10/05/world/africa/authorities-in-tunisia-seek-death-pena

Second, ultra-conservative Salafis seized control of ten percent of the country's estimated 5,000 mosques, which were officially sanctioned earlier by the government as it appointed every prayer leader and listed acceptable topics for their Friday sermons.[38] Salafi clerics preach that women must be veiled, Islamic law (Shariah) imposed immediately, alcohol outlawed, and that Muslims join the jihad in Syria and shun the West, insisting that democracy is incompatible with Islam.[39] Critics suggest that all Islamists are alike, arguing that Ennahda eventually will move toward the severe application of the Shariah and will work with the Salafis.[40]

C. Libya[41]

In response to peaceful protests and demonstrations against Colonel Muammar el-Qaddafi's regime, Libya's security forces tried to brutally crush the uprising.[42] However, the protests continued and so did the use of excessive force by the regime. Thus on February 26, 2011, the United Nations Security Council invoked R2P to impose sanctions on Libya for the government's use of force against civilians, urging the Libyan authorities to immediately end the violence and to respect human rights and international humanitarian law.[43] It also decided to refer the situation to the International Criminal Court.[44]

As the Libyan security forces continued using brutal oppression, resulting in heavy civilian casualties, the Council adopted a second resolution on March 17, 2011, strengthening the sanctions, imposing a no fly zone, and authorizing member states "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack . . . ."[45] Pursuant to this resolution, NATO took command of enforcement of the no-fly zone and the arms embargo, while the U.S. began an air campaign against Qaddafi's forces.[46] After protracted military operations, which continued for seven months, the Qaddafi regime was

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lties-in-embassy-attacks.html.

38. Neil MacFarquhar, *Tunisia Battles Over Pulpits, and Revolt's Legacy*, N.Y. TIMES (Nov. 11, 2012), http://nytimes.com/2012/11/12/world/africa/tunisia-battles-over-pulpits-and-a-revolutions-legacy.html.

39. *Id.*

40. *See, e.g.*, Daniel Pipes, *Islamism's Unity*, NATIONAL REVIEW ONLINE (Oct. 30, 2012, 12:00 AM), http://www.nationalreview.com/articles/331975/islamism-s-unity-daniel-pipes#.

41. *See generally* Ved P. Nanda, *From Paralysis in Rwanda to Bold Moves in Libya: Emergence of the "Responsibility to Protect" Norm Under International Law—Is the International Community Ready for It?*, 34 HOUS. J. INT'L L. 1, 39-44 (2011) [hereinafter *Emergence of R2P*] (providing a brief account of the uprisings in Libya and developments leading to the toppling of the Qaddafi regime).

42. *See* David D. Kirkpatrick & Mona el-Naggar, *Qaddafi's Grip Falters as His Forces Take on Protestors*, N.Y. TIMES (Feb. 21, 2011), http://www.nytimes.com/2011/02/22/world/africa/22libya.html.

43. S.C. RES. 1970, ¶¶ 17-25, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

44. *Id.* ¶¶ 4-8.

45. S.C. RES. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

46. *Id.*; *President Obama's Speech on Libya*, THE WHITE HOUSE (Mar. 28, 2011), http://www.whitehouse.gov/photos-and-video/video/2011/03/28/president-obama-s-speech-libya.

overthrown, ending his forty-two year rule. Ultimately, he was captured and killed by rebels on October 20, 2011.[47]

Major developments since Qaddafi's death include the capture of his son and Libya's former intelligence chief and their trial;[48] the U.N. Human Rights Council report of March 2012;[49] the attack on the U.S. Consulate in Benghazi that resulted in the death of the U.S. Ambassador to Libya;[50] and the lawlessness caused by armed militias.[51]

A month after Colonel Qaddafi's death, rebel fighters captured his son, Saif Qaddafi, and subsequently Libya's former intelligence chief, Abdulla al-Senussi. The International Criminal Court ("ICC") in The Hague asked that they be surrendered to the Court, but the Libyan authorities rebuffed the ICC's demand and Libya intends to try both men by Libyan judges.[52] However, after four decades of dictatorship and a dysfunctional legal system during that period, there are valid concerns whether the judiciary is now up to the task of ensuring a fair and impartial trial to these men.[53]

In a March 2012 report, the International Commission of Inquiry on Libya established by the U.N. Human Rights Council,[54] reported that in its meetings with government officials they "emphasized the precariousness of the security situation, the weakness of the national police and judicial police force, and the inability of the central authorities to enforce the law."[55] The Commission welcomed the Libyan government's plans to disarm militias and integrate fighters into the police force or national army.[56]

Along with concluding that international crimes were committed by Qaddafi's forces, the Commission found that anti-Qaddafi forces had also committed serious violations, including war crimes and breaches of international human rights law.[57]

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47. Kareem Fahim et al., *Qaddafi, Seized by Force, Meets a Violent End*, N.Y. TIMES, Oct. 21, 2011, at A1, *available at* http://www.nytimes.com/2011/10/21/world/africa/qaddafi-is-killed-as-libyan-forces-take-surt.html.

48. David D. Kirkpatrick & Suliman Ali Zway, *Spy Chief for Qaddafi is Extradited to Libya*, N.Y. TIMES (Sept. 5, 2012), http://www.nytimes.com/2012/09/06/world/africa/senussi-qaddafi-spy-chief-is-extradited-to-libya.html.

49. *See* U.N. Human Rights Council, *Report of the International Commission of Inquiry on Libya,* U.N. Doc. A/HRC/19/68 (Mar. 2, 2012).

50. David D. Kirkpatrick & Steven Lee Meyers, *Libya Attack Brings Challenges for U.S.*, N.Y. TIMES (Sept 12, 2012), http://www.nytimes.com/2012/09/13/world/middleeast/us-envoy-to-libya-is-reported-killed.html.

51. David D. Kirkpatrick, *Libya Struggles to Curb Militias, the Only Police*, N.Y. TIMES (Oct. 13, 2012), http://www.nytimes.com/2012/10/14/world/africa/libyan-government-struggles-to-rein-in-powerful-militias.html.

52. David D. Kirkpatrick and Marlise Simons, *Libya Resists International Court's Claim on War Crimes Case*, N.Y. TIMES (Mar. 21, 2012), http://www.nytimes.com/2012/03/22/world/africa/libya-resists-the-hague-in-war-crimes-case.html.

53. *Id.*

54. U.N. Human Rights Council, *supra* note 49, ¶ 1.

55. *Id.* ¶ 13.

56. *Id.* ¶ 45.

57. *Id.* ¶¶ 15-94.

Its recommendations to the then-interim government of Libya included taking urgent steps to establish an independent judiciary, incorporate international human rights law in the future Libyan constitution, and investigate all violations of human rights and international humanitarian law and prosecute all alleged perpetrators.[58]

On September 11, 2012, Islamist militants attacked the American consulate in Benghazi, burning the building, killing the U.S. Ambassador to Libya, J. Christopher Stephens, and three others, which became an issue in the U.S. election campaign.[59] Libya held national elections on July 7, 2012, and then in mid-October 2012, the Parliament chose a prime minister, Ali Zeidan; his cabinet was overwhelmingly approved, but the country is still wracked with militia unrest and lawlessness.[60] As an observer writing in mid-October commented, "[s]cores of disparate militias remain Libya's only effective police force but have stubbornly resisted government control, a dynamic that is making it difficult for either the Libyan authorities or the United States to catch the attackers who killed Ambassador J. Christopher Stephens."[61] And even a recent optimistic account of new Libya acknowledges:

> Although Libya has not imploded, lawlessness—as Stephens' killing suggests—and corruption persist. *Thuwar* (revolutionaries) are still taking the law into their own hands. Members of rogue militias have tortured and abused detainees they arrested during the civil war. The cities are still plagued by banditry and Mafia-like protection schemes. In the southern part of the country, local Libyan tribes are fighting against Tubu groups over control of the lucrative cross-border trafficking of goods, which the government seems unable to contain.

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58. *Id.* ¶¶ 127-28.

59. *See* David D. Kirkpatrick, *Benghazi and Arab Spring Rear Up in U.S. Campaign*, N.Y. TIMES (Oct. 21, 2012), http://www.nytimes.com/2012/10/22/us/politics/benghazi-and-arab-spring-rear-up-in-us-campaign.html.

60. *See* David D. Kirkpatrick, *Libya Parliament Approves New Premier's Cabinet*, N.Y. TIMES (Oct. 31, 2012), http://www.nytimes.com/2012/11/01/world/africa/libya-parliament-approves-new-premiers-cabinet.html.

61. Kirkpatrick, *supra* note 51; *see also* Editorial, *Making Revolution Work*, N.Y. TIMES (Oct. 26, 2012), http://www.nytimes.com/2012/10/27/opinion/making-revolution-work-in-libya.html ("In Tripoli this week, there was no water for at least five days, huge heaps of garbage lined the highways and thousands of young men, most of them heavily armed, lacked meaningful work. As Libya reached the one-year anniversary of the death of Col. Muammar el-Qaddafi and his regime, the country's new leaders are not delivering on the revolution's promise and many Libyans are souring on democracy."); Kareem Fahim, *Libyan Town Under Siege is a Center of Resistance to the New Government*, N.Y. TIMES, Oct. 22, 2012, at A6, *available at* http://www.nytimes.com/2012/10/22/world/africa/libyan-town-under-siege-is-a-center-of-resistance.html ("[I]n some ways the fighting around Bani Walid, a year after Colonel Qaddafi was caught and killed, is a more pressing reminder of the challenges faced by a weak government that has been unable to tamp down feuds and divisions from the war."); Borzou Daragahi, *Libya: Armed and Dangerous*, FIN. TIMES, Oct. 11, 2012, at 7, *available at* http://www.ft.com/intl/cms/s/0/14894600-1235-11e2-868d-00144feabdc0.html#axzz2D18EsZu5 ("But a year after the end of the conflict, armed groups roam the land. Ethnic and tribal violence erupts periodically in the hinterland. Foreign and domestic investment and reconstruction projects stall, even as unspent billions in oil revenues fill state coffers.").

> Alarmingly, much of this smuggling involves weapons, including heat-seeking missiles and rocket-propelled grenades, looted from Qaddafi-era depots.[62]

D. Yemen[63]

The violent uprising in the poorest country in the Arab world against President Ali Abdullah Saleh's autocratic rule began in January 2011.[64] Although hundreds of protesters died in clashes with the security forces, Saleh held on to power with false promises and threats. Finally, in November 2011, he signed an agreement ceding power to his vice president, Abed Rabbo Mansur Hadi, who officially assumed the presidency in February 2012 after national elections.[65] The country remains deeply divided and Hadi presides over a corrupt bureaucracy while Yemen is running out of oil and water. The United States has used drones to assassinate the leaders of al-Qaeda's Yemen branch.[66]

Two days after the American ambassador in Libya was killed by terrorists, hundreds of protesters attacked the U.S. Embassy in Sana, the capital of Yemen. They broke through an outer perimeter protecting the fortified embassy compound, climbing over a high wall and setting fire to a building.[67] Yemeni security forces eventually forced them to retreat.[68] However, terrorism remains a constant menace, as in October 2012, a senior Yemeni officer who had worked at the U.S. Embassy for about twenty years was killed in an attack.[69] It was only after the terrorists' suicide attack on the USS Cole, a destroyer stationed in Aden's harbor in October 2000, which killed seventeen U.S. sailors, that the U.S. began giving aid to Yemen. As Robert Worth, a New York Times staff writer who has commented on the Middle East for almost a decade, writes:

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62. Dick Vandewalle, *The New Libya,* FOREIGN AFF., Nov.-Dec. 2012, at 8, 10.

63. *See generally* Robert F. Worth, *The Jihadis of Yemen*, N.Y. REVIEW OF BOOKS (Nov. 9, 2012), http://www.nybooks.com/articles/archives/2012/dec/06/jihadis-yemen/.

64. Laura Kasinof & Robert F. Worth, *8 Months After First Protests, Yemen Enters Dangerous New Phase*, N.Y. TIMES (Sept. 22, 2011), http://www.nytimes.com/2011/09/23/world/middleeast/snipers-imperil-truce-in-yemen.html.

65. Laura Kasinof, *Yemen Gets New Leader as Struggle Ends Calmly*, N.Y. TIMES (Feb. 24, 2012), http://www.nytimes.com/2012/02/25/world/middleeast/yemen-to-get-a-new-president-abed-rabu-mansour-hadi.html.

66. *See, e.g.*, Associated Press, *Yemen: Airstrike Kills a Top Leader of Al Qaeda*, N.Y. TIMES (Sept. 11, 2012), http://www.nytimes.com/2012/09/11/world/middleeast/yemen-airstrike-kills-a-top-leader-of-al-qaeda.html; Scott Shane, *Yemen's Leader Praises US Drone Strikes*, N.Y. TIMES (Sept. 29, 2012), http://www.nytimes.com/2012/09/29/world/middleeast/yemens-leader-president-hadi-praises-us-drone-strikes.html?gwh=2AD7A62D5DFDEE105797FC2C4FBB6245.

67. Nasser Arrabyee et al., *Turmoil Over Contentious Video Spreads*, N.Y. TIMES (Sept. 13, 2012), http://www.nytimes.com/2012/09/14/world/middleeast/mideast-turmoil-spreads-to-us-embassy-in-yemen.html.

68. *Id.*; *Anti-American Protests, supra* note 36.

69. Nasser Arrabyee, *Yemeni Officer at U.S. Embassy in Sana Is Shot Dead*, N.Y. TIMES (Oct. 11, 2012), http://www.nytimes.com/2012/10/12/world/middleeast/yemeni-employee-at-us-embassy-in-sana-is-shot-dead.html?hp&gwh=772B22C7E07EC46C82F8766C29282408.

> Since then, the mayhem directed at the U.S. has brought Yemen hundreds of millions of dollars in American military assistance and training, along with billions in pledges from the "Friends of Yemen," an international coalition that aims to help it address the root causes of terrorism with development and education programs. Yemen's threat to the United States has made it a crucial source of intelligence as well.[70]

E. Syria[71]

As of November 20, 2012, the day Britain recognized a new opposition group in Syria, called the "[Syrian] National Coalition for Revolutionary and Opposition Forces,"[72] the civil war wages on with a fury.[73] It has indeed spilled over into neighboring countries—Turkey, Iraq, Jordan, and Israel[74]—and caused a great deal of death and destruction. To illustrate, on November 18, 2012, the New York Times noted that, according to the United Nations, nearly 40,000 people—most of them civilians—had been killed, and more than 400,000 Syrian refugees had registered in neighboring countries, while about 2.5 million Syrians needed aid inside the country, with more than 1.2 million having been displaced domestically.[75]

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70. Worth, *supra* note 63.

71. *See generally* Max Rodenbeck, *The Agony of Syria*, N.Y. REVIEW OF BOOKS (Aug. 27, 2012), http://www.nybooks.com/articles/archives/2012/sep/27/agony-syria/. For an account of the Syrian conflict prior to September 2012 and the role of the international community in addressing the conflict, *see* Ved P. Nanda, *The Future Under International Law of the Responsibility to Protect After Libya and Syria*, MICH. ST. INT'L L. REV. (forthcoming 2012) [hereinafter *Future of R2P*] (on file with authors).

72. J.A., *Syria's Agony: Recognizing the "United" Opposition*, THE ECONOMIST (Nov. 20, 2012), http://www.economist.com/blogs/theworldin2013/2012/11/syrias-agony/print.

73. Farnaz Fassihi, *Islamists Reject Syria Rebel Group, As EU Embraces It*, WALL ST. J., Nov. 20, 2012, at A11 ("The war's stalemate dragged on Monday, as a bomb exploded on a minibus in Damascus that injured 10 people, said the Syrian Observatory for Human Rights, which tallies victims of the conflict. After several days of fighting the Free Syrian Army said it appeared to be gaining the upper hand over the Special Forces 46th Regiment, a well-trained army regiment . . . . Opposition general Ahmed al-Faj, a field commander, said his group of about 1,500 fighters had captured dozens of army hostages and controlled most of the 640-acre headquarters."). *See also* Neil MacFarquhar, *Dozens are Killed in a Fierce Outburst of Syrian Violence*, N.Y. TIMES, Nov. 6, 2012, at A4, *available at* http://www.nytimes.com/2012/11/06/world/middleeast/Syria.html.

74. *See* Aymenn Jawad Al-Tamimi, Op-Ed., *Syria: Spillover into Iraq?*, JERUSALEM POST (Nov. 18, 2012), http://www.jpost.com/Opinion/Op-EdContributors/Article.aspx?id=292339; Sebnem Arsu & Rick Gladstone, *New Mayhem on 2 Borders as Syrian Opposition Unifies*, N.Y. TIMES (Nov. 12, 2012), http://www.nytimes.com/2012/11/13/world/middleeast/syria-war-updates.html; Editoral, *Time to Change Course on Syria*, FIN. TIMES (Oct. 22, 2012, 5:36 PM), http://www.ft.com/intl/cms/s/0/7efe7efe-1c4b-11e2-a14a-00144feabdc0.html [hereinafter *Change Course on Syria*]; Isabel Kershner, *Israel Fires Into Syria After Shell Hits Post*, N.Y. TIMES (Nov. 11, 2012), http://www.nytimes.com/2012/11/12/world/middleeast/israel-fires-into-syria-after-mortar-hits-military-post.html; Isabel Kershner, *Israel Strikes at Syria Again in Response to Mortar Attacks*, N.Y. TIMES (Nov. 12, 2012), http://www.nytimes.com/2012/11/13/world/middleeast/israel-strikes-at-syria-again-in-response-to-mortar-attacks.html.

75. *Syria-Overview*, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html (last updated Nov. 29, 2012). For earlier report, *see* Daniel Dombey & Abigail Fielding-Smith, *Turkey Warns on Syria Refugees*, FIN. TIMES (Oct. 15, 2012, 11:44 AM), http://www.ft.

The uprising in Syria began on March 15, 2011, and after the government cracked down with excessive force the protests spread, eventually growing into a civil war. Despite repeated efforts by the United Nations, the Arab League, neighboring states, and the West, the violence has intensified. The opposition forces, which have been fractured, finally came together for negotiations in Doha, Qatar, and formed a new coalition on November 11, 2012, receiving full diplomatic recognition from France, Turkey, and several Arab countries of the Persian Gulf.[76] The European Union has also supported the coalition, saying that it constitutes the "legitimate representatives for the Syrian people."[77]

However, Islamists reject this new coalition, as representatives from thirteen Islamist factions released a video statement rejecting the new council and calling for an Islamist state, with a man reading a statement, "[w]e reached a consensus on the establishment of a just Islamic state and the rejection of any foreign plan from coalitions or councils imposed on those of us inside [Syria] no matter which side it comes from," and sending the statement to the Syrian Observatory for Human Rights, a London-based activist group.[78]

Unlike in Libya, the international community has failed to take effective action to address what indeed has become a humanitarian crisis. The Security Council has been paralyzed, Russia and China having vetoed any attempt to adopt a resolution on Syria, even the one aimed at imposing sanctions on the government for its brutal crackdown, not to speak of intervening militarily under R2P.[79] In addition to the Russian and Chinese vetoes in the Security Council, the situation in Syria is rather muddied. Iran and Russia are helping the Syrian government,[80] while Saudi Arabia and Qatar are helping the rebels;[81] within the country sectarian

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com/intl/cms/s/0/c9fe784e-1615-11e2-b6f1-00144feabdc0.html; Rick Gladstone, *Winter's Approach Adds to Crisis as Refugee Population Swells*, N.Y. TIMES, Oct. 27, 2012, at A10, *available at* http://www.nytimes.com/2012/10/27/world/middleeast/winters-approach-adds-to-crisis-as-syrians-continue-to-flee.html; Rhonda Roumani, Op-Ed., *Syria Stains the World's Conscience*, FIN. TIMES (Oct. 14, 2012, 8:07 PM), http://www.ft.com/intl/cms/s/0/1a30925e-1481-11e2-aa93-00144feabdc0.html.

76. Tim Arango, *European Union Backs Syrian Opposition Coalition*, N.Y. TIMES, Nov. 20, 2012, at A8, *available at* http://www.nytimes.com/2012/11/20/world/middleeast/islamists-reject-new-syrian-opposition-coalition.html.

77. *Id.*

78. Fassihi, *supra* note 73.

79. Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protesters, Owing to Veto by Russian Federation, China, U.N. Press Release SC/10403 (Oct. 4, 2011), *available at* http://www.un.org/News/Press/docs/2011/sc10403.doc.htm. For another Security Council resolution vetoed by Russia and China, *see* Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria as Russian Federation, China Veto Text Supporting Arab League's Proposed Peace Plan, U.N. Press Release SC/10536 (Feb.4, 2012), *available at* http://www.un.org/News/Press/docs/2012/sc10536.doc.htm (rejecting U.N. Security Council, Draft Resolution S/2012/77).

80. Tim Arango & Hwaida Saad, *Turkey's Parliament Backs Military Measure on Syria*, N.Y. TIMES (Oct. 4, 2012), http://www.nytimes.com/2012/10/05/world/middleeast/syria.html.

81. David E. Sanger, *Rebel Arms Flow is Said to Benefit Jihadists in Syria*, N.Y. TIMES (Oct. 14, 2012), http://www.nytimes.com/2012/10/15/world/middleeast/jihadists-receiving-most-arms-sent-to-syrian-rebels.html.

forces are at loggerheads. Minorities—Christians and Kurds—are not confident that the rebels, if they succeed in toppling Bashar al-Assad, will treat them justly.[82] It is feared that the conflict, which is already spilling over into neighboring countries, could destabilize the region.

Although diplomacy thus far has failed to resolve the conflict, every possible means should be explored to convince Assad to seek asylum in a friendly country and leave Syria so that a transitional phase can begin. However, as the war drags on, there are calls for greater international intervention.[83]

F. Other Countries in the Region

A contributing editor at Foreign Policy Magazine and senior fellow at the MIT Center for International Studies, Christian Caryl, wrote on October 17, 2012, naming several countries where revolutionary discontent continues to simmer without attracting headlines.[84] He includes Bahrain, Jordan, Kuwait, Morocco, and Saudi Arabia as "the places where we may be experiencing the political conundrums and diplomatic surprises of tomorrow."[85] He adds that:

> [I]t seems reasonable to conclude that the Arab Spring still has its share of surprises left. The fact that the situation in each of these countries is at once intensely local and yet linked with larger regional themes (such as political Islam and the rising political self-awareness of Arab Shiites) merely adds to the unpredictability factor. And you may have noticed that all of these stories have one common denominator: in each case, the government in question is an important ally of the United States.[86]

Since then, acts of violence have continued in several of these countries. For instance, on October 30, Bahrain banned all protests and gatherings to maintain security after clashes with Shiite-led demonstrators.[87] Subsequently, on November 5, a series of bomb blasts killed at least two people,[88] and on November 7, the government revoked the citizenship of thirty-one Shia activists, including two

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82. *See* Alexandra Sandels & Patrick J. McDonnell, *Syria Christian Refugees in Lebanon Fear Islamist Rebels*, L.A. TIMES (Aug. 22, 2012), http://articles.latimes.com/2012/aug/22/world/la-fg-syria-christians-20120822.

83. *Change Course on Syria*, *supra* note 74 ("Non-intervention is only credible as a policy if it is respected by everyone. This is manifestly not the case in Syria. The Assad regime is receiving military and financial help from Iran and Russia. The rebels are being supplied by Saudi Arabia and Qatar. The conflict is at a bloody impasse, while the policy of the international community amounts to little more than hand-wringing from the sidelines. This risks prolonging a dreadful conflict and radicalizing the region. Now is the moment to change course.").

84. Christian Caryl, *Where the Arab Spring Has Not Yet Sprung*, FOREIGN POLICY (Oct. 17, 2012), http://www.foreignpolicy.com/articles/2012/10/17/where_the_arab_spring_has_not_yet_sprung.

85. *Id.*

86. *Id.*

87. *Bahrain Bans Protests to "Maintain Security" After Clashes*, THE TELEGRAPH (Oct. 30, 2012, 2:47 PM), http://www.telegraph.co.uk/news/9643215/Bahrain-bans-protests-to-maintain-security-after-clashes.html.

88. *Bomb Blasts Rock Bahrain*, THE TELEGRAPH (Nov. 5, 2012, 11:07 AM), http://www.telegraph.co.uk/news/worldnews/middleeast/bahrain/9655356/Bomb-blasts-rock-Bahrain.html.

former members of Parliament, for having "undermined state security."[89] In late November 2012 Professor Cherif Bassiouni, who a year earlier in his report on Bahrain accused the Bahraini government of using excessive force against protesters and torturing detainees, criticized Bahrain for its slow pace of change.[90]

Jordan has remained relatively quiet after the initial outburst of protests that began during the Arab Spring pro-democracy uprisings.[91] King Abdullah II has promised constitutional reforms, but they have fallen short of expectations. He has repeatedly shuffled his cabinet four times since February 2011, and has frequently changed his intelligence chiefs, but critics have seen these as mostly cosmetic changes.[92] Elections are scheduled for January 23, 2013, but the Islamists have threatened to boycott the elections.[93] The Economist, in it's *The World in 2013* edition, considers Jordan to be "[o]ne state that will be particularly shaky in 2013."[94]

G. The Revolutionary Uprisings and U.S. Foreign Policy

The "Arab Spring" is indeed becoming the "Arab Decade," as many experts predict.[95] The future direction of the countries in the region is unclear. Two analysts have aptly stated:

> Amid chaos and uncertainty, the Islamists alone offer a familiar, authentic vision for the future. They might fail or falter, but who will pick up the mantle? Liberal forces have a weak lineage, slim popular support, and hardly any organizational weight. Remnants of the old regime are familiar with the ways of power yet they seem drained and exhausted. If instability spreads, if economic distress deepens, they could benefit from a wave of nostalgia. But they face long odds, bereft of an argument other than that things used to be bad, but now are worse.[96]

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89. *Bahrain Revokes Citizenship of Shia Activists*, THE TELEGRAPH (Nov. 7, 2012, 11:51 AM), http://www.telegraph.co.uk/news/worldnews/middleeast/bahrain/9660985/Bahrain-revokes-citizenship-of-Shia-activists.html.

90. Alex Delmar-Morgan, *Bahrain Is Criticized for Slow Pace of Change*, WALL ST. J. (Nov. 22, 2012, 3:03 PM), http://online.wsj.com/article/SB10001424127887324712504578135212234042602.html?KEYWORDS=bahrain+criticized+slow+pace+of+change.

91. Bill Spindle & Suha Phillip Ma'ayeh, *Jordanians Call for End to Monarchy: A Regime Long Sheltered From Arab Spring Sees Economic Discontent Feed New Demand for 'Revolution,'* WALL ST. J., Nov. 17-18, 2012, at A10, *available at* http://online.wsj.com/article/SB10001424127887324556304578122784202064810.html?KEYWORDS=jordanians+call+for+end+to+monarchy.

92. *Id.*

93. *Id.*

94. *The cycle of history: The Arab summer will be delayed*, THE ECONOMIST (Nov. 21, 2012), http://www.economist.com/news/21566339-arab-summer-will-be-delayed-cycle-history.

95. *See, e.g.*, Anthony H. Cordesman, *The "Arab Spring" Becomes the "Arab Decade"—The Causes of Stability and Unrest in the Middle East and North Africa: An Analytic Survey*, CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Apr. 23, 2012), http://csis.org/publication/arab-spring-becomes-arab-decade.

96. *Not a Revolution*, *supra* note 2.

The United States has adapted its foreign policy in light of the uprisings. Hosni Mubarak, Ben Ali, and Saleh were all U.S. allies in the war on terror. And all of them were in office for long periods, often ruling with heavy-handed methods. Eventually, the U.S. saw the handwriting on the wall and the Obama administration changed its course and supported the revolutions when its calls for meaningful reforms were not met with effective action.[97]

What shape should U.S. foreign policy take in the future? On October 12, 2012, Secretary of State Hillary Rodham Clinton outlined the policy's contours in remarks at the Center for Strategic and International Studies ("CSIS").[98] She acknowledged that "these transitions are not America's to manage, and certainly not ours to win or lose."[99] She added: "But we have to stand with those who are working every day to strengthen democratic institutions, defend universal rights, and drive inclusive economic growth. That will produce more capable partners and more durable security over the long term."[100]

Secretary Clinton recognized that recent events such as political turmoil in Libya and Yemen, the rise of Islamist parties to win elections in Egypt and Tunisia, and the crisis in Syria, have tested U.S. leadership. She also mentioned the challenges facing Morocco, Algeria, Yemen, and Jordan, stating that, although it is too soon to say how these transitions will happen, America indeed "has a big stake in the outcome."[101]

Secretary Clinton reiterated that American foreign policy has to balance the U.S. interests in security and stability with the country's values in freedom and democracy, and that "supporting democratic transitions is not a matter of idealism. It is a strategic necessity."[102] She added, "we will not return to the false choice between freedom and stability. And we will not pull back our support for emerging democracies when the going gets tough. That would be a costly strategic mistake that would, I believe, undermine both our interests and our values."[103] Referring to the terrorists' attack on the U.S. Mission in Benghazi, Libya, Secretary Clinton said:

> We have to, as always, be clear-eyed about the threat of violent extremism. A year of democratic transition was never going to drain away reservoirs of radicalism built up through decades of dictatorship,

97. *See* Helene Cooper & Robert F. Worth, *In Arab Spring, Obama Finds a Sharp Test*, N.Y. TIMES (Sept. 24, 2012), http://www.nytimes.com/2012/09/25/us/politics/arab-spring-proves-a-harsh-test-for-obamas-diplomatic-skill.html.

98. Hillary Clinton, U.S. Sec'y of State, Democratic Transitions in Maghreb Region, Address before Center for Strategic and International Studies (Oct. 12, 2012), *available at* http://translations.state.gov/st/english/texttrans/2012/10/20121012137427.html#axzz2CtkNNZZ4.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

> nor was that enough time to stand up fully effective and responsible security forces to replace the repressive ones of the past.[104]

In President Obama's second term the implementation of this policy will be essential.

III. THE "RESPONSIBILITY TO PROTECT" NORM: APPLICATION IN LIBYA BUT NOT IN SYRIA

I have previously written on the evolution of the responsibility to protect norm and its invocation in Libya,[105] but not in Syria.[106] Here it will suffice to recall briefly the genesis of the concept, which took shape in response to the international community's failures to protect populations from mass atrocities—genocide, crimes against humanity, war crimes, and ethnic cleansing. U.N. Secretary General Ban Ki-moon clarified the three-pillar framework of the concept in his 2009 report, *Implementing the Responsibility to Protect*: (1) the primary responsibility of each state to protect its population from these atrocity crimes; (2) the international community's commitment to provide assistance to states in capacity-building; and (3) timely and decisive response by the international community to prevent and halt these crimes.[107] These pillars are not sequential and are of equal importance.[108] The concept was invoked and applied in Libya as NATO intervened and eventually the Qaddafi regime was overthrown.

In his latest report on July 25, 2012, the Secretary-General focused on "Responsibility to protect: timely and decisive response," and noted the interactive and mutually supportive relationship between the three pillars.[109] Mr. Ban stated that although the first two pillars of R2P are generally associated with prevention and the third pillar with response, "[t]he dividing lines are . . . not so clear in practice [as action under either pillar] . . . . can also comprise elements of both prevention and response."[110]

On U.N. peacekeeping missions, the report stated that these are implemented under pillar two and should be distinguished from action under pillar three.[111] Reiterating that responsibility is an ally of sovereignty, the Secretary-General outlined among lessons learned to date that the concept should be applied consistently and uniformly, and that an effective and integrated strategy to protect populations is likely to include both prevention and response.[112] The report discusses at length the many R2P tools available under the Charter, including non-

104. *Id.*

105. *See Emergence of R2P*, *supra* note 41.

106. *See Future of R2P*, *supra* note 71.

107. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 11, U.N. Doc. A/63/677 (Jan. 12, 2009).

108. *See id.* ¶ 12.

109. U.N. Secretary-General, *Responsibility to Protect: Timely and Decisive Response, Rep. of the Secretary-General*, ¶ 61, U.N. Doc. A/66/874-S/2012/578 (July 25, 2012).

110. *Id.* ¶¶ 11, 12.

111. *Id.* ¶ 16.

112. *Id.* ¶ 20.

coercive responses under Chapters VI and VIII and coercive tools under Chapter VII.[113]

The Secretary-General also welcomed the Brazilian initiative on "responsibility while protecting,"[114] which the permanent representative of Brazil had presented to the Secretary-General as a concept note entitled, *Responsibility while protecting: Elements for the development and promotion of a concept.*[115] Responsibility while protecting ("RwP") highlights prevention as "always the best policy"[116] and the use of force as a measure of last resort,[117] which must always be authorized by the Security Council under Chapter VII, or by the General Assembly in exceptional circumstances, under the "Uniting for Peace" resolution.[118] Furthermore, the use of force must always meet the standard of proportionality and neither exceed the mandate conferred by the Security Council or the General Assembly, nor "generate more harm than it was authorized to prevent."[119] The paper calls for chronological sequencing,[120] and also proposes the creation of a monitoring and assessment system to review the use of force.[121]

At the General Assembly's Informal Interactive Dialogue on the responsibility to protect on September 5, 2012, the Secretary-General noted that the R2P was a concept whose time had come and that the concept reaffirmed "sovereignty as a positive responsibility" for governments to protect their populations.[122] Implicitly referring to NATO's intervention in Libya, he acknowledged concerns regarding measures undertaken having exceeded the intent and mandate of the Security Council resolution providing for the use of force.[123] Notwithstanding these concerns, he stated that we must move forward, for "[w]e cannot stand by while populations fall victim to these grave crimes and violations."[124] Following the Secretary-General's address, deliberations in the General Assembly found a general consensus on the primacy of the preventive aspects of R2P.[125]

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113. *Id.* ¶¶ 21-37.

114. *Id.* ¶ 50.

115. Permanent Rep. of Braz. to the U.N., Letter dated Nov. 9, 2011 from the Permanent Rep. of Braz. to the United Nations addressed to the Secretary-General, U.N. Doc. A/66/551-S/2011/701 (Nov. 11, 2011).

116. *Id.* ¶ 11(a).

117. *Id.* ¶ 7.

118. *Id.* ¶ 11(c).

119. *Id.* ¶¶ 11(d)-(f).

120. *Id.* ¶ 6.

121. *Id.* ¶¶ 11(g)-(i).

122. U.N. Secretary-General, Secretary-General's Remarks to General Assembly Informal Interactive Dialogue on "The Responsibility to Protect: Timely and Decisive Response" (Sept. 5, 2012), http://www.un.org/sg/statements/index.asp?nid=6271.

123. *Id.*

124. *Id.*

125. *See generally* Press Release, General Assembly, World Not Fulfilling "Never Again" Vow, Secretary-General Tells General Assembly Meeting on Responsibility to Protect, Use of Force Must be

The R2P concept could not be used in the Syrian situation because of the deep divisions between the U.S., France, and Britain, on the one hand, and China and Russia, on the other. RwP, which emphasizes prevention as the best policy and calls for regular monitoring and periodical assessing of the use of force so as to minimize the impact on civilians, must be seen as supplementing R2P—additional accountability and guidelines for and monitoring the implementation of military measures are positive features that RwP adds to R2P. However, chronological sequencing of the three pillars of R2P is not warranted, as this would weaken it, and a flexible approach in the selection of tools aimed at preventing or halting the four named atrocity crimes allows the international community to respond appropriately.

In sum, there is an emerging consensus for the need to develop better preventive and coercive tools to operationalize R2P in the future and to ensure that the concept is not misused for purposes other than protecting civilians, such as regime change. Thus, the need is to ensure that decisionmakers at national, regional, and international levels have the tools of early warning and the capability for assessment and action, as well as mediation and preventive diplomacy. The primary focus must be on prevention and capacity building. However, notwithstanding the availability of these tools and capabilities, atrocities cannot be halted without political will and international resolve.

IV. SUTTON COLLOQUIUM CONTRIBUTIONS

The first two articles in this symposium issue specifically address U.S. foreign policy in the region. The first, by a Middle East scholar, explores the question of democracy. The second is from the perspective of two public international law practitioners who have worked with clients in several Middle Eastern states, including Tunisia, Egypt, Yemen, Lebanon, and Syria. Their article seeks to provide a better understanding of the Arab Spring and inform policymakers and analysts on "what actions will help to bring future stability to the region." The remaining two articles, both by academicians, study the emerging new norm in international law, R2P. The authors focus on different aspects of the concept—one on the relationship between R2P and customary international law, and the other on the traditional practice of humanitarian intervention as compared to and contrasted with R2P.

In "*The Arab Spring, U.S. Foreign Policy, and the Question of Democracy in the Middle East*," Nader Hashemi provides a sobering assessment of the traditional U.S. policy toward the Middle East and calls for a major shift in light of the recent developments there. He asserts that the Arab Spring has helped to clarify that the basic political chasm in the region is between the authoritarian regimes and the people over whom they rule, and not between pro-Western and anti-Western forces, or between Shia and Sunni, or Arab and Jew. He challenges two prevalent

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Last Resort, Says President Before Panel Discussion, U.N. Press Release GA/11270 (Sept. 5, 2012), *available at* http://www.un.org/News/Press/docs/2012/ga11270.doc.htm.

assumptions: (1) that the voice of people in the Middle East was "too fractured, too politically immature or too radical to be taken seriously[,]" and (2) that "the Arab authoritarian order was there to stay." He asserts that the upheavals in the region, which toppled entrenched dictators, caught the Obama administration off guard.

The U.S. administration had long supported authoritarian regimes in the region to ensure stability. However, as President George W. Bush reflected on past U.S. policy following the September 11, 2001, terrorist attacks: "[I]n the long run, stability cannot be purchased at the expense of liberty. As long as the Middle East remains a place where freedom does not flourish, it will remain a place of stagnation, resentment, and violence ready for export."

Hashemi refers to an incident in May 2003 when Washington pressured the newly elected government in Turkey to acquiesce to its request that a second battlefront be opened into Iraq from the North, across the Turkish border, and offered a $32 billion aid package as an incentive. But, as public opinion in Turkey was opposed to the country's role in the invasion of Iraq, the Turkish government refused the American request, although it had originally been receptive to the offer. Hashemi uses this example to make the point that the U.S. finds it easier to work with military regimes than with democratic parliaments and that a key principle regarding U.S. foreign policy in the Middle East has been that "[g]reater democracy does not always translate into greater support for U.S. geo-strategic interests in the region."

Hashemi notes that the Hamas victory in the 2006 Palestinian Legislative Council elections and the growing Turkish assertiveness in the Middle East reflect the tension between the U.S. policy in the Middle East and democracy. He observes, "[f]rom the perspective of U.S. foreign policy, democracy was acceptable as long as the results worked in favor of securing American strategic interests in the region. If they did not, then democracy was a problem."

He provides historical context to make the point that two American priorities intersect in the Middle East—oil and the State of Israel. He quotes former Supreme Allied Commander of NATO Wesley Clark, who observed about the consequences of the Arab Spring for U.S. foreign policy: "[i]n Tunisia, Egypt and Libya, strong Islamic sentiments have inevitably surfaced despite the democratic and western-oriented facade of the initial Arab Spring uprisings. The future orientation of these states is likely to be less helpful to U.S. aims and policies for the region than their predecessors." Hashemi suggests that, to ensure its long-term security in the Middle East, Israel must make peace with the people of the region instead of the dictators who rule over them, and that the U.S. will have to reorient how it views and deals with a new Middle East. In conclusion he aptly cautions that "the old assumptions that shaped and guided America's approach to the region will no longer work. A specter is haunting U.S. policy toward the Middle East. With mass revolution, democracy is now the only game in town."

Paul R. Williams and Colleen (Betsy) Popken concur regarding the pitfalls of the traditional U.S. approach of allying with undemocratic leaders in the name of stability in their article, "*U.S. Foreign Policy and the Arab Spring: Ten Short-Term Lessons Learned.*" Giving the examples of Egypt and Libya, where the U.S. did

break from the status quo in abandoning its support for Hosni Mubarak and Muammar al-Qaddafi, the authors fear that in light of the post-conflict developments in those countries, the U.S. may revert to the old approach. However, they acknowledge that "the U.S.'s actions in some of the Arab Spring states demonstrates a recognition of the value gained in supporting democratic movements in lieu of maintaining the status quo."

After noting that the Muslim Brotherhood has emerged as a winner from the Arab Spring, Williams and Popken acknowledge that it is hard to tell whether this rise is because of actual support for the Brotherhood's "ideology, empathy for the group as representative of the oppressed masses, or respect for an entity capable of delivering during a time of important transition." However, they observe that this rise demonstrates that religion will play a greater role in post-Arab Spring states, and that the success of the extreme Salafist parties—especially in Egypt and Syria—suggests future tensions between secularists and those promoting governance under Islamic law. They advise U.S. policymakers to seriously reconsider their arms-length relationship with the Brotherhood.

Williams and Popken analyze the role of the Arab League in the upheavals in Tunisia, Libya, and Syria and of the Gulf Cooperation Council in Yemen, and caution the West to recognize the limits of the Arab League and take action itself when a regional solution is important and the League has requested such action. They also suggest that the Arab League, which has played a significant role in the Arab Spring, encourage its member states to institute internal democratic reforms, and they caution U.S. policymakers and analysts "to be aware of the potentially competing interests of individual member states, as well as [these regional] organizations' capabilities and shortcomings."

The authors contrast the NATO intervention in Libya with the international community's ineffective response in Syria, which thus far has been limited to some sanctions and what the authors call "pin-prick diplomacy," and which they surmise may have been due to the international community's reluctance to undertake humanitarian intervention. They conclude that since R2P has failed to provide a solid basis for any effective action by the international community and has not been able to prompt "consistent or decisive application in the Arab Spring," the concept has matured but is used inconsistently. They conclude that the discussions on Libya and Syria at the United Nations Security Council demonstrate that the BRIC countries—Brazil, Russia, India, and China—may not be ready for a greater role in world politics.

Williams and Popken have words of caution and advice for rebels and pro-democracy movements and their leaders, who, they say, should prepare transition plans outlining what they hope to accomplish post-transformation and which could "also demonstrate the responsibility and capability of a state's future leadership." Such plans could also identify individuals to be groomed as leaders in a new government and "may afford the time and opportunity to obtain the resources necessary for a healthy democracy."

They also note that in Egypt and Tunisia there were no such plans; and even when plans were in place, as in Libya, implementation during the transition period

has been challenging. Tunisia, too, has faced key challenges in addressing dissent and stimulating its economy, even though it had a successful election for a national constituent assembly.

With justice as a priority demand of Arab Spring pro-democracy movements, they are eager to ensure accountability. However, citing Egypt, Libya, and Tunisia as examples, the authors state that while these nations are eager for accountability, truth and reconciliation could benefit countries in transition. They also caution interim governments to be aware of the possibility for counterrevolution because, as they state, "striking a balance between protecting civil rights, particularly freedom of expression, and preventing the transition from being hijacked by counter-revolutionaries is difficult." After observing that social media played a significant role both in sparking and facilitating the uprisings in the Arab Spring countries, and that rebels have been using social media and the internet to promote themselves and market their ideas and seek outside assistance, they counsel those rebels to be media-savvy.

Finally, Williams and Popken suggest that understanding the Arab Spring's relationship to the democratic transitions in Iraq and South Sudan is essential because these two states "illuminate the challenges involved in transition to democracy, as well as the importance of democratic change . . . . Our knowledge of the origins, progression, and future of the Arab Spring will be much improved by taking these two recent democratic transitions into consideration."

In "*Politics or Law? The Dual Nature of the Responsibility to Protect*," Rachel VanLandingham, a retired judge advocate of the United States Air Force and now a law professor, sketches the lineage and evolution of R2P and cites examples of how it has been utilized. She also addresses the significance of the distinction between policy, politics, and law, as she asserts that "[t]he transformation from a political and moral commitment to protect human rights to a legal rule is not purely theoretical; it matters because the responsibility to protect as law forecasts how national leaders will react to mass human rights abuses, and informs their future decision-making."

VanLandingham elaborates by suggesting that all law involves some level of politics, and that responsibility to protect thus involves politics, as well. She argues that states' indulging in political calculations in implementing R2P does not negate the concept's status as customary international law. In her words, "[w]hat is considered international law frames the international discussion and helps shape behavior of its actors; responsibility to protect is both a product of politics and a shaper of same as its essential elements drive state policy."

She also distinguishes international law from pure politics based on its potential for imposing sanctions, although a sanction may take many forms. She argues that:

> In today's globally-interdependent and politically conscious world, nation-states simply cannot intentionally commit, allow, or fail to prevent mass human rights abuses within their territories without eliciting some type of sanction-type reaction by the global community. This reaction demonstrates the legal status of the obligation not to engage in such behavior in the first place.

VanLandingham discusses the formation of customary international law as a combination of state practice and *opinio juris*. Her thesis is that the first pillar of R2P, as reformulated by U.N. Secretary General Ban Ki-moon in 2009—a state's obligation to protect its inhabitants from genocide, war crimes, crimes against humanity, and ethnic cleansing, which, she says has been quietly accepted by the international community—has progressed from a theory to a norm to customary international law. Although the concept is not formally recognized as such, it has gained wide acceptance, and even such a staunch proponent of nonintervention as Iran implicitly supports it.

The author traces the evolution of the R2P doctrine by providing an historical context. She discusses the failures of humanitarian intervention followed by then-Secretary-General Kofi Annan's challenge to the global community to forge a united front to protect people from massive and systematic violations of human rights. She recounts the response to this challenge by the International Commission on Intervention and State Sovereignty ("ICISS"), prioritizing the international community's prevention responsibility and identifying the U.N. Security Council as the appropriate body to authorize military intervention for protection purposes.

The 2001 ICISS report was followed by the 2005 U.N. World Summit, which gave shape to R2P and was subsequently reformulated by Secretary-General Ban Ki-moon into three distinct pillars: (1) the protection responsibilities of the state, (2) international assistance and capacity building, and (3) timely and decisive response. VanLandingham cites the 2009 General Assembly debate on R2P, two General Assembly resolutions, and several Security Council resolutions referring to the principle. Based upon these developments she concludes:

> The verbal acts of passing the 2005 World Summit Outcome Document and its subsequent General Assembly and Security Council reaffirmations, in addition to the . . . state-specific resolutions which cite to a particular state's responsibility, provide significant examples of state practice to demonstrate that states now possess a binding legal obligation to prevent or halt (i.e., protect) crimes against humanity, genocide, ethnic cleansing, and war crimes within their borders.

Notwithstanding several states' failures to fulfill their legal responsibility to protect, she further contends that "as the International Court of Justice has highlighted, the international condemnation of [tragedies which states failed to prevent], as well as the excuses, justifications, and denials issued by the states themselves, underscore the existence of the 'state as protector' rule itself."

VanLandingham acknowledges that there is no general and consistent practice regarding assistance to states. Similarly, such practice does not exist of "timely and decisive action" when states fail their obligation. However, when states manifestly fail to protect their populations from one of the four enumerated mass atrocities, the international community demonstrates recognition that states are compelled to act in some manner, although such a response might take any of the following forms to stop the ongoing atrocities: public condemnations; formal regional discussions; referral to the International Criminal Court and indictments

by it; deliberations and resolutions in the General Assembly and the Security Council; individual state and regional sanctions; peacekeeping; and even armed intervention, as in Libya.

The author asserts that there is at least some *opinio juris* behind these actions and acknowledges that "arguably, the cited state practice is too inconsistent, and *opinio juris* too nebulous, to definitively conclude the existence of such an internationally binding rule." Thus she considers the third pillar obligation to be "rather ambiguous," but argues that it "provides a platform on which it can expand." She reaches the conclusion that the first and third pillars of R2P as customary international law will exert greater influence on global politics as nation-states sporadically fail to shoulder their legal obligation to protect their peoples. Just as the Arab Spring will continue for years to come as states wrestle with governance after decades of tyrannical rule, responsibility to protect's transition from hortatory doctrine to customary international law will likewise continue to evolve.

Amy E. Eckert begins her article, "*The Responsibility to Protect in the Anarchical Society: Power, Interest, and the Protection of Civilians in Libya and Syria*," by contrasting R2P with humanitarian intervention, in which military force is used to address humanitarian crises. The responsibility to protect calls for a continuum of actions that include, as a last resort, the use of force, and it is intended to address crises at an earlier stage.

Eckert, however, contrasts the NATO intervention in Libya with the international community's playing little, if any, role in preventing Syrian atrocities. This comparison leads her to contend that R2P suffers from selectivity in its application, which is similar to the practice under humanitarian intervention. This, she contends, "stems from the nature of the international system, and the lack of a realistic alternative to state action in support of either principle." Thus she asserts that although R2P has advanced the debate about protection of human rights in some key aspects, it suffers from the same pitfalls with respect to implementation as humanitarian intervention.

Eckert traces the trajectory of the Arab Spring from Tunisia to Libya to Syria, and studies the international responses to all these cases. She provides a historical context by discussing instances of humanitarian intervention during the post-Charter era as that concept was subject to the criticism of selectivity. She then traces the evolution of R2P and contends that the inconsistencies in the treatment by the international community of Libya and Syria are created by the dynamics of the international system under which states pursue their own interests. Thus she contends that since intervention in Syria would make the costs to states' security interests higher than they were in Libya because of the differences in the strategic situation between these two cases, even significant and effective non-forcible measures have not been undertaken by the international community to prevent and respond to the Syrian government's systematic attacks on its own population.

Based on her thesis, Eckert aptly argues that state interests:

> Can change over time, and future developments within the international system may prompt a formulation of state interest that is more

> consistent with a more even-handed approach to the responsibility to protect . . . . The reasons for state intervention will continue to evolve, as will states' conception of their interests. Without such evolution, the conceptual advances embodied in the concept of the responsibility to protect will not likely lead to a more consistent state practice.

V. CONCLUDING COMMENTS

The contributors to this Sutton Colloquium issue have provided valuable insights regarding the shape of the Arab Spring, the significance of the new R2P norm emerging under international law and the need to operationalize it, and the direction U.S. foreign policy should take in light of the changed circumstances in the region. The Egyptian-led and -mediated ceasefire between Israel and Hamas is a testament to the leadership of a Muslim Brotherhood-dominated government.[126] The ceasefire was greeted with worldwide appreciation and praise for Mr. Morsi. However, a day after the ceasefire, Mr. Morsi's usurpation of state power has caused considerable consern, as well.

Thus, without compromising on its values, the U.S. must take a practical approach in its relationships with the newly emerging Islamist-dominated governments. Secretary of State Hillary Clinton's October speech,[127] characterized by a call for engagement, pragmatism, and flexibility, provides a glimpse into the evolution of U.S. foreign policy in the region.

126. Kirkpatrick & Rudoren, *supra* note 12; *see* Mohamed ElBaradei, *Morsi's Power Grab Has Left Eqypt on the Brink*, FIN. TIMES, Dec. 4, 2012, at 7.

127. Clinton, *supra* note 98.

THE ARAB SPRING, U.S. FOREIGN POLICY, AND THE QUESTION OF DEMOCRACY IN THE MIDDLE EAST

NADER HASHEMI*

Shortly after the overthrow of Hosni Mubarak, Aluf Benn, the editor-in-chief of *Haaretz*, wrote a column titled "Mubarak's departure thwarted Israeli strike on Iran."[1] His argument was that the Arab Spring had fundamentally transformed the geopolitics of the Middle East ushering "in a new era of uncertainty for the entire region, and for Israel in particular."[2] His observation is an astute one as it both draws attention to linkages between different conflicts in the Middle East as well as highlighting how the spread of democracy has forced a reassessment of national security priorities by countries across the region.

The Arab Spring has also overturned a binary and simplistic view of the political divisions in the Middle East. Long-standing assumptions about a regional order defined by a pro-Western "moderate Arab" and Israeli bloc versus an anti-Western axis comprised of Iran, Syria, and Hezbollah/Hamas is analytically distorting today. What the Arab Spring has done is help clarify what Middle East scholars have known for a long time—that the fundamental political chasm in the Middle East that shapes internal politics is not between pro-Western and anti-Western forces nor is it between Shia and Sunni or Arab and Jew, but rather it is the enormous gulf that separates longstanding authoritarian regimes from the people they rule over.

The principle near-term consequence of the Arab Spring, therefore, is that for the first time a new global spotlight is being directed at dictatorial regimes. Those countries that have yet to experience a democratic revolt are now scrambling to buy off popular discontent with salary increases, new state subsidy packages, and promises of political reform.[3] Simultaneously, a new global recognition has been given to democratic movements and the aspirations of millions of Arab and Muslims who seek *hurriya* (political freedom), *adala ijtima'iyya* (social justice), and *karama* (dignity). Prior to the Arab Spring, it was long assumed that the voice

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1. Aluf Benn, *Mubarak's Departure Thwarted Israeli Strike on Iran*, HAARETZ (Feb. 13, 2011, 1:27 AM), http://www.haaretz.com/print-edition/news/mubarak-s-departure-thwarted-israeli-strike-on-iran-1.343012.

2. *Id.*

3. *See* Toby C. Jones, *Saudi Arabia's Regional Reaction*, THE NATION (Aug. 24, 2011), http://www.thenation.com/article/162962/saudi-arabias-regional-reaction.

of people of the region did not matter in terms of Western policy.[4] There was a tacit and widespread assumption that this voice was too fractured, too politically immature, or too radical to be taken seriously.

Similarly, there was an erroneous assumption that the Arab authoritarian order was there to stay. In the same way that a decade ago longstanding dictators in Jordan, Morocco, and Syria passed on their political thrones to their sons, it was widely thought (and in some political circles hoped) that the same process would follow in Egypt, Libya, Yemen, and beyond. This assumption no longer applies, as a new generation of Arabs and Muslims have come of age and are politically asserting themselves. The old political order is gradually receding and a new one is emerging on the horizon where the theme of democracy is now at the center of the politics of the region. Where does U.S. foreign policy fit into this picture?

Like the rest of world, the Obama Administration was caught off guard by the Arab Spring. Its initial reaction toward the Egyptian revolt suggested as much. Secretary of State Clinton claimed in the early days of the protests that "[o]ur assessment is the Egyptian government is stable"[5] while Vice President Biden, echoing a comment by President Obama two years earlier, affirmed that "I would not refer to [Mubarak] as a dictator."[6] Yet two weeks later President Obama, along with most of the world, was hailing the Egyptian revolution and praising the democratic aspirations of the Tahrir Square protesters as a manifestation of longstanding American principles and values.[7]

Praise for the Arab Spring by the Obama Administration has been a consistent theme of his presidency since that moment. This praise has also largely enjoyed bipartisan support in Congress. These recent public statements by senior American politicians in support of democracy in Middle East, however, ignore longstanding U.S. policy where political stability was preferred over parliamentary democracy. Stability was a code word for support for authoritarian regimes that protected U.S. interests from hostile forces emerging from within and outside the region. In this article, I seek to provide a brief overview of this forgotten history that substantively begins after World War II when the U.S. emerged as a global superpower and continued until the 2011 Arab Spring. I also wish to comment on

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4. *See* Rami G.Khouri, *The Arab Awakening*, THE NATION (Aug. 24, 2011), http://www.thenation.com/article/162973/arab-awakening.

5. *US Urges Restraint in Egypt, Says Government Stable*, REUTERS (Jan. 25, 2012, 5:56 PM), http://www.reuters.com/article/2011/01/25/us-egypt-protest-clinton-idUSTRE70O7RC20110125.

6. *Mubarak is Not a Dictator but People Have the Right to Protest*, PBS: NEWSHOUR (Jan. 27, 2011), http://www.pbs.org/newshour/bb/politics/jan-june11/biden_01-27.html. Prior to his visit to Egypt in 2009 to deliver his famous lecture on US-Islamic relations, President Obama was asked if he considered Mubarak an authoritarian leader. He replied: "No, I tend not to use labels for folks. I haven't met him; I've spoken to him on the phone. He has been a stalwart ally, in many respects, to the United States. He has sustained peace with Israel, which is a very difficult thing to do in that region." *See* Press Release, The White House, Interview of the President by Justin Webb, BBC (June 1, 2009), http://www.whitehouse.gov/the_press_office/Transcript-of-the-Interview-of-the-President-with-Justin-Webb-BBC-6-1-09.

7. Barack Obama, President of the United States, Remarks by the President on Egypt (Feb. 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/02/11/remarks-president-egypt.

the emerging challenges to U.S. interests in the region, with a focus on the implications for Israel that flow from the spread of democracy in the region.

I. U.S. OPPOSITION TO DEMOCRACY IN THE MIDDLE EAST: TWO POST-9/11 EVENTS

Evidence of U.S. opposition to democracy in the Middle East was on display on several occasions after September 11, 2001. The terror attacks that killed 3,000 people in New York and Washington, D.C. traumatized the United States and became the defining issue for the contemporary generation of American citizens. As a consequence it forced a re-examination of U.S. policy toward the Muslim world in general and the Arab Middle East in particular. The American public, along with leading members of the U.S. foreign policy establishment, were trying to make sense of what had happened. What had gone wrong, why do they hate us, and what was the new way forward in terms of U.S. policy toward the Middle East? In a famous speech in November 2003, President Bush, reflecting on past U.S. policy toward the region drew a direct link between American support for dictatorial regimes, violence, and the question of democracy:

> Sixty years of Western nations excusing and accommodating the lack of freedom in the Middle East did nothing to make us safe – because in the long run, stability cannot be purchased at the expense of liberty. As long as the Middle East remains a place where freedom does not flourish, it will remain a place of stagnation, resentment, and violence ready for export.[8]

The phrase "stability cannot be purchased at the expense of liberty" is an indirect way of acknowledging two important facts: (1) that for 60 years the U.S. has been supporting authoritarian regimes in the Middle East and (2) this policy had come back to haunt the United States. As *The 9/11 Commission Report* acknowledged, "[o]ne of the lessons of the long Cold War was that short-term gains in cooperating with the most repressive and brutal governments were too often outweighed by long-term setbacks for America's stature and interests."[9] The purported political stability that was assumed to accompany this policy was no longer guaranteed and a new grand strategy toward the Muslim world was needed, one which President Bush described as "a forward strategy of freedom in the Middle East."[10] The following table, produced by *The Economist*, lays out the

8. George W. Bush, President of the United States, Remarks by President George W. Bush at the 20th Anniversary of the National Endowment for Democracy (Nov. 6, 2003), *available at* http://www.ned.org/george-w-bush/remarks-by-president-george-w-bush-at-the-20th-anniversary. The fact that fifteen of the nineteen hijackers on September 11, 2001 came from one country, Saudi Arabia, confirms the linkage between political despotism and violence.

9. NAT'L COMM'N OF TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT ON NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 376 (2004).

10. George W. Bush, *supra* note 8.

problem.[11] Note the connection between the low democracy rankings of the listed countries and their close relations with the United States.

In the bottom division

Arab League*

Overall democracy ranking out of 167 countries

Lebanon	86	Egypt	138
Palestinian Territories	93	Oman	143
Iraq	111	Tunisia	144
Kuwait	114	Yemen	146
Mauritania	115	United Arab Emirates	148
Morocco	116	Sudan	151
Jordan	117	Syria	152
Bahrain	122	Djibouti	154
Algeria	125	Libya	158
Comoros	127	Saudi Arabia	160
Qatar	137		

Source: Economist Intelligence Unit, Democracy Index 2010, to be issued on December 8th *Somalia not ranked

In May 2003, a second revealing event took place that laid the bare the tension and contradictions between U.S. values and interests in the Middle East. Careful scrutiny of what transpired helps understand why in the past the U.S. has preferred authoritarian regimes in the Middle East to democratic ones, and why a transition to a new policy after the Arab Spring will be difficult for any U.S. administration.

In the lead-up to the 2003 U.S. invasion of Iraq, the Bush Administration was hoping to open a second battlefront into Iraq from the north, across the Turkish-Iraqi border. The newly elected government in Turkey was subjected to considerable pressure from Washington to acquiesce to this request, including as an incentive a USD $32 billion dollar aid package that was desperately needed to bolster a sagging Turkish economy.[12] While initially Ankara seemed to be receptive to the offer, Turkish public opinion was strongly opposed to any role Turkey might play in the invasion of Iraq (about 90 percent of the Turkish public strongly opposed Turkish involvement in the invasion of Iraq).[13] After an extensive public debate in the media and in parliament, the Turkish government, bowing to overwhelming public sentiment, refused the American request.

After the toppling of Saddam in March 2003, Deputy Defense Secretary Wolfowitz traveled to Turkey. In a famous interview on CNN-Turk, he publicly criticized the Turkish government for its non-cooperation in the invasion of Iraq and then he stated "[l]ets [sic] have a Turkey that steps up and says we made a

11. ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT 5-7 (2012), *available at* http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf.

12. Dexter Filkins & Eric Schmitt, *Turkey Demands $32 Billion U.S. Aid Package if It Is to Take Part in a War on Iraq*, N.Y. TIMES, Feb. 19, 2003, at A15.

13. Nasuh Uslu et al., *Turkish Public Opinion Toward the United States In the Context of the Iraq Question*, MIDDLE E. REV. OF INT'L AFF., Sept. 2005, at 75, 76.

mistake."[14] Wolfowitz then added a revealing comment that he wished the Turkish military would have stepped forward and played a more prominent role in shaping Turkish foreign policy in the lead-up to the war.

> I think for whatever reason they did not play the strong leadership role on that issue that we would have expected . . . . [A]ll I'm saying is that when you had a[n] issue of Turkey's national interest and national strategy I think it's perfectly appropriate, especially in your system, for the military to say it was in Turkey's interest to support the United States in that effort.[15]

These controversial comments unleashed a furious debate in Turkey. Wolfowitz's desire that the Turkish military play a more prominent role in politics was shocking in light of modern Turkish history. At the time, Turkey was just emerging from a long period of authoritarian rule dominated by the intrusive role of the armed forces that had toppled four civilian governments, most recently in 1997. One year earlier, in 2002, Turkey's freest and most inclusive election took place bringing the Justice and Development Party to power.[16] While Wolfowitz's statement was shocking from a political development perspective, it was completely understandable from a U.S. foreign policy point of view. As this case amply demonstrates, it is much easier for the U.S. to deal with military regimes than with democratic parliaments who reflect the will of the people. One can project forward and imagine the complications and difficulties that might arise if Washington has to deal with democratically-elected governments across the region in countries such as Saudi Arabia, Kuwait, Jordan, Qatar, Bahrain, the United Arab Emirates, and Oman instead of the pro-Western monarchies and family dictatorships that are currently in power.

This example establishes a key principle that has long guided U.S. foreign policy in the Middle East. Greater democracy does not always translate into greater support for U.S. geo-strategic interests in the region. There is often a chasm between popular indigenous nationalist sentiments on key geo-strategic issues versus the foreign policy preferences of the United States. In this context Tamara Coffman Wittes has correctly observed that the

> broad problem that haunts American democratization efforts is that . . . [the] general preference for democratic politics has long been tempered, in regard to the Arab world, by the knowledge that the victors of a democratic process in most Arab countries are unlikely to be the parties who share America's policy preferences in the region.[17]

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14. Deputy Secretary of Defense Wolfwitz, Interview with CNN Turk (May 6, 2003) (transcript on file with U.S. Dep't of Def.), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2572.

15. *Id.*

16. *See* Soner Cagaptay, *The November 2002 Elections and Turkey's New Political Era*, MIDDLE E. REV. OF INT'L AFF., Dec. 2002, at 42.

17. TAMARA COFMAN WITTES, FREEDOM'S UNSTEADY MARCH: AMERICA'S ROLE IN BUILDING ARAB DEMOCRACY 21 (2008). Another example of the clash between U.S. interests in the Middle East

In other words, as former Secretary of State Madeline Albright once observed, "Arab public opinion, after all, can be rather scary."[18]

II. THE LONGER HISTORICAL BACKGROUND ON DEMOCRACY AND U.S. POLICY

Prior to September 11, 2001, theoretical discussion on the impact of foreign intervention in promoting democratization in the Middle East was limited in the academic literature. If it was seriously discussed at all views were polarized. This polarity is best captured by William Quandt's observation that "it is unfair to say that American policy has been consistently hostile to democratic movements *per se* in the Middle East"[19] versus that of the editors of the *Middle East Report* who maintain that "in its 20th century engagement with the Middle East, Washington has consistently opposed and subverted those forces pursuing any measure of a democratic program."[20] It is a premise of this article that the bulk of the empirical evidence lies with the second claim.

The broader U.S. strategic position on the topic has been that as long as there was no immediate clash between U.S. interests and democracy; U.S. policy could support democratization processes and movements, albeit cautiously. The case of contemporary Turkey illustrates this point. During the 20th century, the United States supported the democratization of Turkey. Efforts to expand and deepen democracy in Turkey to include even religious-based political parties with an Islamist past were not opposed by the U.S. In fact, Turkey has repeatedly been praised by both Republican and Democratic Administrations as a role model for the rest of the Islamic world—one which the U.S. would like to see replicated in other Muslim majority societies. This support for democracy, however, was always conditional. Hypothetically speaking, if during this period a democratically elected Turkish parliament would have voted to withdraw from NATO, close down the U.S. military base in Incirlik, and sever relations with Israel, American support and enthusiasm for Turkish democracy would have rapidly abated. Recent tensions in U.S.-Turkish relations suggest as much.

During the first decade of the 21st century, Turkey experienced a steady process of democratization but not without controversies and setbacks.[21] As

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and greater democracy was on display when it was revealed that the Bush Administration was contemplating bombing Al Jazeera in Qatar because of its reporting on the Iraqi insurgency and the negative effects with was having on the US occupation of Iraq. David Leigh & Richard Norton-Taylor, *MPs Leaked Bush Plan to Hit al-Jazeera*, THE GUARDIAN (Jan. 9, 2006), http://www.guardian.co.uk/media/2006/jan/09/Iraqandthemedia.politicsandiraq.

18. Madeleine K. Albright, *Bridges, Bombs or Bluster?*, FOREIGN AFF., Sept.-Oct. 2003, at 2, 13.

19. Rex Brynen et al., *Introduction: Theoretical Perspectives on Arab Liberalization and Democratization*, *in* POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN THE ARAB WORLD 3, 19 (Rex Brynen et al. eds., 1995) (citations and internal quotations omitted).

20. *Id.*

21. *See* Howard Eissenstat, *Turkey's General Resign*, INFORMED COMMENT: THOUGHTS ON THE MIDDLE EAST HISTORY AND RELIGION (Feb. 2, 2011), http://www.juancole.com/2011/08/eissenstat-turkeys-generals-resign.html. *See also* Aliza Marcus, *The Historical Blindness of Turkey's Detractors*, FOREIGN POLICY (Nov. 24, 2010), http://www.foreignpolicy.com/articles/2010/11/24/the_historical_blindness_of_turkeys_detractors?page=full.

Turkey democratizes, the government of Recep Tayyip Erdoğan, responding to public pressure, has become outspoken on the question of Palestinian suffering. Given that the plight of the Palestinians is a key marker of identity for many Arabs and Muslims, politicians increase their profile and popularity by speaking out on the topic.[22]

Following the 2008-2009 Israeli war in Gaza, there has been a noticeable rhetorical shift in Turkish foreign policy toward the Israel-Palestine conflict. Turkish-Israeli relations reached a nadir in May 2010 when the Israeli Navy tried to stop an international aid flotilla to Gaza. Nine Turkish civilians were killed in the raid, which lead to a major international crisis, a special UN investigative report, and the rupturing of Turkish-Israel relations.[23] The mainstream U.S. foreign policy analysis of these events was revealing.

Reporting on growing Turkish assertiveness in the Middle East and the anxiety it was creating in Washington, the *New York Times* published an insightful article titled "Turkey Goes from Reliable Ally to Thorn for U.S."

> Turkey is seen increasingly in Washington as "running around the region doing things that are at cross-purposes to what the big powers in the region want," said Steven A. Cook, a scholar with the Council on Foreign Relations. The question being asked, he said, is "How do we keep the Turks in their lane?"[24]

According to a senior administration official, "[t]he president has said to Erdogan that some of the actions that Turkey has taken have caused questions to be raised on the Hill [Congress] . . . about whether we can have confidence in Turkey as an ally."[25] He added, "[the Turks] need to show that they take seriously American national security interests."[26] A new assertive Turkish foreign policy, in part buttressed by its democratization process, is clearly becoming a problem for U.S. foreign policy.

The tension between U.S. policy and democracy in the Middle East was further exposed a few years earlier in the West Bank and Gaza. In 2006, Palestinian legislative council elections were held with full U.S. support and monitoring by international observers. Jimmy Carter, in conjunction with the National Democratic Institute, sent a team that verified that the electoral process was free and fair.[27] When it was announced that Hamas had won a solid and

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22. Nader Hashemi, *Revisiting Erskine Childers' Thesis on the 'Broken Triangle': Why Palestine is Central to Resolving Islam-West Relations*, *in* ISLAM-WEST RELATIONS: TOWARD A CIVILIZED DIALOGUE (Nigel Dingwall ed.) (forthcoming) (manuscript at 11-13).

23. Mark Landler, *Israel Faces Deepening Tensions With Turkey Over Raid, and Bond With U.S. Frays*, N.Y. TIMES, June 4, 2010, at A7.

24. Sabrina Tavernise & Michael Slackman, *Turkey Goes from Pliable Ally to Thorn for U.S.*, N.Y. TIMES, June 8, 2010, at A10.

25. Daniel Dombey, *US Warns Turkey on Iran and Israel*, FIN. TIMES (Aug. 15, 2010, 11:05 PM), http://www.ft.com/intl/cms/s/0/35d01e4e-a895-11df-86dd-00144feabdc0.html#axzz28NT2gBYx.

26. *Id.*

27. STAFF OF S. COMM. ON FOREIGN RELATIONS, 109TH CONG., PALESTINE LEGISLATIVE COUNCIL ELECTIONS – CHALLENGES OF HAMAS' VICTORY 18 (Comm. Print 2006).

surprising victory, U.S. support for these elections, which were arguably the freest elections in history of the Arab world, quickly soured and the Bush Administration tried to covertly subvert them.[28] The lesson here is clear. From the perspective of U.S. foreign policy, democracy was acceptable as long as the results worked in favor of securing American strategic interests in the region. If the elections did not, then democracy was a problem.

III. WHAT ARE WESTERN STRATEGIC INTERESTS IN THE MIDDLE EAST?

Historically, the Middle East's strategic value lay in its geographic importance linking the continents of Asia, Europe, and Africa. The region was of particular interest to the British because it was a conduit on the way to India, the jewel in the crown of their empire. The importance of the Middle East changed significantly, however, in 1907 when oil was discovered in Iran, leading the British navy on the eve of World War I to switch from coal to oil as its primary energy source.

After World War II, the United States gradually replaced Britain (and to a lesser degree, France) as the dominant external power in the region, which effectively transformed the Persian Gulf from a British to an "American lake."[29] During the Cold War, there was serious concern in the United States about Soviet penetration in the Middle East, which the 1979 Soviet invasion and occupation of Afghanistan amplified. It is debatable, however, how big of a threat the Soviets actually posed to U.S. interests in the region. A post World War II *modus vivendi*, or unwritten understanding, existed between Moscow and Washington that the Middle East, particularly its vast energy reserves, was to be a Western sphere of influence. This is not to deny that the Soviet Union did not try to exploit opportunities to expand its influence. In the early 1950s, for example, after the U.S. refusal to sell arms to Egypt, Nasser turned to the Soviet Union for support.[30] The main external influences in the region, however, for most of the second half of the 20th century have always been American and to a lesser extent British. This partly explains why these governments led the coalition in the 1991 Gulf War and the 2003 Iraq invasion and occupation.

During the height of the turmoil engendered by the Iranian Revolution in 1979, then National Security Advisor Brzezinski coined the term the "arc of crisis."[31] His reference was to the Middle East, or as he described it, that part of

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28. David Rose, *The Gaza Bombshell*, VANITY FAIR (Apr. 2008), http://www.vanityfair.com/politics/features/2008/04/gaza200804.

29. DANA H. ALLIN & STEVEN SIMON, THE SIXTH CRISIS: IRAN, ISRAEL, AMERICA AND THE RUMORS OF WAR 96 (2010).

30. GALIA GOLAN, SOVIET POLICIES IN THE MIDDLE EAST: FROM WORLD WAR II TO GORBACHEV 45 (1990); Rashid Khalidi, *The Superpowers and the Cold War in the Middle East*, *in* THE MIDDLE EAST AND THE UNITED STATES: HISTORY, POLITICS, AND IDEOLOGIES 157, 165-66 (David W. Lesch & Mark L. Haas eds., 2012).

31. Steve R. Weisman, *The Middle Thicket*, N.Y. TIMES (May 27, 2003), http://www.nytimes.com/2003/05/27/world/the-mideast-thicket.html?n=Top%2fReference%2fTimes%20Topics%2fSubjects%2fT%2fTerrorism.

the globe which "stretches along the shores of the Indian Ocean, with fragile social and political structures in a region of vital importance to us threatened with fragmentation. The resulting political chaos could well be filled by elements hostile to our values and sympathetic to our adversaries."[32] It is in this region that two priorities intersect: oil and the state of Israel.

In writing about American interests in the Middle East, William Quandt, a leading mainstream Middle East scholar and former member of the National Security Council in the Nixon and Carter Administrations, observed that "three concerns—oil, Israel, and the Soviet Union—were the driving forces behind American Middle East policy throughout most of the period from the 1950s through the 1980s."[33] In terms of oil, it is common knowledge that the vast energy reserves (two-thirds of the world's total) located in the Saudi peninsula in particular are a major concern of the United States.[34]

The U.S. State Department has described the region as "a stupendous source of strategic power, and one of the greatest material prizes in world history, probably the richest economic prize in the world in the field of foreign investment,"[35] or in President Eisenhower's words, the most "strategically important area in the world."[36] While these quotes are from the 1940s and 1950s, they have been reaffirmed continuously by high-ranking American officials and by internal U.S. government documents. Writing about the Middle East, Richard Nixon stated that "its oil is the lifeblood of modern industry, the Persian Gulf region is the heart that pumps it, and the sea routes around the Gulf are the jugular vein through which that lifeblood passes."[37] In a subsequent book, Nixon argued that because the Middle East is likely to remain "the only source of significant exportable oil in the world for the next twenty-five years—we have no choice but to remain engaged in the area."[38] Furthermore, in explaining the U.S. rationale for maintaining a military presence in the Gulf, then Secretary of Defense Cheney stated in 1991 that

> given the enormous resources that exist in that part of the world, and given the fact that those resources are in decline elsewhere, the value of

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32. *The Crescent of Crisis: Iran and a Region of Rising Instability*, TIME, Jan 15, 1979, at 18.

33. William B. Quandt, *American Policy toward Democratic Political Movements in the Middle East*, *in* RULE AND RIGHTS IN THE MIDDLE EAST: DEMOCRACY, LAW, AND SOCIETY 165 (Ellis Goldberg et al. eds., 1993).

34. The Middle East is also home to about 40 percent of the world's natural gas reserves as well. *BP Statistical Review of World Energy*, BP.COM/STATISTICALREVIEW (June 2012), http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2012.pdf.

35. NOAM CHOMSKY, WORLD ORDERS: OLD AND NEW 190 (1994) (internal quotations omitted).

36. *Id.* (internal quotations omitted).

37. RICHARD NIXON, THE REAL WAR 74 (1980).

38. RICHARD NIXON, SEIZE THE MOMENT: AMERICA'S CHALLENGE IN A ONE-SUPERPOWER WORLD 214 (1992). Released British government documents in 2004 confirm this view. They revealed that the U.S. government was considering seizing the Saudi and Kuwaiti oil fields in 1973 in response to the Arab oil embargo. *See* Paul Reynolds, *U.S. Ready to Seize Gulf Oil in 1973*, BBC NEWS (Jan. 2, 2004, 8:01 AM), http://news.bbc.co.uk/2/hi/middle_east/3333995.stm.

> those resources is only going to rise in the years ahead, and the United States and our major partners cannot afford to have those resources controlled by somebody who is fundamentally hostile to our interests.[39]

During the Cold War, as in other parts of the developing world, U.S. interests in the Middle East were challenged by independent Third World nationalism, in both its secular and religious variants. Originally, this manifested itself in the form of Arab and Iranian nationalism, led by Gamal Abdel Nasser and Mohammad Mossadeq. More recently, various forms of religious nationalism, otherwise known as political Islam, specifically its mainstream variant, have posed a challenge to American interests in the Arab-Islamic world. Quoting from the U.S. State Department internal record, Gabriel Kolko observed that as early as 1950 it was explicitly acknowledged that "[t]he main risk to the West [in the Middle East] came from 'ultra-nationalist elements.'"[40]

In 1958, President Eisenhower told Vice President Nixon that the trouble we are facing in the Middle East is that "we have a campaign of hatred against us, not by the [Arab] governments but by the people. The people are on Nasser's side."[41] According to a National Security Council report at the time, the reason why the United States was viewed negatively was because in

> the eyes of the majority of Arabs the United States appears to be opposed to the realization of the goals of Arab nationalism. They believe that the United States is seeking to protect its interest in Near East oil by supporting the status quo and opposing political or economic progress.[42]

This report went on to note that the

> principal points of difficulty . . . are: the Arab-Israeli dispute; Arab aspirations for self-determination and unity; widespread belief that the United States desires to keep the Arab world disunited and is committed to work with "reactionary" elements to that end; the Arab attitude toward the East-West struggle; U.S. support of its Western "colonial" allies; and problems of trade and economic development.[43]

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39. Richard Cheney, *The Gulf War: A First Assessment*, *in* THE SOREF SYMPOSIUM: AMERICAN STRATEGY AFTER THE GULF WAR 53-54 (Yehudah Mirsky ed., 1991).

40. GABRIEL KOLKO, CONFRONTING THE THIRD WORLD: UNITED STATES FOREIGN POLICY, 1945-1980 70 (1988). The architect of President Carter's Rapid Deployment Force in the Middle East, Robert Komer, in testimony before the Senate Armed Services Committee, acknowledged the central US concern in the region was not a Soviet attack but, according to Melvyn Leffler, the real concern was to "deal with indigenous and regional unrest within the Persian Gulf region." Melvyn P. Leffler, *From the Truman Doctrine to the Carter Doctrine: Lessons and Dilemmas of the Cold War*, 7 DIPLOMATIC HISTORY 245, 259 (1983).

41. SALIM YAQUB, CONTAINING ARAB NATIONALISM: THE EISENHOWER DOCTRINE AND THE MIDDLE EAST 228 (2004).

42. Nat'l Sec. Council, *Note by the Executive Secretary to the National Security Council on Long-Range U.S. Policy Toward the Near East*, ¶ 2, NSC Doc. 5801/1 (Jan. 24, 1958), *available at* http://www.history.state.gov/historicaldocuments/frus1958-60v12/d5.

43. *Id.*

The issues of oil, Israel, independent indigenous nationalism, and the United States intersect at a regional level by virtue of the U.S. decision to adopt Israel as a regional ally to protect Western interests. In 1958, the National Security Council proposed that a "logical corollary" against those who opposed American interests "would be to support Israel as the only strong pro-Western power left in the Middle East."[44] At this time, it was Nasser who inspired the pan-Arab nationalism that was threatening the stability and legitimacy of the pro-British and pro-American oil-producing regimes.[45]

The British cabinet's Eastern Committee after World War I was to accurately characterize these regimes as an "Arab Facade."[46] Lord Curzon, the British foreign secretary at the time, described these countries as being "ruled and administered under British guidance and controlled by a native Mohammedan, and, as far as possible, by an Arab staff."[47] These weak monarchies and authoritarian regimes would remain in power "veiled by constitutional fictions, as a protectorate, a sphere of influence, a buffer State, and so on."[48]

In America's strategic conception of the Middle East, Israel's role is that of a regional power, preserving stability (read: American hegemony) in the region. The tacit alliance between the U.S., Israel, and the "Arab Facade" was publicly acknowledged in 1973 by the Senate's leading oil expert, Senator Henry Jackson, who spoke in Congress about

> "the strength and Western orientation of Israel on the Mediterranean and Iran [under the Shah] on the Persian Gulf," two "reliable friends of the United States," who, along with Saudi Arabia, "have served to inhibit and contain those irresponsible and radical elements in certain Arab states . . . who, were they free to do so, would pose a grave threat indeed to our principal sources of petroleum in the Persian Gulf."[49]

After the Cold War, Israel's strategic function remained the same.

This was confirmed in unambiguous terms by the former head of Israeli military intelligence, General Shlomo Gazit. Writing in *Yediot Ahronot* he stated

> Israel's main task has not changed at all, and it remains of crucial importance. Its location at the centre of the Arab-Muslim Middle East predestines Israel to be a devoted guardian of stability in all the countries surrounding it. Its [role] is to protect the existing regimes: to prevent or halt the processes of radicalisation, and to block the expansion of fundamentalist religious zealotry.[50]

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44. CHOMSKY, *supra* note 35, at 204.

45. *Id.* at 201-02.

46. WILLIAM STIVERS, SUPREMACY AND OIL: IRAQ, TURKEY, AND THE ANGLO-AMERICAN WORLD ORDER, 1918-1930 28 (1982).

47. *Id.* at 28-29.

48. *Id.* at 34.

49. NOAM CHOMSKY, DETERRING DEMOCRACY 55 (1992).

50. Israel Shahak, *How Israel's Strategy Favours Iraq over Iran*, MIDDLE E. INT'L, Mar. 19, 1993, at 19, 20.

Scholars from the Dependency School of political development (i.e., on the Left) maintain that what follows from these facts is that any movement toward democratization of the Middle East poses a threat to U.S. interests in the area. This is because democratic forces will refuse to play an accommodative or subordinate role to Western foreign policy interests. In this context Gudrun Krämer has noted that

> the deep resentment of foreign intervention and Israeli policies among Arab nationalists and Islamist activists, even limited liberalization increases opposition to pro-Western policies . . . More liberal regimes in the Arab World, therefore, are likely to be less accommodating regarding Western economic and strategic interests than authoritarian regimes that do not openly challenge the regional balance of power.[51]

The United States historically has opposed democracy in the region because "it is much simpler to manipulate a few ruling families—to secure fat orders for arms and ensure that oil price remains low—than a wide variety of personalities and policies bound to be thrown up by a democratic system," observes the veteran Middle East journalist Dilip Hiro.[52] Reflecting on British policy in the Middle East, "Prime Minister Harold Macmillan found it 'rather sad that circumstances compel us to support reactionary and really rather outmoded regimes because we know that the new forces, even if they begin with moderate opinions, always seem to drift in violent revolutionary and strongly anti-Western positions.'"[53] Former Secretary of Defense and CIA chief James Schlesinger concurs with this observation. He once asked a congressional committee

> whether we seriously desire to prescribe democracy as the proper form of government for other societies. Perhaps this issue is most clearly posed in the Islamic world. Do we seriously want to change the institutions of Saudi Arabia? The brief answer is no; over the years we have sought to preserve those institutions, sometimes in preference to more democratic forces coursing throughout the region.[54]

Over the years this policy of opposing democratization in the Middle East has enjoyed wide support among segments of the liberal intelligentsia in the United States. For example, commenting on the CIA coup in 1953 that overthrow the prime minister of Iran, Muhammad Mossadeq, and the nascent democratic experiment that was emerging, the *New York Times* editorialized on the lessons that should be learned from this event:

> Underdeveloped countries with rich resources now have an object lesson in the heavy cost that must be paid by one of their number which goes berserk with fanatical nationalism. It is perhaps too much to hope

51. Gudrun Krämer, *Liberalization and Democracy in the Arab World*, MIDDLE E. R., Jan.-Feb. 1992, at 35.

52. CHOMSKY, *supra* note 35, at 198.

53. *Id.* at 199.

54. Yahya Sadowski, *The New Orientalism and Democracy Debate*, MIDDLE E. R., July-Aug. 1993, at 14.

> that Iran's experience will prevent the rise of Mossadeghs in other countries, but that experience may at least strengthen the hands of the more reasonable and far-seeing leaders.[55]

While this quotation is from 1953, it is debatable whether there has been a qualitative and substantive change on this topic over the years among members of America's foreign policy establishment. For example, writing in the summer of 2011, after the start of the Arab Spring, Aaron David Miller, a liberal intellectual, Middle East analyst, and advisor to six American Secretaries of State, wrote that the "growing influence of Arab public opinion on the actions of Arab governments and the absence of strong leaders will make it much tougher for the United States to pursue its traditional policies. For America, the Arab Spring may well prove to be more an Arab Winter."[56] He went on to note that

> as public opinion becomes more influential in shaping domestic and foreign policies in the Arab countries, the space available for U.S. policies and influence may contract. The acquiescent autocrats have acquiesced, albeit often grudgingly, in our approach to Iran, Gaza, Israel, and counterterrorism. The new regimes won't, or at least not as easily. Since most of our policies won't change quickly, or at all, the United States will likely be in for a rough ride, with both emerging governments and old ones.[57]

Similarly, Wesley Clark, former Supreme Allied Commander of NATO and Democratic Party presidential candidate, reflected a similar concern about the consequences of the Arab Spring for U.S. foreign policy. "In Tunisia, Egypt and Libya," he observed, "strong Islamic sentiments have inevitably surfaced despite the democratic and Western-oriented facade of the initial Arab Spring uprisings. The future orientation of these states is likely to be less helpful to U.S. aims and policies in the region than their predecessors."[58] These observations have special relevance for the future of Israel in the Middle East.

IV. THE ARAB SPRING AND ISRAEL

The spread of democratic rebellions across the Arab world was not welcomed by Israel.[59] The influential Israeli historian Benny Morris blamed Islam for the Arab Spring "which gradually eroded secularism and brought down pragmatic,

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55. Editorial, *The Iranian Accord*, N.Y. TIMES, Aug. 6, 1954, at 16, *available at* ProQuest Doc. No. 113065530.

56. Aaron David Miller, *For America, an Arab Winter*, WILSON Q., Summer 2011, at 38.

57. *Id.* at 42.

58. Wesley Clark, *Why US Shouldn't Rush to War in Syria*, CNNOPINION (March 9, 2012, 12:34 PM), http://www.cnn.com/2012/03/08/opinion/clark-syria-intervention/index.html?hpt=hp_c2.

59. Douglas Hamilton, *Israel Shocked by Obama's 'Betrayal' of Mubarak*, REUTERS (Jan. 31, 2011, 12:54 PM), http://www.reuters.com/article/2011/01/31/us-egypt-israel-usa-idUSTRE70U537201 10131; *see also* Mohammed Ayoob, *The Arab Spring: Its Geostrategic Significance*, MIDDLE E. POL'Y, Fall 2012, at 87-89 (providing a serious analysis of these events).

prudent governments in the region."[60] Prime Minister Netanyahu has described the Arab Spring as an "Islamic, anti-Western, anti-liberal, anti-Israeli and anti-democratic wave."[61] He initially, however, instructed his Cabinet to remain silent on the issue out fear of inflaming an uncertain situation. But instructions were subsequently given to Israeli ambassadors in key capitals to emphasize Egyptian stability as the revolution unfolded. President Shimon Peres, who was not bound by these restrictions, stated that "[w]e always have had and still have great respect for President Mubarak. . . . I don't say everything that he did was right, but he did one thing which all of us are thankful to him for: he kept the peace in the Middle East."[62] Reportedly Israel offered Mubarak asylum and the Israeli government was lobbying the Obama Administration on his behalf until his final days.[63]

Israel's concerns about the Arab Spring are understandable. The spread of democracy in the region fundamentally and qualitatively undermines Israel's national security strategy, which similar to U.S. foreign policy goals, was predicated on the survival of pro-Western authoritarian regimes. The problem with this strategy, however, is that from the very beginning it was based on the faulty assumption that the voice of the people did not matter in policy-making and that these regimes would be around forever. This point is best exemplified by Egyptian-Israeli relations.

It is often stated that for the last thirty-three years, Egypt and Israel have had a peace treaty. This is a misleading characterization of the 1979 Camp David Accords. It is more accurate to state that Israel has had a peace treaty—not with Egypt—but with the Sadat-Mubarak regime and with the Egyptian ruling elites that supported it. The people of Egypt were not consulted on the Camp David Accords and they have had no input on this important foreign policy decision. The same truism applies to Israel's 1994 peace treaty with Jordan. Moshe Arens, a Likud party hardliner and three-time Minister of Defense, addressed this topic with considerable candor and clarity at the start of the Arab Spring.

"The ugly facts," he noted, "are that the two peace treaties that Israel concluded so far—the one with Egypt and the other with Jordan—were both signed with dictators: Anwar Sadat and King Hussein."[64] He added that "the negotiations that for a while held some promise of reaching a peace agreement—

60. Benny Morris, *Islam's Strangehold on Israel*, THE NATIONAL INTEREST (Sept.12, 2011), http://nationalinterest.org/commentary/islams-stranglehold-israel-5875.

61. Barak Ravid, *Netanyahu: Arab Spring Pushing Mideast East Backward, not Forward*, HAARETZ (Nov. 24, 2011, 12:04 AM), http://www.haaretz.com/news/netanyahu-arab-spring-pushing-mideast-backward-not-forward-1.397353.

62. Hamilton, *supra* note 59.

63. *MK Ben Eliezer: Israel Offered Political Asylum to Mubarak*, HAARETZ (Aug, 3, 2011, 10:06 AM), http://www.haaretz.com/news/diplomacy-defense/mk-ben-eliezer-israel-offered-political-asylum-to-mubarak-1.376721; *see* Helene Cooper et al., *In U.S. Signals to Egypt, Obama Straddled a Rift*, N.Y. TIMES (Feb. 12, 2011), http://www.nytimes.com/2011/02/13/world/middleeast/13diplomacy.html?page wanted=all.

64. Moshe Arens, Op-Ed., *Can Israel Only Make Peace with Dictators?*, HAARETZ (Feb. 1, 2011, 1:59 AM), http://www.haaretz.com/print-edition/opinion/can-israel-only-make-peace-with-dictators-1.340493.

with Syria and with the Palestine Liberation Organization—were also conducted with unsavory dictators."[65] With the gradual and inevitable spread of democracy throughout the region, this national security strategy is no longer tenable. Israel's long-term security in the Middle East can only be guaranteed when it makes peace with the people of the region, not with the dictators that rule over them. This can only happen if Israel is willing to give justice to Palestinians, which is a precondition for its acceptance as legitimate state in the eyes of the people of the Arab-Islamic world. Ibrahim Kalin, an adviser to the Turkish government, captures this point quite succinctly in calling on Israel to reassess its strategic priorities. "The Netanyahu government's defiant yet eventually self-destructive approach is indicative of the eclipse of Israeli strategic thinking," he observes.[66] "Israeli politicians fail to understand that the fundamental values of the new Middle East spearheaded by the Arab Spring are no longer occupation, dictatorship and alienation but justice, freedom and rule of law. No policy that does not take these values seriously can have legitimacy."[67]

V. CONCLUSION

There is a broad consensus among Middle East scholars that the region is entering a new historical phrase. Today, in contrast with the past, the key internal axis of conflict that will shape the contours of political power will be public demands for citizenship rights and effective and accountable government. While transitions to democracy will take time, and the consolidation of these transitions even longer, there is no denying that the Arab Spring is a turning point in the modern history of the region. The rules have changed and it can no longer be business as usual. For the United States, this will require an adjustment in terms of how it views and deals with a new Middle East. To his credit, at least rhetorically, President Obama has been on the right side of history.

On May 19, 2011, President Obama delivered a major foreign policy speech on the Arab Spring where he spoke about "a new chapter in American diplomacy."[68] In contrast to his predecessors, he sought to strike a balance between American interests and American values in the Middle East. He acknowledged that

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65. *Id.*

66. Ibrahim Kalin, Op-Ed., *Israel Misreads History, Corners Itself*, HURRIYET DAILY NEWS (Sept. 9, 2011, 12:00 AM), http://www.hurriyetdailynews.com/israel-misreads-history-corners-itself.aspx?pageID=438&n=israel-misreads-history-corners-itself-2011-09-09.

67. *Id.*

68. Press Release, Office of the Press Sec'y, The White House, Remarks by the President on the Middle East and North Africa (May 19, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa [hereinafter Office of the Press Sec'y]. For background on Obama's foreign policy agenda with specific details on the Arab Spring, *see* Ryan Lizza, *The Political Consequentialist: How the Arab Spring Remade Obama's Foreign Policy*, THE NEW YORKER (May 2, 2011), http://www.newyorker.com/reporting/2011/05/02/110502fa_fact_lizza.

> a strategy based solely on the narrow pursuit of these [longstanding American] interests will not fill an empty stomach or allow someone to speak their mind. Moreover, failure to speak to the broader aspirations of ordinary people will only feed the suspicion that has festered for years that the United States pursues our interests at their expense.[69]

In this speech, Obama announced a new policy toward the Middle East "to promote reform across the region, and to support transitions to democracy."[70] He noted that while "each country is different, we need to speak honestly about the principles we believe in, with friend and foe alike. Our message is simple," the President stated, "[i]f you take the risks that reform entails, you will have the full support of the United States."[71]

Whether the United States will be able to live up to these words remains to be seen. The fact that the U.S. has resumed the sale of arms to Bahrain—despite its crackdown on pro-democracy protesters—and the refusal to tie American aid to Egypt to progress on democratization, notwithstanding the arrest of American NGO workers by the Egyptian military, suggests greater continuity rather than a departure in U.S. policy toward the Middle East.[72]

In his recent book, *Obama and the Middle East*,[73] Fawaz Gerges echoes this skeptical reading of American policy. He observes that Obama has "shown . . . more continuity with the past than real change. He has adopted a centrist-realist approach toward the region, an approach consistent with the dominant U.S. foreign policy orientation."[74] The problem with this traditional approach toward the Middle East is that the old assumptions that shaped and guided America's approach toward the region will no longer work. A specter is haunting U.S. policy toward the Middle East. With mass revolution, democracy is now the only game in town. Adjusting to this new reality will take time and it will be difficult. But regardless of U.S. preferences or hopes, Washington is not in the driver seat. The Arab-Islamic world is coming of age and we are all observers of this historic, uncertain, and tumultuous phenomenon.

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69. Office of the Press Sec'y, *supra* note 68.

70. *Id.*

71. *Id.*

72. *See US Partially Resumes Arms Sales to Bahrain*, AL JAZEERA (ENGLISH) (May 12, 2012), http://www.aljazeera.com/news/middleeast/2012/05/201251206551162 84.html; Steven Lee Myers, *Despite Rights Concerns, U.S. Plans to Resume Egypt Aid*, N.Y. TIMES (March 15, 2012), http://www.nytimes.com/2012/03/16/world/middleeast/us-military-aid-to-egypt-to-resume-officials-say.html?_r=0.

73. FAWAZ A. GERGES, OBAMA AND THE MIDDLE EAST: THE END OF AMERICA'S MOMENT? 233 (2012).

74. *Id.*

U.S. FOREIGN POLICY AND THE ARAB SPRING: TEN SHORT-TERM LESSONS LEARNED

PAUL R. WILLIAMS* AND COLLEEN (BETSY) POPKEN**

As the Arab Spring states continue down the long path towards democracy, it is important to reflect upon the previous year of the Arab Spring in order to better understand what actions will help to bring future stability to the region. Originally presented as part of a panel on U.S. foreign policy and the Arab Spring, this article sets forth ten observations about the Arab Spring from two public international law practitioners working with clients in several Arab Spring states, including Tunisia, Egypt, Yemen, Libya, and Syria. In particular, these observations seek to contribute to a more complete and balanced understanding of the Arab Spring, to inform the decisions of policymakers and analysts in the months ahead.

1. THE U.S. IS WILLING TO CONSIDER POLICY OPTIONS BEYOND "MAINTAIN THE STATUS QUO"

For decades, the U.S. has sought to maintain the status quo in the Middle East,[1] particularly in the Arab Spring states, by relying on dictatorships to provide stability in the region. A review of U.S. foreign policy over the last year, however, reveals that in limited circumstances, the U.S. is willing to loosen its traditional attachment to the status quo in favor of democratic change. In nearly all of the Arab Spring states, the U.S. has moved away from long-standing relations—and in some cases, devoted allies—to support pro-democracy movements.

Although Egyptian activists criticized the U.S. government for its tardy condemnation of President Mubarak, in reality, it took only one week for the

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1. Haviland Smith, *Transition to Democracy in the Middle East*, AMERICAN DIPLOMACY (Mar. 2012), http://www.unc.edu/depts/diplomat/item/2012/0106/ca/smith_transition.html.

administration to call for a transition to a representative government. In so doing, President Obama noted that, "the status quo is not sustainable."[2] Mubarak ruled Egypt for three decades, during which time he forged close bonds with many in the administration. A U.S. reversal of policy—however tepid—to abandon support for a ruler described as a "friend" by officials, including Hillary Clinton and Dick Cheney, represents a serious and surprising willingness to reevaluate the U.S.'s relationship with states that were once staunch allies.[3]

In Libya, historically tense relations with Colonel Muammar al-Qadhafi likely made it easier for the U.S. to abandon its support for the dictatorship. And yet, despite Qadhafi's role in the bombing of Pan Am Flight 103—which resulted in the deaths of hundreds of U.S. citizens—as well as the regime's notorious intimidation, torture, imprisonment, and murder of Libyan citizens, relations between the U.S. and Libya had in fact begun to warm in recent years. This is largely attributable to the U.S.'s increased reliance on Qadhafi for cooperation in the post-9/11 War on Terror. Despite these improved relations, just fourteen days after the uprising began, President Obama called upon Qadhafi to step down. Another fourteen days later, the U.S. supported, and indeed largely drafted, a U.N. Security Council resolution authorizing the use of force to end Qadhafi's rule.[4]

Notwithstanding the eventual willingness of the U.S. to break from the status quo in Libya and Egypt, its support of the Arab Spring pro-democracy movements has been neither unconditional nor uniform. The response of the U.S. appears in some instances to depend on the likelihood that the ruler's ousting is inevitable. In Syria, for example, over five months passed with the death toll exceeding the tens of thousands before President Obama finally called upon President Bashar al-Assad to step down.[5] Since then, the U.S. has only matched this demand with sanctions and diplomatic slaps on the wrist. Additionally, the response by the U.S. to the violent suppression of the pro-democracy movement in Bahrain, the strategic headquarters of the U.S. Navy's Fifth Fleet, has been notably muted. The U.S. has been critical of the minority-Sunni monarchy's arrest and detention of Shiite pro-democracy movement members, but such criticism has fallen short of support for a democratic transition.

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2. Karen DeYoung, *Obama Presses Mubarak to Move "Now,"* WASH. POST (Feb. 2, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/01/AR2011020106860.html; Marc Lynch, *America and Egypt After the Uprisings,* 25 SURVIVAL 31, 32-37 (April-May 2011), *available at* http://www.marclynch.com/wp-content/uploads/2011/03/survival-america-egypt.pdf.

3. Michael Blood, *Cheney Calls Mubarak A Good Friend, U.S. Ally,* HUFFINGTON POST (Feb. 6, 2011), http://www.huffingtonpost.com/2011/02/06/cheney-calls-mubarak-a-good-friend_n_819196.html; Glenn Kessler, *Obama and Mubarak and Democracy—An Accounting,* WASH. POST (Jan. 29, 2011), http://voices.washingtonpost.com/fact-checker/2011/01/obama_and_mubarak_and_democrac.html.

4. CHRISTOPHER BLANCHARD, CONG. RESEARCH SERV., RL 33142, LIBYA: UNREST AND U.S. POLICY 3-4 (2009).

5. Ian Black, *Syrian Death Toll Rises as Arab States Protest,* THE GUARDIAN (Aug. 8, 2011), http://www.guardian.co.uk/world/2011/aug/08/syria-deaths-arab-states-protest; JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: U.S. AND INTERNATIONAL RESPONSE, SUMMARY (2012).

Thus, while the U.S. is showing some willingness to consider options other than the status quo in Arab Spring states, it is hesitating to do so where change is perceived as too risky. As a result, and unfortunately for the Syrian and Bahraini pro-democracy movements, the U.S.'s risk analysis does not always fall in favor of taking actions necessary to support a democratic transition. In making this observation, it is also important to remember that the U.S.'s trend towards loosening its embrace on the status quo is not irreversible. Given unfortunate post-conflict developments in Egypt and Libya, it may only be a matter of time before the U.S. reverts to its traditional approach of relying on undemocratic leaders in the name of stability. Indeed, this may be a part of the administration's current calculation on Syria. Nonetheless, the U.S.'s actions in some of the Arab Spring states demonstrates a recognition of the value gained in supporting democratic movements in lieu of maintaining the status quo.

2. THE MUSLIM BROTHERHOOD IS ALIVE AND WELL

The Muslim Brotherhood has emerged from the Arab Spring as a winner. Prior to the Arab Spring, Arab dictators often attempted to suppress the controversial Muslim Brotherhood, which they viewed as a source of political opposition. Despite this, the Muslim Brotherhood has emerged as a leader in the post-conflict periods and in some cases, during the initial movements toward democratic transition.

Although youth activists sparked the Egyptian pro-democracy movement, the Muslim Brotherhood has emerged as the principle opposition party and will likely be successor to the Supreme Council of the Armed Forces ("SCAF") in post-Mubarak Egypt. With organizational structures and fundraising plans already in place, the Muslim Brotherhood's Freedom and Justice Party secured the largest number of parliamentary seats—more than forty-seven percent—in the state's first post-Mubarak parliamentary elections.[6] The Muslim Brotherhood in Libya is also gaining traction since the revolution ended. Though smaller than its Egyptian counterpart and with less historical opportunity to organize, the Muslim Brotherhood in Libya formed its first political party—the Justice and Construction Party—in November 2011.[7] The Syrian Muslim Brotherhood has emerged as a major player too. It has the highest percentage of members in the opposition party Syrian National Council ("SNC"), and members of the Muslim Brotherhood serve on some of the most influential committees within the SNC.[8] In Tunisia, the moderate Islamist Ennahda Party, which was inspired by the Muslim

6. *Egypt's Islamist Parties Win Elections to Parliament*, BBC NEWS (Jan. 21, 2012), http://www.bbc.co.uk/news/world-middle-east-16665748.

7. Omar Ashour, *Libya's Muslim Brotherhood Faces the Future*, BROOKINGS (Mar. 9, 2012), http://www.brookings.edu/research/opinions/2012/03/09-muslim-brotherhood-ashour.

8. Martin Chulov, *Syria Endgame: Who and What Will Emerge From the Ruins?*, THE GUARDIAN (July 21, 2012), http://www.guardian.co.uk/world/2012/jul/21/syria-bashar-al-assad-free-syrian-army.

Brotherhood,[9] won forty-one percent of the seats in the Constituent Assembly and has formed a government with two center-left secular parties.[10]

What does the emergence of the Muslim Brotherhood as a major player mean for the future of the Arab Spring states? It is difficult to know whether the Muslim Brotherhood's rise is a result of actual support for its ideology, empathy for the group as representative of the oppressed masses, or respect for an entity capable of delivering during a time of important transition. The rise of the Muslim Brotherhood likely reveals a rather unsurprising desire for religion to play a greater role in post-Arab Spring states. However, more surprising—and concerning—is the success of Salafist parties in Egypt and their slow rise in revolutionary Syria. Together, these trends suggest future tensions between those who would like to see a secular, democratic state in the Western tradition and those who would prefer their new state to be governed by Islamic law.

The effects of this emergence are yet to be seen, but one thing is certain: the Muslim Brotherhood is now a major player in the region. While the U.S. may disagree with certain policies and beliefs of the Muslim Brotherhood, U.S. policy-makers would benefit from a serious reconsideration of their arms-length relationship with the Brotherhood.

3. THE ARAB LEAGUE IS PLAYING IN THE BIG LEAGUES

Though the effectiveness of the Arab League's actions may be debated, the League has undeniably played a significant role in the Arab Spring. At a minimum, the events of the Arab Spring have afforded the League an enhanced status in regional conflict resolution. After two controversial interventions in Iraq and Afghanistan, Western states have happily allowed the Arab League to take the lead in the Arab Spring. However, internal divisions and weak enforcement mechanisms have prevented the Arab League from taking consistently effective action. Though unilateral action by the Arab League may be insufficient to facilitate democratic transition, the League's increased role in the international dialogue shows that the world may prefer Arab-led solutions to Arab Spring conflicts.

In the early days of the Arab Spring, the Arab League was hesitant to strongly condemn the Tunisian and Egyptian authoritarian regimes. The Arab League was largely quiet during the pro-democracy movements and subsequent transitions in both states, though the uprisings were relatively quick compared to what followed in Libya and Syria. After President Zine al-Abidine Ben Ali fled Tunisia, Arab League Secretary-General Amr Moussa predicted that the unrest in Tunisia would spread to the entire region, and called for an Arab "renaissance" to alleviate the poor living conditions in many Arab states.[11] Similarly, in Egypt, Amr Moussa

9. Aidan Lewis, *Profile: Tunisia's Ennahda Party*, BBC NEWS (Oct. 25, 2011), http://www.bbc.co.uk/news/world-africa-15442859.

10. ALEXIS ARIEFF, CONG. RESEARCH SERV., RS 21666, POLITICAL TRANSITION IN TUNISIA, SUMMARY (2011).

11. *Arab Leaders Warned of 'Revolution,'* AL JAZEERA (Jan. 19, 2011), http://www.aljazeera.co

called upon President Mubarak to institute serious reforms that would lead to multi-party democracy, though he did not urge Mubarak to resign.[12]

After taking a relatively restrained position during the Egyptian and Tunisian revolutions, the Arab League took a more aggressive position toward the Libyan and Syrian dictators. In Libya, calls for a no-fly zone went unanswered until the Arab League decided that it supported the plan, at which time the Western states took action. In fact, U.N. Security Council Resolution 1973 expressly "[took] note . . . of the decision of the Council of the League of Arab States of 12 March 2011 to call for the imposition of a no-fly zone on Libyan military aviation . . . ."[13] However, some Arab League representatives retracted support for the no-fly zone once they saw what was required to enforce such measures.[14]

In Syria, the Arab League reacted quickly with warnings, and then suspended the state's membership when those warnings failed to yield results.[15] The Arab League also imposed sanctions on the Syrian government, though the implementation of such sanctions is voluntary for member states.[16] In addition, the Arab League has engaged in peace efforts, which have included promoting a transition plan, and setting up a short-lived observer mission in Syria to monitor the human rights situation.[17] Unfortunately, however, the regime rejected the transition plan,[18] and the international community criticized the observer mission for its ineffectiveness as well as for the fact it was led by a Sudanese military commander associated with the genocide in Darfur.[19] Recently, the Arab League referred the situation to the U.N.[20] Ultimately, though Arab League actions in Syria have been unsuccessful thus far in ending the violence, its measures far exceed those taken in the initial year of the conflict by other international organizations.

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m/news/middleeast /2011/01/201111916542730342 3.html.

12. Keith Weir, *Arab League Head Wants Egypt Multi-party Democracy*, REUTERS (Jan. 30, 2011), http://af.reuters.com/article/egyptNews/idAFLDE70T0B620110130?sp=true.

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

14. Edward Cody, *Arab Group Decries West's Broad Air Campaign in Libya*, WASH. POST, Mar. 21, 2011, at A13, *available at* http://english.htu.cn/washington%20post/2011/03/21/Ax13.pdf.

15. Neil MacFarquhar, *Arab League Votes to Suspend Syria Over Crackdown*, N.Y. TIMES (Nov. 12, 2011), http://www.nytimes.com/2011/11/13/world/middleeast/arab-league-votes-to-suspend-syria-over-its-crackdown-on-protesters.html?pagewanted=all.

16. *Arab League: Carry Out, Monitor Syria Sanctions*, HUMAN RIGHTS WATCH (Mar. 29, 2012), http://www.hrw.org/news/2012/03/29/arab-league-carry-out-monitor-syria-sanctions.

17. Rene Wadlow, *Syria-Arab League Observer Mission*, PEACE AND COLLABORATIVE DEVELOPMENT NETWORK (Jan. 26, 2012), http://www.internationalpeaceandconflict.org/forum/topics /syria-arab-league-observer-mission?xg_source=activity.

18. *Syria Rejects Arab League Transition Plan*, AL JAZEERA (Jan. 23, 2012), http://www.aljazeera .com/news/ middleeast/2012/01/201212305618873831.html.

19. Kareem Fahim, *Chief of Arab League's Mission in Syria is Lightning Rod for Criticism*, N. Y. TIMES (Jan. 2, 2012), http://www.nytimes.com/2012/01/03/world/middleeast/arab-league-criticized-over-syria-observer-mission.html?pagewanted=all.

20. Yasmine Saleh & Lin Noueihed, *Arab League Proposes New Plan for Syrian Transition*, REUTERS (Jan. 22, 2012), http://www.reuters.com/article/2012/01/22/us-syria-idUSTRE8041A82012 0122.

The lack of an effective response to the violence in Syria is not unique to the Arab League, and indeed, Western insistence on Arab League leadership may actually represent a stalling tactic. While a regional solution is important, the West must recognize the limits of the Arab League and take action itself when the Arab League has reached them. Similarly, to continue to be relevant the Arab League will need to embrace more emphatically the responsibilities that the new regional environment demands of it, including reevaluating the structure of the organization. Additionally, the Arab League would benefit from serious encouragement of its member states to institute internal democratic reforms. In the end, a more active regional organization capable of protecting democratic interests and promoting true stability may lessen the need for Western intervention.

In making this observation, it is also worth noting that the Arab League is not the only regional organization involved in Arab Spring conflict resolution. In particular, when the Arab League was mostly silent, the Gulf Cooperation Council ("GCC") played an important role in the transition of Yemen's President Saleh from power. The GCC initiatives were ultimately successful in brokering a deal, in which Saleh handed power to Vice President Abdurabu Mansour Hadi to institute constitutional reform and supervise open elections.[21] However, there are concerns that a more active GCC, which largely represents the interests of established Sunni—and especially Saudi—monarchies, may actually be detrimental to democratic progress.[22] Similar concerns were expressed about the Arab League's silence during the largely Shia-led pro-democracy movements in Bahrain.[23] Thus, in relying upon the Arab League and other regional organizations like the GCC in the future, policy-makers and analysts will need to be aware of the potentially competing interests of individual member states, as well as the organizations' capabilities and shortcomings.

4. R2P MATURES, BUT IS USED INCONSISTENTLY

The Responsibility to Protect ("R2P") has evolved from a policy vision discussed and debated by academics to a norm adopted by the U.N. Security Council. R2P first emerged in response to the debate on the legality of humanitarian intervention in several humanitarian crises in the 1990s. R2P consists of three pillars: (1) states' responsibility to protect their own citizens; (2) the international community's responsibility to aid states in protecting their

21. *Arab League Body Wants to Suspend Syria, Yemen Membership,* REUTERS (Sept. 20, 2011), http://af.reuters.com/article/egyptNews/idAFL5E7KK0RX20110920; Hugh Naylor & Hakim Almasmari, *The Election Only One Man Can Win—But Yemen is Used to That,* THE NATIONAL (Feb. 16, 2012), http://www.thenational.ae/news/world/middle-east/the-election-only-one-man-can-win-but-yemen-is-used-to-that.

22. Mehran Kamrava, *The Arab Spring and the Saudi-Led Counterrevolution,* 56 ORBIS 96, 96 (2011), *available at* http://www18.georgetown.edu/data/people/mk556/publication-61403.pdf; *Saudi Arabia in the New Middle East,* COUNCIL ON FOREIGN RELATIONS (Jan. 26, 2012), http://www.cfr.org/saudi-arabia/saudi-arabia-new-middle-east/p27205.

23. Bill Law, *How the Arab League Embraced Revolution,* BBC NEWS (Dec. 2, 2011), http://www.bbc.co.uk/news/ world-middle-east-15948031.

citizens; and, (3) timely and decisive action by the international community if states manifestly fail to do so.[24] Libya and Syria represent perhaps the two strongest candidates for humanitarian intervention under the third pillar of R2P.

The military intervention in Libya represented the first time, since the articulation of the doctrine, that the international community employed the full extent of the measures available under the third pillar. With Security Council Resolution 1973, the U.N. authorized, and NATO then enforced, many of the military options available under the third pillar. These included (1) the use of "all necessary measures" to enforce the resolution; (2) the protection of all "civilian populated areas . . . including Benghazi"; (3) the protection of areas "under threat of attack"; (4) an exception to the arms embargo for the protection of civilians; (5) an exclusion of a "foreign occupation force" that still allowed for limited presence on the ground; and (6) a no-fly zone with teeth.[25] The success of the intervention in Libya has set a precedent for the circumstances in which R2P should be invoked, as well as for the appropriate military measures that may be used in its enforcement. In this way, the Arab Spring has led to the further refinement of R2P and the available options to states considering humanitarian intervention.

When the security situation in Syria took a turn for the worse, with the government directly targeting civilians, the Syrian democratic forces began to demand from the international community certain protections that their counterparts in Libya received: a no-fly zone, targeted airstrikes, arms to defend themselves, and safe zones (though in Libya, all "civilian populated areas" were given protection).[26] In fact, the Syrian pro-democracy movement has named different Friday protests after the protections they are seeking, for instance, October 28, 2011 was "No-Fly Zone Friday."[27]

Despite the Syrian democratic movement's requests for protection, the international community has yet to move beyond limited sanctions and pinprick diplomacy. This is perhaps due to the international community's systemic reluctance to undertake humanitarian intervention. Additionally, it appears that the circumstances that contributed to the success of R2P in Libya may be hindering its application in Syria. Intervention in Libya was supported in large part because the Arab League endorsed it. The notion that such regional support is necessary for intervention under R2P gained further credence after President Obama's "A Responsibility to Act" speech, which cited Arab world support as a major reason for the intervention. As a result, some have argued that action cannot be taken

24. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General to the General Assembly*, ¶ 11(a)-(c), U.N. Doc. A/63/677 (Jan. 12, 2009).

25. S.C. Res. 1973, ¶¶ 4, 6-12, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1970, ¶¶ 9, 24, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

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

27. Shadi Hamid, *Why We Have a Responsibility to Protect Syria*, THE ATLANTIC (Jan. 26, 2012), http://www.theatlantic.com/international/archive/2012/01/why-we-have-a-responsibility-to-protect-syria/251908/.

without the consent of major regional players,[28] though such an argument may defeat the underlying purpose of R2P. Indeed, in Syria, R2P has only been helpful in its capacity as an advocacy tool for Syrians, but it has failed to provide a solid basis for any meaningful action. Thus, while intervention in Libya is a significant step forward for the third pillar of R2P, it has not yet prompted consistent or decisive application in the Arab Spring.

5. THE BRIC COUNTRIES MAY NOT BE READY—OR EAGER—FOR PRIMETIME

If the Arab Spring has shown that the Arab League may be ready for a greater role in world politics, the opposite is true of two of the four "BRIC" (Brazil, Russia, India and China) countries—Brazil and India. Despite the hopes of many, their apparent disinterest in supporting the broad consensus for support of the Arab Spring pro-democracy movements raises serious questions as to whether they are ready to transform their successful economic development into global political leadership. And, in the case of the other two BRIC countries, Russia and China, they continue to more or less adhere to their traditional positions of supporting sovereignty and non-interference over the principles of democratic transformation.

As a result, although the BRIC states aligned themselves with the initial sanctions in Libya, participated in the condemnation of the government crackdowns in Yemen, and supported an observer mission in Syria, they have blocked meaningful action in Syria, and appear ready to put the brakes on democratic transformations in the region.

When the international community was organizing and implementing a response to the conflict in Libya, Brazil and India were happy to cede leadership to the traditional powerhouses—the U.S., U.K., and France. Indeed, the BRIC countries constituted four-fifths of the Security Council states that abstained from Resolution 1973, with the fifth being Germany.[29] The individual fears that the BRIC countries voiced when explaining their abstentions, which mostly emphasized unpredicted consequences of intervention and difficulties with implementation, turned out to be unfounded. In the case of Russia and China, the states were protecting their longstanding interests in sovereignty and non-intervention. In the case of Brazil and India, their abstentions reflected a hesitancy to accept their responsibilities as Security Council member states to assume the weight of leadership and either endorse humanitarian intervention or stand firmly against it.

In Syria, both Russia and China vetoed the two initial resolutions that came before the U.N.—including one condemning the use of force against civilians in Syria. Their opposition to these resolutions rested mostly on principles of non-

28. *E.g.*, James Traub, *Intervention in Syria is Morally Justified—and Completely Impractical*, THE NEW REPUBLIC (Feb. 10, 2012), http://www.tnr.com/article/world/100615/syria-symposium-intervention-arab-league.

29. 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).

intervention and respect for national sovereignty and territorial integrity, though Russia also expressed concern that the second resolution was unbalanced in its treatment of rebel forces. Additionally, Russia has refused to support any initiative that would facilitate "regime change," or a transition of Assad from power.[30] Though Russia and China recently voted in favor of Resolution 2042, which authorized deployment of some unarmed U.N. military observers into Syria, they only did so following extended negotiations to ensure that the Resolution dealt equally with the Assad regime and the Syrian pro-democracy movements.[31]

6. THERE IS INCENTIVE TO PLAN FOR THE "DAY AFTER"

Pro-democracy movements and their leaders are learning about the challenges they will face in a post-conflict transition period, and are beginning to take steps to plan for these difficulties before they arise. In particular, they are learning from the mistakes that others have made, for instance in Iraq and the Balkans, and are reaching out to experts who have tackled these issues before. They are finding that there are many incentives to developing "day after" plans early on—before gaining power, or even the upper hand.

In general, pro-democracy movements are learning that their ability to anticipate challenges that are likely to arise during the transition period will make them easier to overcome. A transition plan can also demonstrate the responsibility and capability of a state's future leadership. Additionally, a proactive transition plan that outlines what the democratic forces hope to accomplish post transformation can encourage stakeholders, both within and outside the state, to support the pro-democracy movement's efforts. Early transition planning can also help to identify qualified individuals to groom for leadership roles in a new government, and may afford the time and opportunity to obtain the resources necessary for a healthy democracy. Such plans may also be useful in identifying and approaching potential funders for various initiatives prior to the transition.

In Egypt, when youth activists first took to the streets simply seeking "democracy and freedom," they did not anticipate how their protests would end or what they would achieve.[32] They certainly were not prepared for the speed with which Mubarak resigned and the military assumed the reins of power. As a result, relatively little advance planning took place to shape what post-Mubarak Egypt would look like. After Mubarak resigned, Egyptians were left scrambling to plan forums to educate one another about elections, constituent assemblies, and

30. Colum Lynch, *Russia and China Veto Security Council Resolution Condemning Syria*, FOREIGN POLICY TURTLE BAY BLOG (Oct. 4, 2011), http://turtlebay.foreignpolicy.com/posts/2011/10/04/russia_and_china_veto_security_council_resolution_condemning_syria.

31. S.C. Res. 2042, ¶ 7, U.N. Doc. S/RES/2042 (Apr. 14, 2012); *Security Council Unanimously Approves Observers for Syria*, USA TODAY (Apr. 14, 2012, 4:41 PM), http://usatoday30.usatoday.com/news/world/story/2012-04-14/syria-shelling/54269782/1.

32. Shaimaa Fayed, *Egypt Presidential Elections: Democratic Vote Won't Erase Arab Spring Country's Mubarak Memories*, HUFFINGTON POST (May 22, 2012), http://www.huffingtonpost.com/2012/05/22/egypt-presidential-elections_n_1535438.html.

democratic reforms. In the meantime, SCAF took this opportunity to fill the void and continue a modified version of the earlier system of authoritarian rule.[33]

Ironically, inherent in this observation is the recognition that the longer the conflict is, the more time there is to plan for the transition period. Syrian opposition members are taking advantage of the unfortunate length of the conflict in their state to plan for post-Assad Syria.[34] Naturally, Syrians outside of the country who are not faced with the challenges of protecting their families or overthrowing the regime have more time to do so. But as long as planning is being done, and connections are being made with all interested parties, then one can hope that whoever ends up in power after the fall of Assad will have access to a well-developed transition plan for the state.

Even with plans in place, however, the Arab Spring states are learning that their implementation during the transition period is naturally quite challenging. In Libya, the National Transitional Council ("NTC") focused significant effort on transition planning, and yet they still face many difficulties in a post-Qadhafi era—including how to administer transitional justice and foster reconciliation, the role of religion in the new constitution, and how to enforce security and encourage disarmament among a diverse group of actors.[35] Even Tunisia, which has successfully held elections for a National Constituent Assembly and is making progress in drafting their constitution, faces key challenges, such as how to deal with dissent and stimulate a stagnant economy.[36]

7. JUSTICE IS A TOP DEMAND

Justice is a top demand of Arab Spring pro-democracy movements. Those seeking a democratic transition not only want their dictators to step down; they want them held accountable for the crimes they committed during the uprising and throughout their time in power. When Yemen's former President Saleh received amnesty as part of his negotiated transition from power, democracy activists took to the streets in protest.

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33. Yasser M. El-Shimy, *The Final Task for Egypt's Brass*, N.Y. TIMES (May 21, 2012), http://www.nytimes.com/2012/05/22/opinion/the-final-task-for-egypts-brass.html.

34. *See* Pub. Int'l. Law & Policy Grp., *Planning for Syria's "Day After"—Security, Rule of Law & Democracy* (Mar. 2012), *available at* http://gallery.mailchimp.com/91ab76eaf4f3105e695b69fac/files/PILPG_Report_ Planning_for_Syria_s_Day_After.pdf.

35. *Libya: Challenges Abound in post-Gaddafi Era*, NEWSFROMAFRICA (Sept. 15, 2012), http://www.newsfromafrica.org/newsfromafrica/articles/art_13559.html; Luke Harding, Chris Stevens, *US Ambassador to Libya, killed in Benghazi Attack*, THE GUARDIAN (Sept. 12, 2012), http://www.guardian.co.uk/world/2012/sep/12/chris-stevens-us-ambassador-libya-killed.The challenges faced by Lybia are exemplified by increased violence in the region. For example, in September 2012, the U.S. Ambassador to Libya, Chris Stevens, was killed after Islamist militants fired rocked at their car in the Libyan town of Benghazi.

36. *IMF Survey: Tunisia Faces Economic, Social Challenges amid Historic Transformation*, INT'L MONETARY FUND (Sept. 5, 2012), http://www.imf.org/external/pubs/ft/survey/so/2012/CAR090512A.htm.

But what does it mean for justice to be served and who is to administer it? Some Arab League dictators have simply fled, while others have been imprisoned or killed. Likewise, some Arab Spring pro-democracy movements have called for justice by international courts, namely the International Criminal Court ("ICC"), while others have insisted on justice at home. As to the latter, few will soon forget the image of Mubarak standing trial in a cage. Egyptians wanted an Egyptian trial and Egyptian justice for their dictator. Libyans, on the other hand, initially embraced the referral of the situation in Libya to the ICC and the subsequent indictments of Colonel Qadhafi, the Colonel's son, Saif al-Islam Qadhafi, and Libyan intelligence chief Abdullah al-Senoussi. However, when the time came for justice to be served, Libyans instead wanted local justice. Those who watched the video of Qadhafi's demise online are unlikely to forget the fate he suffered at the hands of his captors. Additional questions regarding the Libyan commitment to international justice have arisen since Saif al-Islam was captured, disguised as a Bedouin in the Sahara desert last November. He now sits in a Libyan prison, and is currently the subject of argument between the new Libyan authorities and the ICC regarding where he should be tried. Similarly, Abdullah al-Senoussi was recently captured in a Mauritanian airport carrying a fake passport. Now, the ICC is asking for Mauritania's cooperation in surrendering him to the Court, while the NTC calls for his extradition to Tripoli.[37]

In another instance, while Tunisia did not have much time for planning before the transition period began, the state has employed a range of tools to pursue transitional justice. The interim government established three separate commissions to investigate constitutional reforms, corruption, and crimes committed against the population during the pro-democracy demonstrations. Although Ben Ali and his family fled, the government continues to seek his extradition and has begun trials in absentia.[38] Other officials from his regime are also awaiting trial. Additionally, the government has sought help from NGOs to improve its capacity to prosecute war criminals.

Finally, while Arab Spring pro-democracy movements are eager for accountability, they are also aware of truth and reconciliation measures that can benefit a country in transition. Truth and reconciliation measures, however, are not always compatible with demands for strict accountability. In light of the complex considerations involved in the transition, incorporating plans for transitional justice into "day after" planning efforts may increase the likelihood of lasting success for Arab Spring pro-democracy movements in the transition and post-transition periods.

37. Rami al-Shaheibi, *ICC: Libya has Evidence of Killing by Gadhafi Son*, ASSOCIATED PRESS (Apr. 19, 2012), *available at* http://www.icc-cpi.int/iccdocs/doc/doc1407190.pdf.

38. David D. Kirkpatrick, *Ex-Tunisian President Found Guilty, in Absentia*, N.Y. TIMES (Jun. 20, 2011), http://www.nytimes.com/2011/06/21/world/middleeast/21tunisia.html?_r=0.

8. INTERIM GOVERNMENTS SHOULD BE AWARE OF THE COUNTER-REVOLUTION OR MORE-OF-THE-SAME

Arab Spring pro-democracy movements should be aware of the possibility for counter-revolution. This is partly due to the fact that, many times, states experiencing democratic transition are often fragile in the wake of violent conflict, and are thus vulnerable to counter-revolution. New governments or opposition figures planning for the transition period should thus put mechanisms in place to identify potential spoilers and create incentives and punishments to deter counter-revolutionary behavior. On the other hand, new governments should make sure not to punish an entire group of people solely on the basis that they were loyal to the last regime. Arab Spring states can learn from the mistake in Iraq, for example, of conducting a wholesale *de-baathification* of the regime, rather than a careful vetting process.

Additionally, striking a balance between protecting civil rights, particularly freedom of expression, and preventing the transition from being hijacked by counter-revolutionaries is difficult. Nearly all of the new Arab Spring governments have at some point stifled legitimate political dissent in ways that run counter to the principles of freedom and democracy that inspired the pro-democracy movements in the first place. In Egypt and Tunisia, for instance, security forces have continued to use excessive, and sometimes lethal, force to silence groups who criticize the nature or pace of the transition process.[39]

In the post-conflict jockeying for power, groups seeking a democratic transition should also be aware of those who may have fought for change, but whose ambitions are too similar to the recently departed dictator. When strong authority is all a state knows, the fight to fill that authority gap can lead to more of the same. In Egypt, for instance, some of the original January 25th pro-democracy movement members now believe that they were better off under Mubarak's rule than they currently are under the SCAF. In Libya, on the other hand, it remains unclear which elements of the original pro-democracy movement will ultimately be in charge and how regional interests will be represented in the new government, which incidentally has resulted in a surge of post-Qadhafi violence.

Similarly, there is the possibility of trading true democratic reform for peace and stability. In Yemen, Ali Abdullah Saleh handed formal power to his Vice President. However, Saleh remains the leader of the General People's Congress Party, which is well represented in the cabinet. This has allowed him to continue to play a major role in Yemeni politics, and many fear that he is using his position to sabotage the coalition government and democratic progress.

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39. Elliott Abrams, Op-Ed., *In Tunisia, Press Freedoms are in the Crosshairs,* WASH. POST (Mar. 11, 2012), http://www.washingtonpost.com/opinions/tunisias-press-is-coming-under-attack/2012 /03/11 /gIQA5Dgx5R_story.html; *Egypt: Dismantle Tools of Repression,* HUMAN RIGHTS WATCH (Jan. 16, 2012), http://www.hrw.org/news/2012/01/16/egypt-dismantle-tools-repression; *Tunisia: Dismantle Repressive Ben-Ali-Era Laws,* HUMAN RIGHTS WATCH (Dec. 17, 2011), http://www. hrw.org/ news /20 11/12/17/tunisia-dismantle-repressive-ben-ali-era-laws.

9. REBELS MUST BE MEDIA-SAVVY

The Arab Spring has taught us that rebels must be media savvy. Many analyses of the Arab Spring have focused on the role that social media has played in sparking and facilitating the revolutions. For instance, media has contributed to showing those in the Arab world what other systems of governance are available. Additionally, social media enabled rebels inside the Arab Spring states to communicate with the international community, and within their own ranks, to a degree that would have been impossible only five years ago. And pro-democracy activists have used social media to organize protests and events on the ground during the uprisings and to keep rebels in one town or city apprised of what is going on in another.

Importantly, rebels are also using social media and the Internet as a tool to market themselves, their ideas, and their needs. This has allowed them to gain support both from their counterparts within their own states as well as from the international community. The NTC's website explicitly states that its goal was to connect Libyans to the outside world so that their voice could be heard.[40] In some cases, pro-democracy movements have used the Internet to facilitate and encourage military operations. For example, the SNC's website published four maps that showed the location and type of Syria's air defense systems.[41]

The role of media in facilitating the Arab Spring also has lessons for new governments. Egypt's attempt to put an end to the pro-democracy movement by closing off access to the Internet—presumably eliminating the movement's ability to communicate—actually backfired. Unable to communicate with each other remotely, dissenters were forced into the streets to reach one another, leading to an increase in the size and intensity of the pro-democracy movement.[42]

10. DO NOT FORGET SOUTH SUDAN AND IRAQ

Since the Arab Spring began, much time and effort has been directed to deciphering what combination of factors led to the 2011 pro-democracy movements, which have now spilled over into 2012. Many studies attribute the Arab Spring to the rising level of education in the region, the lack of decent jobs available, and the growth of social media, without examining other democratic trends that have developed in the region.[43] Few, however, acknowledge the two

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40. *The Council's Statement*, THE LIBYAN INTERIM NATIONAL COUNCIL, www.ntclibya.org/english/ (last visited October 22, 2012).

41. David Kenner, *Syria National Council Publishes Maps of Syrian Air Defenses **updated,* FOREIGN POLICY PASSPORT BLOG (Oct. 3, 2011), http://blog.foreignpolicy.com/posts/2011/10/03/syrian_national_council_publishes_maps_of_syrian_air_defenses.

42. Noam Cohen, *Egyptians Were Unplugged, and Uncowed*, N. Y. TIMES (Feb. 20, 2011), http://www.nytimes.com/2011/02/21/business/media/21link.html.

43. Sarah Hamdan, *Arab Spring Spawns Interest in Improving Quality of Higher Education*, N. Y. TIMES (Nov. 6, 2011), http://www.nytimes.com/2011/11/07/world/middleeast/arab-spring-spawns-interest-in-improving-quality-of-higher-education.html; Adeel Malik & Bassem Awadallah, *The Economics of the Arab Spring,* CENTER FOR THE STUDY OF AFRICAN ECONS. (Dec. 2011), *available at* http://www.csae.ox.ac.uk/workingpapers/pdfs/csae-wps-2011-23.pdf; Ekaterina Stepanova, *The Role of*

most recent changes from dictatorship to democracy that took place in the Arab Spring states' backyard—in Iraq and South Sudan—as contributing factors. Any discussion of the Arab Spring would thus be remiss without analyzing its relationship to the democratic transitions in these two states.

In January of 2005, the Iraqi people voted in the first democratic elections the state had ever seen. In the wake of U.S. troop withdrawals from Iraq almost seven years later, President Obama related that, "Iraq is not a perfect place, but we are leaving a sovereign, stable and self-reliant country with a representative government elected by its people."[44] Parallels can be drawn between the aspirations for freedom and democracy of the Iraqi people during that time and the Arab Spring pro-democracy movements over the last year.[45] While democratic fervor in Iraq may have finally rubbed off on other Arab states, the U.S. invasion of Iraq may have alternatively delayed the desire for democracy in the Arab world.[46] Though the exact effect of Iraq's transition cannot be quantified, the birth of the Arab Spring cannot be analyzed without it.

Likewise, the momentum of the Arab Spring must be examined in light of the recent self-determination of the South Sudanese. Though northern Sudan still suffers from the authoritarian grip of President Omar al-Bashir, the South Sudanese are squarely on the path of democracy. The timeline for preparing the South, set forth in the Comprehensive Peace Agreement, substantially improved the chances for a successful separation and transition to democracy. The transition, while not threatened from an internal counter-revolution, does remain threatened by the aggressive posture of northern Sudan. In fact, one cannot really consider the Arab Spring to have run its full course until there is a democratic transformation in northern Sudan, and President Bashir stands before the ICC to face his indictment for genocide in Darfur.

For those seeking democratic transition in the Arab Spring movement, the prospect of free and fair elections was – and in some cases, still is – a dream worth risking their lives for. The cases of Iraq and South Sudan illuminate the challenges involved in transitioning to democracy, as well as the importance of democratic change. In Sudan, conflicts constantly threatened the implementation of the peace agreement and continue to pose a risk to the stability of South Sudan. In Iraq, democratic elections were both volatile and polarizing. Our knowledge of the origins, progression, and future of the Arab Spring will be much improved by considering these two recent democratic transitions.

Information Communication Technologies in the "Arab Spring": Implications Beyond the Region, PONARS EURASIA (May 2011), *available at* http://www.gwu.edu/ ~ieresgwu/assets/ docs/ponars/pepm_ 159.pdf.

44. David Gordon Smith, *Without Iraq 'Arab Spring May Have Broken Out Earlier,'* DER SPIEGEL (Dec. 16, 2011), http://www.spiegel.de/international/world/0,1518,804204,00.html.

45. Con Coughlin, *Without Iraq, There Would Be No Arab Spring,* THE TELEGRAPH (Dec. 15, 2011), http://blogs.telegraph.co.uk/news/concoughlin/100124358/without-iraq-there-would-be-no-arab-spring/.

46. Ulf Laessing & Alexander Dziadosz, *Insight: In Sudan, Glimpses of an Arab Spring,* REUTERS (Feb. 8, 2012), http://www.reuters.com/article/2012/02/08/us-sudan-idUSTRE81713Z20120208.

More than a year and a half after the Arab Spring began, some states in the region continue to be in turmoil, while others are just beginning their democratic transitions. By learning these simple, short-term lessons from a review of the first year of the Arab Spring, the U.S. and its allies can better respond to the continued calls for democratic transformation in the region, and improve their efforts to promote stable and lasting transitions.

POLITICS OR LAW? THE DUAL NATURE OF THE RESPONSIBILITY TO PROTECT

RACHEL VANLANDINGHAM*

No longer wholly an aspirational doctrine, the responsibility to protect concept, *as international law*, obligates nation-states to protect their people against mass grievous human rights violations, and also obligates the international community to respond in some manner to mass atrocities when a state has failed to fulfill its original sovereign protective responsibility. While this doctrine is mutlti-faceted, only these two components have attained the status of customary international law, and the latter responsive facet in a rather embryonic and amorphous manner. Though not a black and white discussion, it is important to consider responsibility to protect's role on the world stage, since such consideration lends to more accurate assessments of national obligations and future actions. It also separately highlights the messy process of the formation of international law.

Customary international law can be rather opaque, and constitutes a spectrum ranging from aspirational ideals on one end, to settled legal precepts and *jus cogens* on the other. The state's obligation to protect its own people is farther to the right on this spectrum, toward settled legal precepts, than the nascent obligation of the international community to respond in some manner to gross human rights abuses. However, this essay's premise—that there is some type of obligation, binding on the international community of nation-states, to react in some condemnatory manner to atrocities previously solely within a sovereign state's domain—highlights how customary international law evolves. In 2005, as nation-states began to operationalize the responsibility to protect theory on the world stage, they formally agreed to assist nations in satisfying their individual state protection responsibility, and also pledged to consider taking collective action when a nation-state fails its own protection mission. These commitments currently exist as indeterminate pledges to engage in unspecified action, and have yet to become customary international law in the particular form articulated at the 2005

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United Nations World Summit gathering.[1] This essay briefly demonstrates how and why responsibility to protect has otherwise evolved into customary international law by sketching its lineage and citing examples of how it has been utilized. This piece also summarily addresses why the distinction between policy/politics and law matters. The transformation from a political and moral commitment to protect human rights to a legal rule is not purely theoretical; it matters because the responsibility to protect as law forecasts how national leaders will react to mass human rights abuses, and informs their future decision-making.[2]

In 2009, the United Nations Secretary-General re-formulated the responsibility to protect into three distinct pillars: "[t]he protection responsibilities of the State"; "[i]nternational assistance and capacity-building"; and "[t]imely and decisive response."[3] Based on the language of the original international consensus on responsibility to protect as stated at the 2005 World Summit, as well as the global community's reaction to this formulation and actual practice regarding this issue, this essay declines to find that the Secretary-General's second pillar has attained customary law status, and explains how only a generalized version of the third has reached the same. The first pillar, however, seems to have become non-controversial international law.

I. BACKGROUND: WHAT IT IS AND WHY IT MATTERS

As agreed to unanimously by the United Nations General Assembly in 2005,[4] and twice thereafter reaffirmed by the United Nations Security Council,[5] the responsibility to protect legal paradigm first and foremost requires nation-states to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity.[6] It concomitantly obliges the international community to use peaceful means to help protect populations from the four scourges; if these means are inadequate and "national authorities are manifestly failing to protect their

1. Not only are the specific actions the international community is required to take unclear, whether or not responsibility to protect is a legal requirement itself remains controversial. *See* Ved Nanda, Director of International Legal Studies at the University of Denver Sturm College of Law, Remarks at the University of Denver Sturm College of Law Annual Sutton Colloquium: The Arab Spring and its Unfinished Business (Nov. 5, 2011) (referring to responsibility to protect generally as customary international law, while disagreeing with then-United Nations Special Advisor Dr. Edward Luck, who, at the same forum, stated that the doctrine is only political and not legal).

2. It will surely continue to evolve, but in the words of the United Nations Secretary General, "this fundamental principle of human protection is here to stay." Press Release, Secretary-General, 'Responsibility to Protect' Came of Age in 2011, Secretary-General Tells Conference, Stressing Need to Prevent Conflict before it Breaks Out, U.N. Press Release SG/SM/14068 (Jan. 18, 2012).

3. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, at 2, U.N. Doc. A/63/677 (Jan.12, 2009) [hereinafter *Implementing R2P*].

4. 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) [hereinafter 2005 World Summit Outcome].

5. S.C. Res. 1894, U.N. Doc. S/RES/1894 (Nov. 11, 2009); S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

6. 2005 World Summit Outcome, *supra* note 4, ¶¶ 138-40; *see also* S.C. Res. 1894, *supra* note 5; S.C. Res. 1674, *supra* note 5, ¶ 4 (providing confirmation by United Nations Security Council of the 2005 United Nations General Assembly responsibility to protect commitments).

populations" from same, responsibility to protect allows the international community to take non-consensual "Chapter 7" collective action. [7] This latter collective action, presumably to stop such atrocities, is to be conducted via the United Nations Security Council but is not mandated in every instance of mass atrocities.[8] The international consensus agreement regarding the responsibility to protect, as reflected in the United Nations documents, stops short of requiring coercive action, stating instead that the international community is "prepared to take" such action on a "case-by-case basis."[9]

The first obligation—that of nation-states to protect their inhabitants—has progressed from a theory, to a norm, to customary international law.[10] But surprisingly, this evolution of state sovereignty has elicited little concern on the international stage. This quiet acceptance is perhaps due to the fact that the other main prong of responsibility to protect, that of intervention by the international community into the internal affairs of states when they have not fulfilled their protection responsibility, directly challenges the Westphalian model of sovereignty, and its controversial nature has overshadowed the idea that state sovereignty includes a responsibility of the state to its people.[11]

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7. 2005 World Summit Outcome, *supra* note 4, ¶ 139; S.C. Res. 1894, *supra* note 5; S.C. Res. 1674, *supra* note 5, ¶ 4. While Article 139 of the World Summit Outcome has been interpreted as imposing a duty to engage in collective action under Chapter 7 of the United Nations Charter if states fail to protect their populations, the clear language states that the international community is "prepared to take" such action but does not say it is required. Its use of "case-by-case basis" language also supports the conclusion that the responsibility to protect legal paradigm allows for such action but does not require it; instead, it obligates the international community to consider such action based on the individual extant dynamics of the situation. *See* Carsten Stahn, Note and Comment, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 109 (2007); Alex J. Bellamy, *Preventing Future Kosovos and Future Rwandas: The Responsibility to Protect After the 2005 World Summit*, Carnegie Council Policy Brief No. 1, at 13 (2006), *available at* http://www.cceia.org/media/Bellamy_Paper.pdf.

8. Stahn, *supra* note 7, at 109-10.

9. 2005 World Summit Outcome, *supra* note 4, ¶ 139; S.C. Res. 1894, *supra* note 5; S.C. Res. 1674, *supra* note 5, ¶ 4.

10. Alex J. Bellamy, *The Responsibility to Protect—Five Years On*, 24 CARNEGIE COUNCIL FOR ETHICS & INT'L AFF., no. 2, 143, 160 (2010) (defining norms as "shared expectations of appropriate behavior for actions with a given identity").

11. Dave O. Benjamin, *Prosecuting Crimes Against Humanity, The Revolution in International Criminal Law*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 13, 15-17 (Sanford R. Silverburg ed., 2011) (discussing the Peace of Westphalia as establishing the legal standard of an autonomous state as "the power of central authority" and the Montevideo Convention of 1933 as listing the criteria of sovereign statehood; and explaining that the United Nations Charter via Article 2(7) establishes the non-interference principle as a component of sovereignty: that the United Nations, as well as other states, cannot interfere in the domestic affairs of another state, unless authorized by the United Nations Security Council. Benjamin also claims that the Westphalian model does not "adequately address . . . the responsibility of the state to its population."). *See also* Giulherme M. Dias, *Responsibility to Protect: New Perspectives to an Old Dilemma*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 48, 52-53 (Sanford Silverburg ed., 2011) (highlighting that the central feature of the Westphalian notion of sovereignty is nonintervention by states into the internal affairs of fellow states); Sanford R. Silverburg, *Introduction*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 1, 2-3 (Sanford R. Silverburg ed., 2011)

The traditional notion of state sovereignty rests on the tenet that the central state authority controls everything within its territorial jurisdiction and that fellow states cannot interfere in this domestic sphere: this is the international law principle of non-intervention.[12] This Westphalian model of sovereignty does not specify a state's relationship to its own population, making the responsibility to protect's fundamental tenet, that states possess a legally-binding duty to protect their populations from mass atrocities, superficially revolutionary. However, as recognized by the United Nations Secretary-General, "[p]rotection was one of the core purposes of the formation of States and the Westphalian system."[13] This attribute of sovereignty is really "old wine in new bottles";[14] its lineage can be traced to Hobbes' social contract theory: that people covenant with a sovereign authority in exchange for fundamental protection from life's vicissitudes.[15]

The fact that the first tenet of the responsibility to protect doctrine is well-grounded in existing international law and political philosophy does not mean that leaders such as the United Nations Secretary-General have admitted it constitutes customary international law; perhaps they fear partitioning the general doctrine, with its controversial intervention prong, into distinct components with differing legal status.[16] Despite this lack of formal recognition, even nations such as Iran, a staunch proponent of non-intervention, implicitly support the concept of a nation-state's responsibility to protect its people.[17] The Iranian Ambassador to the United Nations has stated that Syria had an obligation to its people to stop the then-extant human rights abuses there, regardless of who was perpetrating them, while vehemently condemning any attempt by other nations to take coercive action against the Syrian government.[18]

In contrast to the relatively non-controversial acceptance of the concept of the state's responsibility to protect its population, the status of the responsibility to protect's prong which posits a collective obligation by other states to help prevent and stop ongoing instances of one of four mass human rights violations in a fellow

(explaining that the traditional notion of state sovereignty focuses on the ability of the state to control everything within its borders).

12. U.N. Charter art. 2, para. 7.

13. Press Release, Secretary-General, Secretary-General Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World,' U.N. Press Release SG/SM/11701 (July 15, 2008) [hereinafter Secretary-General Defends R2P].

14. Stahn, *supra* note 7, at 111.

15. *Hobbes's Moral and Political Philosophy*, ¶ 7, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. ed. 2008), http://plato.stanford.edu/entries/hobbes-moral/#EstSovAut ("Political legitimacy depends not on how a government came to power, but only on whether it can effectively protect those who have consented to obey it . . . .").

16. Secretary-General Defends R2P, *supra* note 13 ("Today, the responsibility to protect is a concept, not yet a policy; an aspiration, not yet a reality.").

17. Interview by Charlie Rose with Mohammad Khazaee, Iranian Ambassador to U.N., Charlie Rose TV Show (Jan. 18, 2012), http://www.charlierose.com/view/interview/12093.

18. *Id.*

state is much more controversial.[19] But with sufficient caveats as explained below, it also appears to have evolved into the most elementary level of customary international law. That is, responsibility to protect's second customary international law component is a requirement for some type of censorious action by the international community in response to genocide, crimes against humanity, war crimes, and ethnic cleansing.[20] This obligation is a vague one, which involves a spectrum of responses. It does not require one particularized type of action, such as the use of non-consensual military force within the territory of another nation-state to interdict mass atrocities (the 1990's concept of humanitarian intervention, with Kosovo being a prime example).

Rather, responsibility to protect as law provides that (1) national sovereignty confers to the nation-state an obligation to protect their populations from the four stated grave human rights abuses, and (2) when a nation-state is unwilling or unable to render such protection, the international community is legally required to engage in some type of condemnatory action, ranging from critical discussion to coercive military intervention.[21] While the latter proposition seems to imply that mere global hand-wringing is sufficient to prove that responsibility to protect has evolved into customary law, such reactive discussion is a type of behavior and its ubiquitous nature does in fact indicate international law status.

II. LAW VERSUS POLITICS: DOES IT MATTER?

The United Nations Special Advisor for the Responsibility to Protect, Dr. Edward C. Luck, has emphasized that the responsibility to protect is "not law, it's politics."[22] Of course the responsibility to protect involves politics—all law involves some level of politics, as legal realism has long avowed.[23] Simply because the implementation of responsibility to protect involves political calculations by nation states does not innately negate its status as customary international law. The adherence to law by nation states in the international arena rarely fails to include a weighing of national interests, resources, and other dynamics: in other words, politics. If responsibility to protect is not law because it

19. INT'L COMM'N ON INTERVENTION AND STATE SOVEREIGNTY, *RESPONSIBILITY TO PROTECT* 32-33 (2001), *available at* http://responsibilitytoprotect.org/ICISS%20Report.pdf [hereinafter ICISS REPORT].

20. 2005 World Summit Outcome, *supra* note 4, ¶ 139.

21. *Id.* ¶¶ 138-39; ICISS REPORT, *supra* note 19, at 29.

22. Edward C. Luck, U.N. Special Adviser, Remarks at the University of Denver Sturm College of Law Annual Sutton Colloquium: The Arab Spring and its Unfinished Business (Nov. 5, 2011); *see also* Edward C. Luck, *The Responsibility to Protect: Growing Pains or Early Promise?*, 24 ETHICS & INT'L AFF. J. 349, 349 (2010) [hereinafter Luck, *Responsibility to Protect*] (characterizing responsibility to protect as "a policy tool"). Dr. Luck argues that responsibility to protect is not only a policy tool but "a principle," and that policy measures implementing it are inherently political, and therefore the principle's import cannot be judged by how little or much it is operationalized via policy. He therefore claims that responsibility to protect is merely a policy tool, while simultaneously claiming it is a principle that cannot be judged by its implementation into policy. *Id.* at 352-53.

23. Michael C. Dorf, *Is There A Distinction between Law and Politics? Yes, and the* Bush v. Gore *Decision Proves It*, FINDLAW (Dec. 27, 2000), http://writ.news.findlaw.com/dorf/20001227.html.

involves politics, than none of what comprises international law can be considered law.[24] By downplaying responsibility to protect's nature as customary international law, Dr. Luck risks diluting some of its potency as, in Alex J. Bellamy's words, a "catalyst for action."[25]

Dr. Luck's mischaracterization resembles one of the classic critiques of the nature of international law itself: that it is not "law" and instead merely national interests pursued on the global stage.[26] While this Austinian cum Goldsmithian argument is interesting and highlights the diverse views of the nature of law, it is increasingly moot in today's world of global interdependence, which relies on a structural framework of international law.[27] This legal framework is clearly demonstrated by the omnipresent references to international law as justification for both action and inaction by nation states and other international actors.[28] What is considered international law frames the international discussion and helps shape behavior of its actors; responsibility to protect both is a product of politics and a shaper of same as its essential elements drive state policy.

Another way to distinguish international law from pure politics is to consider the sanctions-based perspective. International law generally distinguishes itself from social, moral and other rules based on the potential for sanction, with this sanction taking many forms.[29] This sanction-based litmus test for distinguishing international law from moral, ethical, and other dynamics is relevant to this essay's thesis that components of responsibility to protect constitute customary international law: the failure of a nation-state to protect its population from mass human rights abuses generally prompts some form of counter-measure by the international community, be it condemnation via individual national statements or global resolutions, loss of credibility, boycotts, trade sanctions, criminal

24. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 101 (1987) (referring to international law as "rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons, whether natural or juridical").

25. Bellamy, *supra* note 10, at 160.

26. PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 5 (7th ed. 1997) (critiquing the international community's lack of an enforcement mechanism to sanction violations of its rules); *see also* MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 62-66 (2008) (highlighting the legal theories for and against international law as law, and concluding that the availability of sanctions distinguishes international law as a legal system).

27. *See* O'CONNELL, *supra* note 26, at 2-4 (reviewing Austin's classic formulation of international law and Jack Goldsmith's modern espousal of same).

28. WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 54-57 (5th ed. 2007).

29. O'CONNELL, *supra* note 26, at 6-7 (discussing the Grotian view that sanctions signal the rule, but noting international law "does not rely on 'effective' sanctions for its classification as law"). O'Connell notes that every rule of international law is backed at least by a "general-purpose countermeasure," while also discussing Hart's view that community acceptance is central to law's characterization as law. *Id.*

indictments of national leaders, or coercive military force.[30] These censorious reactions help prove the international law status of the rule which has been broken. In today's globally-interdependent and politically-conscious world, nation-states simply cannot intentionally commit, allow, or fail to prevent mass human rights abuses within their territories without eliciting some type of sanction-type reaction by the global community. This reaction demonstrates the legal status of the obligation not to engage in such behavior in the first place.

Because of the reality that nation states, as well as other international actors, use international law precepts as a basis for common ground, as well as to justify and guide their actions, it is important to call a spade a spade, and highlight what components of the responsibility to protect doctrine have evolved into international law. This exercise is "useful to reduce the complexity and uncertainty in international relations . . . [and to clarify] the external relevant terms of legal reference for the conduct of states in their international relations . . . [as] they are members of an existing international community."[31] In concrete terms, responsibility to protect, as law, structures the debate regarding on-going killings of civilians by various governments and helps guide policy makers as they struggle to craft a solution.

III. THE RESPONSIBILITY TO PROTECT DOCTRINE

Since customary international law status is demonstrated by analyzing how states act—including what they say—and why they do so, it is critical to briefly review the evolution and context of the responsibility to protect doctrine because its development reveals the beliefs of the international community.[32] The following will clarify the consensus the international community has reached regarding the various tenets of this theory, and will lay the foundation for this essay's analysis regarding whether that consensus is of a legally binding nature. An understanding of the history of responsibility to protect is also helpful to place in context the components of the theory of responsibility to protect which have yet to become binding law.

The responsibility to protect doctrine evolved in the late 1990s and early 2000s in response to the failures of nation-states and the world community to prevent mass human rights atrocities, such as the genocidal tragedy in Rwanda and mass human rights abuses in Somalia, as well as in reaction to NATO's unilateral

30. *See, e.g.*, Prosecutor v. Omar Hassan Ahmed al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (Mar. 4, 2009); S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); Catherine Ashton, High Rep. for Foreign Affairs and Sec. Policy and Vice President of the European Commission, Eur. Union, Speech on Syria (Dec. 13, 2011); *Syria Unrest: Arab League Adopts Sanctions in Cairo*, BBC NEWS (Nov. 27, 2011), http://www.bbc.co.uk/news/world-middle-east-15901360.

31. MALANCZUK, *supra* note 26, at 7.

32. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).

(not approved by the United Nations) intervention in Kosovo on humanitarian grounds.[33] The move to develop responsibility to protect was also motivated by various attempts to outline a consistent framework to apply when a nation-state fails to protect individuals within its borders: in the aftermath of Rwanda and Kosovo, it sought to answer the questions of when and how nation-states should take both consensual and non-consensual action to prevent and/or stop grave human rights abuses within another state.[34]

The pivotal dilemma of this period was how to reconcile state sovereignty, as reflected in the United Nations Charter's non-interference principle and prohibition against the use of force, with the urge to stop mass human rights abuses within the territories of other nation-states which were either perpetrating such abuses or failing to stop them.[35] The desire to stop such atrocities stemmed from both the growing internationalization of human rights that had occurred since the U.N. Charter's signing, and from increasing public awareness of human rights abuses due to evolving technology and access to it.[36] Despite these dynamics, much of the global community remained concerned that humanitarian intervention—the non-consensual use or threat of use of military force against a state for the purpose of protecting people within that state—was a guise for power politics, and would be used by stronger powers to dominate the weak via expansionist invasions prompted by imperialist motivations.[37] This fear was compounded by the United Nations Security Council's failure to authorize effective action in cases such as Rwanda and Kosovo, leaving the international community with the choice of either doing nothing or using force illegally to stop the abuses and thereby violating the United Nations Charter and the invaded state's sovereignty.[38]

Despite these fears that humanitarian protection would merely serve as a pretext for coercive action motivated by other goals, by the late 1990s there existed a growing belief by politicians and legal theorists in a "right" of humanitarian intervention: that state sovereignty did not provide a shield to allow a state to violate its populations human rights.[39] This right, tracing its lineage to Hugo

33. NAOMI KIKOLER, RESPONSIBILITY TO PROTECT 4 (2009), *available at* http://www.rsc.ox.ac.uk/pdfs/keynotepaperkikoler.pdf.

34. ICISS REPORT, *supra* note 19, at 1-3.

35. *Compare* U.N. Charter art. 2, paras. 4, 7, *with* ICISS REPORT, *supra* note 19, at 1-3.

36. ICISS REPORT, *supra* note 19, at 6-7; *see* Dave O. Benjamin, *Prosecuting Crimes Against Humanity: The Revolution in International Criminal Law*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 13, 15-18 (Sanford R. Silverburg ed., 2011).

37. ICISS REPORT, *supra* note 19, at 7-8; Ramesh Thakur, *Outlook: Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS*, 33 SECURITY DIALOGUE 323, 328-30 (2002) (outlining fears of nations opposed to humanitarian intervention).

38. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 304-05 (1995); *see also* W. Michael Reisman, Editorial Comment, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 875 (1990) (discussing the ambiguity behind decisions to intrude upon a nation's sovereignty).

39. *See* J.L. Holzgrefe, *The Humanitarian Intervention Debate*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 15, 26-27 (J.L. Holzgrefe & Robert O.

Grotius, the great naturalist and father of international law, was articulated in the late 1980s by French politician Bernard Kouchner and initially primarily referred to the "right of states to provide humanitarian relief even when the violating state refused to give permission," and was implemented by the United Nations in Iraq in 1991, in Somalia in 1992, and by France in Rwanda in 1994.[40]

Following the failures of such humanitarian interventions—which focused on delivery of aid versus stopping the conflicts which were causing the crises—the concept of a "right" to intervene via aid delivery instead evolved into the right to use military force to stop the dynamics which were actually causing the suffering.[41] This latter right was used to justify NATO's unilateral military intervention in Kosovo in 1999.[42] Former British Prime Minister Tony Blair went the farthest in outlining trigger mechanisms for this intervention, and his theory, as well as the Kosovo intervention itself, became known for the position that United Nations approval was not required to use military force against another sovereign nation for the purposes of stopping or preventing grave human rights abuses.[43]

Of course humanitarian intervention as a "right" did little to lessen fears of many states that such a right was a promotion of "hegemonism under the pretext of human rights."[44] It was within this context of humanitarian intervention versus state sovereignty that the then-United Nations Secretary-General issued a challenge to the global community in 1999 to reconcile the tensions between the United Nations paradigm for authorizing force (specifically its prohibition against unilateral action on humanitarian or other grounds without United Nations Security Council approval), and the prevention of mass human rights violations within states when the state itself has failed to protect its inhabitants from such violations:

> The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence of human rights—can only be viewed as a tragedy. It has revealed the core challenge to the Security Council and to the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human

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Keohane eds., 2003) (articulating a tenet of natural law theory that views humanitarian intervention as a discretionary right versus a moral obligation).

40. Chris Abbott, *Rights and Responsibilities:Resolving the Dilemma of Humanitarian Intervention*, HUMANITARIAN ASSISTANCE 2-3 (Oct. 29, 2005) (discussing history of humanitarian intervention as 'droit d'ingerence humanitaire'), *available at* http://sites.tufts.edu/jha/files/2011/04/a180.pdf; Holzgrefe, *supra* note 39, at 26-27 (articulating a tenet of natural law theory that views humanitarian intervention as a discretionary right versus moral obligation); *see also* HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 207-8, 247-8 (A.C. Campbell trans., 2001) (1625). Grotius believed that states have a discretionary right to intervene, by force if necessary, in another state to prevent grave human suffering but that states do not have an obligation to do so. *Id.*

41. Abbott, *supra* note 40, at 2-3.

42. *Id.* at 3.

43. *Id.* at 4-5.

44. Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, *in* HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 204, 225 (J.L. Holzgrefe & Robert O. Keohane, eds., 2003).

> rights—wherever they may take place—should not be allowed to stand.[45]

The Canadian government, via the independent International Commission on Intervention and State Sovereignty ("ICISS"), published their response to this challenge in December 2001.[46] Their resultant responsibility to protect theory, promulgated shortly after the September 11, 2001 attacks, attempted to re-define the issue away from the non-interference versus human rights dichotomy to instead focus on the state's responsibility as a sovereign: from "sovereignty as control to sovereignty as responsibility."[47] The ICISS theory of responsibility to protect trumped the non-interference attribute of state sovereignty in that if a state fails to fulfill its responsibilities to protect its population, the international community has a responsibility to act.[48] It further detailed the international community's obligations as threefold: a responsibility to prevent, a responsibility to react, and a responsibility to rebuild.[49] The Commission's theory prioritized the international community's prevention responsibility, stating that it had an obligation to "address both the root causes and direct causes of internal conflict and other man-made crises putting populations at risk."[50]

The sovereign as protector approach built upon the concept of sovereignty as responsibility originally articulated by Francis Deng, the United Nations Representative on Internally Displaced Persons and later the United Nations Special Advisor on Genocide.[51] Deng posited that "absolute sovereignty . . . never was;" that sovereignty has always resided in the people; and the legitimacy of the government derives from both moral and material responsibilities for the population.[52] If these responsibilities are not met the state loses legitimacy as a sovereign.[53] He and Koffi Annan, the former United Nations Secretary-General, together articulated that sovereignty involves both an internal and an external

45. U.N. GAOR, 54th Sess., 4th plen. mtg. at 2, U.N. Doc. A/54/PV.4 (Sept. 20, 1999).

46. *See* ICISS REPORT, *supra* note 19, at XI-XIII.

47. Abbott, *supra* note 40, at 8.

48. ICISS REPORT, *supra* note 19, at 75. The "non-interference" mentioned in the ICISS report refers to both Article 2(7) of the United Nations Charter which prohibits the United Nations from interfering in the domestic matters of a state, as well as the general international rule stemming from the 1648 Peace of Westphalia that states are likewise prohibited from the internal affairs of another state. *See* Nico Schrijver, *The Changing Nature of State Sovereignty*, 70 BRIT. Y.B. INT'L L. 65, 65 (1999).

49. Guilherme M. Dias, *Responsibility to Protect: New Perspectives to an Old Dilemma*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 48, 54-56 (Sanford R. Silverburg ed., 2011); *see also* Abbott, *supra* note 40, at 8.

50. ICISS REPORT, *supra* note 19, at XI.

51. Roberta Cohen, *Humanitarian Imperatives are Transforming Sovereignty*, BROOKINGS INSTITUTION (Winter 2008), http://www.brookings.edu/research/articles/2008/01/winter-humanitarian-cohen.

52. Benjamin, *supra* note 36, at 15.

53. *Id.* at 16.

component, in the form of accountability to their populations and to the international community, a theme echoed in the ICISS report.[54]

The ICISS report's acceptance of the subordination of the non-interference principle in cases of failure by the state to protect its people seemingly inverted Westphalian sovereignty's emphasis on a state's dominion over all activities within its borders and remains the most controversial component of the responsibility to protect doctrine. However, the final ICISS document also emphasized the primacy of the state as possessing the original protection responsibility, thus attempting to assure those nations fearing illegitimate intervention in the guise of human rights.[55] It concluded that only when the state fails to meet its responsibility to protect its people would the international community shoulder a positive responsibility to act.[56] That is, the Commission's report in general focused on the state as the repository of primary responsibility to prevent human suffering within its borders; only if the state failed to shoulder this responsibility would it shift to the international community, with military intervention only as a last resort.[57]

Additionally, the ICISS theory definitively embraced the United Nations Security Council as the appropriate body to "authorize military intervention for human protection purposes."[58] While it emphasized a requirement to seek United Nations authorization prior to any military intervention on humanitarian grounds, it provided options when such approval was not forthcoming: the General Assembly should consider the matter under the "Uniting for Peace" procedure and action by regional organizations under Chapter VIII of the United Nations Charter as long as they seek subsequent UNSC authorization.[59]

The ICISS responsibility to protect doctrine's "human protection purposes" focused on a population suffering "serious and irreparable harm" (or such harm was imminently likely), which involved "large scale loss of life" due to "deliberate state action, or state neglect or inability to act, or a failed state situation, or large scale 'ethnic cleansing' . . . whether carried out by killing, forced expulsion, acts of terror or rape."[60] It also outlined six criteria for military intervention, including right authority, just cause, right intention, last resort, proportional means, and reasonable prospects.[61] The Commission's report did not distinguish between the state as perpetrator and situations in which the state failed to protect its population

54. *Id.*; Cohen, *supra* note 51; ICISS REPORT, *supra* note 19, at 8; Kofi Annan, *Two Concepts of Sovereignty*, ECONOMIST, Sept. 16, 1999, *available at* http://www.economist.com/node/324795 (the former Secretary-General explicitly linked sovereignty to the individual and not just the people).

55. ICISS REPORT, *supra* note 19, at 7-8.

56. *Id.* at XI.

57. *Id.*

58. *Id.* at XII.

59. *Id.* at 53 (outlining the procedure by which the General Assembly can take measures where the Security Council has failed).

60. *Id.* at XII.

61. *Id.* at 32.

from above acts, and emphasized that its doctrine did not involve human rights violations which did not involve "outright killing" or ethnic cleansing.[62]

IV. RESPONSIBILITY TO PROTECT AS CUSTOMARY INTERNATIONAL LAW: METHODOLOGY AND ANALYSIS

In 2001 the ICISS report provided a well-reasoned theory of the responsibility to protect, but despite its aims, the result did not represent an international consensus on the contours of such a doctrine; the global community has yet to adopt the ICISS formula.[63] However, several of its components evolved, with much prompting by the United Nations Secretary-General, into a consensus reached at the 2005 United Nations World Summit.[64] The outcome of the Summit was this unanimous agreement by the United Nations General Assembly:

> **Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.**
>
> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the

62. *Id.* at 34.

63. Ramesh Thakur, *The Responsibility to Protect and the North-South Divide*, *in* INTERNATIONAL LAW: CONTEMPORARY ISSUES AND FUTURE DEVELOPMENTS 34, 36 (Sanford R. Silverburg ed., 2011); Bellamy, *supra* note 10, at 146; Edward C. Luck, U.N. Special Adviser, Remarks at the University of Denver Sturm College of Law Annual Sutton Colloquium: The Arab Spring and its Unfinished Business (Nov. 5, 2011); *see also* 2005 World Summit Outcome, *supra* note 4, ¶ 138–39 (recognizing the responsibility of the states and international community to "protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"); S.C. Res. 1674, *supra* note 5, ¶ 4 (reaffirming the responsibility outlined in the 2005 World Summit Outcome).

64. Thakur, *supra* note 63, at 38; *see also* Rep. of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, U.N. Doc. A/59/565 (Dec. 2, 2004); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005) (demonstrating the U.N. Secretary-General's efforts to move the global community toward consensus).

> Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.[65]

So what to make of the fact that there was consensus within the international community regarding these two paragraphs in 2005, as demonstrated by their unanimous acceptance within the General Assembly and by re-affirming United Nations Security Council resolutions in 2006 and 2009?[66] Does the above-articulated responsibility to protect doctrine represent international law: because there was consensus, is it consequently binding upon states and the international community?[67] To answer this query one must determine what the international community intended by the above resolution; in 2009 the General Assembly once again debated the doctrine of responsibility to protect, shedding some light on its intentions.

Specifically, not only did consensus exist regarding the above-quoted 2005 commitment to responsibility to protect, it was also present when the United Nations General Assembly reconsidered the 2005 document in 2009; resulting in a General Assembly resolution reaffirming the 2005 World Summit document's commitments.[68] The 2009 General Assembly debate which produced this resolution revolved around Secretary-General Ban Ki-Moon's report of the same year, "Implementing the Responsibility to Protect," which attempted to clarify the 2005 agreement as well as provide implementing methods and modalities.[69] It was this report which structured responsibility to protect as a three-legged stool, identifying its legs as state responsibility; assistance to states; and timely and

65. 2005 World Summit Outcome, *supra* note 4, ¶ 138-139.

66. S.C. Res. 1674, *supra* note 5; S.C. Res. 1894, *supra* note 5 (re-affirming 2005 World Summit Outcome).

67. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 68-73 (July 8); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 188 (June 27); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF U.S. § 101 (1987).

68. Responsibility to Protect, G.A. Res. 63/308, U.N. Doc. A/RES/63/308 (Oct. 7, 2009); Bellamy, *supra* note 10, at 147 (discussing the General Assembly's approval of the Secretary-General's three-pillar approach).

69. *Implementing R2P*, *supra* note 3, ¶ 2; Bellamy, *supra* note 10, at 146.

decisive action by the international community.[70] Specifically, it defined the three pillars as: (1) the protection responsibilities of the state, (2) international assistance and capacity-building, and (3) timely and decisive response to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity.[71]

A comparison of these three pillars with the original wording in the 2005 World Summit document reveal little if any substantive difference, though the last pillar does arguably appear to strengthen the original commitment. It adds "to prevent and halt" the four categories of human rights abuses, whereas the original language speaks in terms of collective coercive actions the international commuity is prepared to take on a case-by-case basis when a nation has failed in its responsibility to protect its people from one of the four named abuses, without specifying to what ends.[72] Hence it appears that the third pillar's re-formulation of the original responsibility to protect's action element turns it from one to act on a case-by-case basis, without guaranteeing a prevention or cessation of atrocities, to one of a beefed-up commitment to actually prevent or halt all cases in which the state has failed to protect its people from war crimes, ethnic cleansing, crimes against humanity, and genocide.

However, the original 2005 document's commitment to "be prepared to take . . . timely and decisive action" when a nation has failed to protect its people must be read in concert with the preceding sentence, which commits the international community to take the appropriate peaceful means to protect populations from the four scourges.[73] Therefore one can conclude that the subsequent sentence which speaks to collective coercive action must also be read with the intent to protect these same populations from the same violations; one can surmise that the Secretary-General's "to prevent and halt" charge is equivalent to the "to protect" language in the original resolution. Hence this third pillar clarifies what "to protect" means, but goes even further because it fails to emphasize the case-by-case nature of the original 2005 commitment, as well as glosses over the 2005 "be prepared" language. Taken together, the original 2005 language appears to leave more room for flexibility by the international community by signaling an intention to be prepared to take coercive action, but not necessarily committing it to do so in every instance—only on a "case-by-case" basis.

The international community, in 2009, also appeared to have some difficulty reconciling the third pillar's language with that found in the 2005 resolution. Fifty of the 180 states represented during the General Assembly session debate on responsibility to protect endorsed the proposed "three pillars" strategy as formulated by the Secretary-General.[74] While there was unanimity within the

70. *Implementing R2P*, *supra* note 3, ¶ 11.

71. *Id.*

72. 2005 World Summit Outcome, *supra* note 4, ¶ 139.

73. *Id.*

74. GLOBAL CENTRE FOR THE RESPONSIBILITY TO PROTECT, IMPLEMENTING THE RESPONSIBILITY TO PROTECT THE 2009 GENERAL ASSEMBLY DEBATE: AN ASSESSMENT 1, 1-2 (2009), *available at* http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf.

entire assembly on the first two pillars, many states expressed concern regarding the third, regarding appropriate circumstances to take coercive action as well as fears regarding misuse of intervention by more powerful states.[75] Despite these concerns, the "majority of the speakers affirmed that it was necessary for the Security Council to be ready to take timely and decisive action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity, should their government be manifestly failing to do so," thereby re-affirming the international community's original 2005 commitment.[76]

A. Sovereignty as Responsibility: General Practice Accepted as Law?

The consensus regarding the 2005 World Summit Outcome document's responsibility to protect commitments, as reflected in the 2009 debate, provides the foundation with which to determine what parts of the broad responsibility to protect theory have attained customary international law status. As detailed above, the 2005 resolution as re-affirmed by the General Assembly in 2009 narrowed the broader Canadian ICISS doctrine to four types of crimes, and created three categories of duties. While the World Summit Outcome document and the subsequent General Assembly resolutions are indicative of customary international law, they are not *per se* such: they are usually not legally binding.[77] However, this World Summit document, as well as both General Assembly and Security Council resolutions, go far in proving the customary international law status of responsibility to protect, as explored below.

Classically, customary international law is demonstrated via demonstrations of state practice and *opinio juris*.[78] Regarding state practice, the International Court of Justice in the North Continental Shelf cases noted that both a selection of state practice and an assessment of the same are required to analyze whether a practice constitutes customary international law.[79] Both verbal and physical acts of states constitute state practice, including the negotiation and passage of resolutions of international bodies, as well as individual states' explanations of their votes.[80] Critically, the "value accorded to any particular resolution in the assessment of the formation of a rule of customary international law depends on its content, its degree of acceptance and the consistency of related State practice. The greater the

75. *Id.* at 2.

76. *Id.* at 4.

77. North Sea Continental Shelf (F.R.G/ Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶¶ 73-74 (Feb. 20); RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §§ 102 cmt. g, 103 cmt. c (1987); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. RED CROSS 175, 179 (Mar. 2005).

78. U.N. Charter, Statute of the International Court of Justice art. 38(1), June 26, 1945; RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. §§ 102 cmt. c, 103 cmt. a (1987).

79. *North Sea Continental Shelf*, 1969 I.C.J. ¶¶ 73-74; Henckaerts, *supra* note 77, at 180-81.

80. Henckaerts, *supra* note 77, at 179.

support for the resolution, the more importance it is to be accorded."[81] In assessing state practice, it has to be "general and consistent,"[82] though some international law studies claim it must be "virtually uniform, extensive and representative" in order to form customary international law.[83] Regarding the second element of customary international law—whether or not state practice was conducted out of a sense of legal obligation—one can actually refer back to the state act itself, as it often also reflects both state practice as well as *opinio juris*.[84]

The first, and arguably most important, pillar of the responsibility to protect as articulated in the 2005 World Summit document has attained customary international law status when analyzed using the above framework. "Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[85] State practice is reflected in the unanimity of the text's original passage in 2005, the two reaffirming Security Council Resolutions, and the 2009 General Assembly resolution.[86] State practice, as evidenced by verbal acts, is also found in numerous Security Council resolutions passed since 2005 which highlight a particular state's responsibility to protect: these resolutions contain specific reminders to certain states that they have an obligation to protect their people from mass atrocities. The first, passed in 2006, was Security Council Resolution 1706, which authorized the deployment of peacekeeping troops to Darfur; it cited both the responsibility to protect paragraphs from the World Summit Outcome document as well as Security Council Resolution 1674.[87] More recently, Security Council Resolutions 1970 and 1973 both reminded Libya of its responsibility to protect its population.[88] The Security Council passed numerous resolutions with similar language in-between the Darfur and Libya bookends: in total, since 2005 the United Nations Security Council has included language reminding a state that it possesses the primary responsibility to protect its citizens in the realm of human rights over ten times,[89] not including

81. *Id.*; *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 70-73 (July 8) (outlining the indicia of law surrounding such resolutions).

82. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 102 (1987).

83. Henckaerts, *supra* note 77, at 180; *see also North Sea Continental Shelf*, 1969 I.C.J. ¶ 74 (describing criteria with which to assess whether state practice establishes customary international law).

84. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE U.S. § 102 cmt. c (1987) ("*opinio juris* can be inferred from acts or omissions"); Henckaerts, *supra* note 77, at 182 (stating that an act can manifest both state practice and *opinion juris*).

85. 2005 World Summit Outcome, *supra* note 4, ¶ 138.

86. G.A. Res. 63/308, *supra* note 68, pmbl.

87. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

88. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

89. S.C. Res. 2021, pmbl., U.N. Doc S/RES/2021 (Nov. 29, 2011); S.C. Res. 2014, pmbl., U.N. Doc. S/Res/2014 (Oct. 21, 2011); S.C. Res. 2010, ¶ 22, U.N. Doc. S/RES/2010 (Sept. 30, 2011); S.C. Res. 2008, pmbl., U.N. Doc. S/RES/2008 (Sept. 16, 2011); S.C. Res. 2003, pmbl., ¶¶ 3, 22, U.N. Doc. S/RES/2003 (July 29, 2011); S.C. Res. 1973, *supra* note 88, pmbl.; S.C. Res. 1925, pmbl., U.N. Doc. S/RES/1925 (May 28, 2010); S.C. Res. 1906, pmbl., U.N. Doc. S/RES/1906 (Dec. 23, 2009); S.C. Res. 1894, pmbl., U.N. Doc. S/RES/1894 (Nov. 11, 2009); S.C. Res. 1834, pmbl., U.N. Doc. S/RES/1834

those resolutions which specifically focus only on war crimes and/or noncombatant deaths during armed conflicts.[90]

The resolutions include language such as that found in S/RES/2021 (2011): "[*s*]*tressing* the primary responsibility of the Government of the Democratic Republic of the Congo for ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights and international humanitarian law."[91] This is echoed in Resolution 2031: "[*u*]*nderscores* the primary responsibility of the Government of the Central African Republic to promote security and protect its civilians with full respect for the rule of law, human rights, and international humanitarian law"[92] and 2014: "[*r*]*ecalling* the Yemeni Government's primary responsibility to protect its population."[93]

The verbal acts of passing the 2005 World Summit Outcome document and its subsequent General Assembly and Security Council reaffirmations, in addition to the above-cited state-specific resolutions which cite to a particular state's responsibility, provide significant examples of state practice to demonstrate that states now possess a binding legal obligation to prevent or halt (i.e., protect) crime against humanity, genocide, ethnic cleansing, and war crimes within their borders.[94] Furthermore, the reasons given by states when passing these various resolutions reflect the general consensus that this duty is a legal derivative of statehood: with sovereignty comes responsibility. Examples include the Prime Minister of Iceland's statement, "[i]t is therefore right that this summit underlines the responsibility that governments have to their people,"[95] and the Prime Minister of the United Kingdom's statement, "[f]or the first time at this Summit we agree that states do not have the right to do what they will within their own borders."[96]

Of course there were some dissenters to this viewpoint, primarily prior to 2009. For example, during the 2005 Security Council debate on the protection of civilians during armed conflict, the majority of states reiterated the state's responsibility to protect, as demonstrated by the South African statement: "[t]he international community agreed during the 2005 World Summit that each

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(Sept. 24, 2008); S.C. Res. 1794, pmbl., U.N. Doc. S/RES/1794 (Dec. 21, 2007); S.C. Res. 1778, pmbl., U.N. Doc. S/RES/1778 (Sept. 25, 2007); S.C. Res. 1739, ¶ 2(f), U.N. Doc. S/RES/1739 (Jan. 10, 2007).

90. *See* sources cited *supra* note 89.

91. S.C. Res. 2021, *supra* note 89, pmbl.

92. S.C. Res. 2031, ¶ 11, U.N. Doc. S/RES/2031 (Dec. 21, 2011).

93. S.C. Res. 2014, *supra* note 89, pmbl.

94. *See generally Excerpted Statements on the Open Debate on Protection of Civilians in Armed Conflict*, INT'L COALITION FOR THE RESP. TO PROTECT (Nov. 20, 2007), http://www.responsibilitytoprotect.org/files/EXCERPTED%20STATEMENTS%20ON%20THE%20OPEN%20DEBATE%20ON%20PROTECTION%20OF%20CIVILIANS%20IN%20ARMED%20CONFLICT%20_2.pdf (quoting delegates endorsing the responsibility to protect as a binding obligation).

95. Halldór Ásgrímsson, Prime Minister of Ice., Statement at the Sixtieth Session of the General Assembly of the United Nations 2 (Sept. 15, 2005), *available at* http://www.un.org/webcast/summit2005/statements15/iceland050915eng.pdf.

96. Tony Blair, Prime Minister of U.K., Speech to the General Assembly at the 2005 UN World Summit 2 (Sept. 14, 2005), *available at* http://www.un.org/webcast/summit2005/statements/ukblair050914eng.pdf.

individual State has the responsibility for the protection of its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[97] However, Pakistan reflected a position expressed by a minority: it specifically called for a treaty to make a state's responsibility international law, thus inferring that it had not yet become a binding legal obligation.[98]

But Pakistan's request in 2005 that a state's responsibility to protect its own populations from mass atrocities be made into treaty law (thus implying it was not already international law) was vastly overshadowed by the resolutions cited above reminding various states of this extant responsibility. It is telling that proposed Security Council resolutions after 2005 involving responsibility to protect which failed to pass were not vetoed because the vetoing states felt that a sovereign possessed no such obligation. For example, Russia and China vetoed a draft resolution on Burma in 2007, citing lack of threat to international peace and security and that the Security Council had no role in the internal affairs of the state.[99] They did not state that Burma lacked an obligation to protect. This failure to deny that the state itself has an obligation to protect was similarly reflected in Russia and China voting against a 2008 United Nations Security Council resolution proposing sanctions against Zimbabwe.[100]

By the time the 2009 United Nations General Assembly debate occurred on responsibility to protect, the international community's belief that states have a legal obligation to protect their peoples had strengthened. Even Russia stated in 2009 that, "[w]e believe that the initial responsibility to protect people from genocide, war crimes, ethnic cleansing and crimes against humanity lies with States. States should constantly strengthen and expand their own means to uphold that responsibility."[101] China similarly stated in 2009 that, "[g]overnments bear the primary responsibility of protecting their civilians."[102] When the Security Council

97. Xolisa Mabhongo, S. Afr. Charge d'Affairs, Statement in the Open Debate of the Security Council on the Protection of Civilians in Armed Conflict (Dec. 9, 2005).

98. Munir Akram, Ambassador and Permanent Rep. of Pakistan to the U.N., Statement in Open Debate of the Security Council on the Protection of Civilians in Armed Conflict (Dec. 9, 2005), *available at* www.responsibilitytoprotect.org/files/Pakistan_POC_09Dec05.pdf (stating that Pakistan desired that a state's responsibility to protect its own populations from genocide and war crimes via formation of a treaty).

99. Vitaly Churkin, Ambassador for Russ. Fed'n, Statements from the Security Council Meeting on the Situation in Burma (Jan. 12, 2007); Wang Min, Ambassador for China, Statements from the Security Council Meeting on the Situation in Burma (Jan. 12, 2007), both *available at* http://www.res ponsibilitytoprotect.org/ICRtoP%20Latest%20Developments%20at%20the%20UN%202011.pdf.

100. Press Release, Security Council, Security Council Fails to Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes, U.N. Press Release SC/9396 (Jul. 11, 2008).

101. Mikhail Margelov, Permanent Rep. of Russ. Fed'n to the U.N., Statement at the July 2009 General Assembly Debate on Responsibility to Protect (2009), *available at* www.ResponsibilitytoPo tect.org/RussianFederation(1).doc.

102. Zhenmin Liu, Ambassador for China, Statement at the Security Council Open Debate on Protection of Civilians in Armed Conflict (Jan. 14, 2009), *available at* http://www.china-un.org/eng/sm hwj/2009/t532205.htm.

passed Security Counsel Resolution 1894[103] in 2009, reaffirming the World Summit Outcome document commitments, "[m]ore than twenty States mentioned RtoP in their statements, recognizing that sovereignty comes with the responsibility to protect populations from mass atrocities."[104]

B. Significance of States' Failures to Fulfill their Legal Responsibility

While there have been various instances since 2005 of states failing to uphold this legal requirement, these failures serve more to prove the legal nature of the fundamental rule instead of to undermine it. The failures to protect demonstrated by a state's intentional killing of its own people (Darfur, Libya, Syria) and the state's failure to prevent war crimes and crimes against humanity from occurring within its borders (Somalia, Afghanistan, Iraq, Kyrgyzstan, Yemen) arguably signify the lack of a consistent state practice of the first pillar of responsibility to protect. However, as the International Court of Justice has highlighted, the international condemnation of these tragedies, as well as the excuses, justifications, and denials issued by the states themselves, underscore the existence of the "state as protector" rule itself.[105] Condemnation by the international community against such atrocities in all the above cases was widespread, and the denials and justifications offered by the responsible states just as indicative.[106]

As highlighted in this essay's introduction, Iran's statement regarding the 2011-12 mass atrocities in Syria is telling: although Iran opposed coercive sanctions against the Syrian government, it placed the responsibility to end such acts squarely at the feet of the Syrian government.[107] Syria itself did not argue against its responsibility to protect its people: instead, it denied that it was committing such atrocities and instead blamed them on opposition forces, justifying its actions as merely a reaction to same.[108] The vetoes against a draft Security Council resolution in early 2011, condemning the violence in Syria, were not cast because Syria lacked any responsibility to protect its people. Instead, China and Russia, the only members of the Security Council to use their veto,

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103. S.C. Res. 1894, *supra* note 5.

104. INT'L COAL. FOR THE RESPONSIBILITY TO PROTECT, KEY DEVELOPMENTS ON THE RESPONSIBILITY TO PROTECT AT THE UNITED NATIONS 2005-2011 5 (2011), *available at* http://www.responsibilitytoprotect.org/ICRtoP%20Latest%20Developments%20at%20the%20UN%202011.pdf.

105. *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 186 (June 27); Henckaerts, *supra* note 77, at 180.

106. *See, e.g.*, G.A. Res. 66/176, U.N. Doc. A/RES/66/176 (Dec. 19, 2011); Ayman Samir & Erika Solomon, *Arab League Suspends Syria Mission as Violence Rages*, REUTERS (Jan. 28, 2012), http://www.reuters.com/assets/print?aid=USTRE8041A820120128; *Syria Calls Arab Sanctions 'Economic War,'* AL JAZEERA (Nov. 28, 2011), http://www.aljazeera.com/news/middleeast/2011/11/201111281416497026 95.html; *Syria crisis: Obama Condemns Onslaught on Homs*, BBC NEWS (Feb. 9, 2012), http://www.bbc.co.uk/news/world-middle-east-16976889.

107. Interview by Charlie Rose with Mohammad Khazaee, *supra* note 17.

108. *Syria Government and Rivals Trade Blame for Aleppo Blasts*, BBC NEWS (Feb. 11, 2012), http://www.bbc.co.uk/news/world-middle-east-16993591; *see also Syria categorically Rejects the Arab League's Resolutions as Hostile Act*, NSNBC (Feb. 13, 2012), http://nsnbc.wordpress.com/2012/02/13/syria-categorically-rejects-the-arab-leagues-resolutions-as-hostile-act/.

explained it was due to the resolution's failure to hold opposition forces accountable.[109] This is similar to their veto of a related resolution in October 2011 also against Syria: their veto was due to the failure of the resolution to appropriately call on the opposition to disassociate with extremists, and because they, along with India, Brazil, and South Africa, were concerned that the resolution was a pretext for armed intervention similar to what they believed occurred in Libya.[110]

The above-cited state practice and *opinio juris* underscore why scholars such as Professor Alex J. Bellamy have stated that "the basic proposition that states are legally and morally required not to intentionally kill civilians is well established" and that the first pillar of responsibility to protect is "best understood as a reaffirmation and codification of already existing norms."[111] Professor Ramesh Thakur believes something similar: that these two paragraphs constitute "a clear, unambiguous, and unanimous acceptance of individual state responsibility to protect populations," from the four specific abuses: war crimes, crimes against humanity, genocide, and ethnic cleansing.[112] The United Nation's Dr. Luck has schizophrenically denied that responsibility to protect has any binding legal qualities while simultaneously admitting that parts of it do.[113] Based on the evidence above, he should go one step further and call a spade a spade: the fundamental essence of responsibility to protect—a state's protection responsibility as an attribute of its sovereignty—is customary international law.

C. *The Rest of Responsibility to Protect: A Nascent Legal Obligation to Do . . . Something*

While the first pillar of responsibility to protect (and the doctrine's very foundation) has attained the status of customary international law, the other two pillars have not, at least not in the specific forms as articulated in the 2005 World Summit Outcome document. There is no general and consistent practice regarding assistance to states, nor is there one of "timely and decisive action" when states have failed their pillar one obligation.[114] As Professor Bellamy convincingly showed in his 2010 analytical work, "state practice . . . suggests that mutual recognition of a positive duty to exercise pillars two and three is inconsistent at best."[115] Regarding the second pillar, that of international assistance and capacity

109. Michael Schwirtz, *Russia Rejects Criticism of Its U.N. Veto on Syria*, N.Y. TIMES (Feb. 6, 2012), http://www.nytimes.com/2012/02/07/world/europe/russia-rejects-criticism-of-its-un-veto-on-syria.html?_r=1.

110. *Russia and China Veto UN Resolution Against Syria Regime*, THE GUARDIAN (Oct. 4, 2011), http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution.

111. Bellamy, *supra* note 10, at 160.

112. Thakur, *supra* note 63, at 38; *see also* 2005 World Summit Outcome, *supra* note 4, ¶ 138 (citing the four specific abuses).

113. Luck, *Responsibility to Protect, supra* note 22, at 359-360.

114. *See* 2005 World Summit Outcome, *supra* note 4, ¶ 139.

115. Bellamy, *supra* note 10, at 161 (reviewing whether the international community possesses a positive duty to prevent mass atrocities based on cited legal developments).

building, there appears to be numerous examples of state practice, usually through the United Nations.[116] However, there is little to no evidence of states' belief that this assistance is legally required.

So while this essay posits that the latter two commitments articulated in the 2005 World Summit document do not represent specific, binding obligations demonstrated by consistent state practice followed out of a sense of legal obligation, the third pillar has consistently manifested itself in one regard, elevating it beyond mere aspiration. Since 2005, mass atrocities within states, on a large enough scale, have routinely prompted some type of international response, ranging from national statements of condemnation to military intervention. This censorious response continuum itself represents a legal obligation: the international community feels that it can no longer simply remain silent when human rights abuses within states pass a certain threshold.

When states manifestly fail to protect their populations from one of the four human rights violations, the international community has felt compelled to act in some manner. This consistent practice of state reaction to mass atrocities in other states demonstrates a recognition by states that they are required to do "something" when faced with their fellow states' manifest failure to protect.[117] The type of responsive act by the international community has ranged from individual states' public condemnations; formal regional discussions; referral to and subsequent indictments by the International Criminal Court; General Assembly debates and resolutions; Security Council debates; individual state and regional sanctions; Security Council resolutions condemning the atrocities and calling for the state in question to fulfill its first pillar obligations; and Security Council resolutions authorizing international sanctions, peacekeepers, and armed intervention to stop the on-going atrocities.[118] It is impossible to cite a situation since 2005 which involved significant human rights abuses within a state that has not elicited some type of response by the international community.

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116. *Implementing R2P*, *supra* note 3, at 15-21.

117. 2005 World Summit Outcome, *supra* note 4, ¶ 139. The World Summit Outcome document does not include a quantitative definition of "manifestly fail," but since it was agreed to by the community of nations in 2005, when a state has either perpetrated or failed to prevent a sufficiently significant amount of mass atrocities within its borders, there has been some type of international response.

118. Bellamy, *supra* note 10, at 162 (listing international responses to various mass atrocities, such as Security Council debates regarding Darfur; international criticism of Sri Lanka, Israel, and Hamas; use of military forces in the Democratic Republic of the Congo, Sudan, and Somalia; etc); *see generally* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011); S.C. Res. 1591, U.N. Doc. S/RES/1591 (Mar. 29, 2005); S.C. Res. 1725, U.N. Doc. S/RES/1725 (Dec. 6, 2006); S.C. Res. 1724, U.N. Doc. S/RES/1724 (Nov. 29, 2006); *Arab League: Report Publicly on Syria Mission*, HUMAN RIGHTS WATCH (Jan. 20, 2012), http://www.hrw.org/news/2012/01/20/arab-league-report-publicly-syria-mission; *Kenya: Prosecute Perpetrators of Post-Election Violence*, HUMAN RIGHTS WATCH (Dec. 9, 2011), http://www.hrw.org/news/2011/12/09/kenya-prosecute-perpetrators-post-election-violence; *U.N.: Rights Council Condemns Violations in Kyrgyzstan*, HUMAN RIGHTS WATCH (Jun. 21, 2010), http://www.hrw.org/news/2010/06/21/un-rights-council-condemns-violations-kyrgyzstan .

While states' actual verbal or physical reactions to mass atrocities can be discerned by reviewing newspapers since 2005's framing of responsibility to protect, it is more difficult to determine what has motivated the international community's responses to mass atrocities. Are they prompted by a sense of legal obligation? The fact that no situation of grave enough magnitude has gone without some type of international response (at least discussed within the General Assembly) supports a conclusion that the majority of states feel obligated to at least demonstrate concern regarding the particular atrocities at hand. One can argue that this sense of obligation to exhibit some type of concerned reaction is politically and/or morally driven, motivated by a sense of legal requirement, hence leaving it devoid of the second criterion of customary international law. [119] But when placed in context of the numerous international legal developments regarding human rights over the last half century, capped by the 2005 World Summit Outcome document, one cannot avoid the sense that there is at least a germ of *opinio juris* behind these actions.[120]

Categorizing an indeterminate requirement to act as customary international law, with the particular required action falling along a broad spectrum of possible responses, is admittedly a bit of a stretch: arguably, the cited state practice is too inconsistent, and *opinio juris* too nebulous, to definitively conclude the existence of such an internationally binding rule. These are valid criticisms, and ones this author hopes to address in the future. It is difficult to deny that some type of state obligation currently exists to react in a condemnatory fashion when faced with compelling evidence of genocide, war crimes, crimes against humanity, and ethnic cleansing in another state.

V. CONCLUSION

The fact that there has been a consistent practice of reaction, along a broad continuum, to mass atrocities since 2005 does not demonstrate a causal link

119. Bellamy, *supra* note 10, at 166.

120. *See* U.N. Charter arts. 1, 55. The first article in the Charter establishes the purposes of the United Nations as: "To maintain international peace and security"; "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; "[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction . . ."; and "[t]o be a center for harmonizing the actions of nations in the attainment of these common ends." *Id.* art. 1. U.N. Charter art. 55 states that the United Nations shall promote the following economic and social concerns in order to pursue its goals of international peace, stability, and friendly cooperation: "higher standards of living, full employment, and conditions of economic and social progress and development"; "solutions of international economic, social, health, and related problems; and international cultural and educational cooperation"; and "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." *Id.* art. 55. *See generally* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Convenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (highlighting the growing priority the international community is placing on human rights).

between the World Summit Outcome document and this reactive practice.[121] But whether or not the 2005 document produced this general rule does not make the rule less real. It was generated by the evolution of the protection of human rights on the international stage, of which the responsibility to protect general theory is but one component. This growing superstructure of protection of human rights, which includes the responsibility to protect doctrine, is a general catalyst to "galvanize the world into action," if one is willing to define the type of action as falling along a continuum vice one finite act.[122]

The United Nations-approved NATO military intervention in Libya in 2011 and the subsequent reaction of the world community to the mass atrocities in Syria demonstrate that the principle of responsibility to protect has attained the status of customary international law in two ways. First, they are the latest manifestations of the belief by the world community that states, as a derivative of their sovereignty, possess a legal obligation to protect their populations from genocide, war crimes, crimes against humanity, and ethnic cleansing. Second, they reflect the sense of the majority of states that they cannot ignore on-going instances of threshold levels of the four human rights crimes in fellow states and must react in some manner aimed at their cessation. While this latter obligation exists as a continuum of soft actions consisting of a legal duty to verbally and/or economically (via sanctions) condemn instead of physically act through military force, it represents the current state of the last pillar of responsibility to protect. If history is any lesson, this latest crystallization of the responsibility to protect's status as customary international law indicates it will continue to transform into a more finite legal duty to act.

Responsibility to protect as customary international law will exert greater influence on global politics as nation-states sporadically fail to shoulder their legal obligation to protect their peoples. Just as the Arab Spring will continue for years to come as states wrestle with governance after decades of tyrannical rule, responsibility to protect's transition from hortatory doctrine to customary international law will likewise continue to evolve.

121. Bellamy, *supra* note 10, at 166.

122. *Id.* (concluding that responsibility to protect is a policy agenda and has little utility in generating international responses to mass atrocities).

THE RESPONSIBILITY TO PROTECT IN THE ANARCHICAL SOCIETY: POWER, INTEREST, AND THE PROTECTION OF CIVILIANS IN LIBYA AND SYRIA

AMY E. ECKERT*

The North Atlantic Treaty Organization's ("NATO") 2011 intervention in Libya is widely regarded as a successful example of the international community fulfilling its responsibility to protect civilians against abuses perpetrated by their own state. The responsibility to protect addresses certain shortcomings in the concept of humanitarian intervention—the use of military force to address humanitarian crises. The use of force to address grave violations of human rights may often be too little, too late. By contrast, the responsibility to protect is a continuum of actions (including, but not limited to, the use of force), which is intended to address crises earlier and through a variety of different tools. The NATO intervention, authorized by the United Nations ("U.N.") Security Council, responded to the Libyan government's attacks against civilian rebels inspired to revolt by the events of the Arab Spring. Yet in other instances in which governments responded brutally to pro-democracy protestors—notably Syria—the role of the international community has been significantly less visible than in Libya. While governments in both Libya and Syria responded with force to unarmed civilian protestors, and are suspected of crimes against humanity, only the former was the target of intervention by the international community, an action that ultimately led to the demise of the regime.

The contrast between these two cases bears out the fact that the responsibility to protect is subject to many of the same pitfalls as humanitarian intervention. Critics of humanitarian intervention correctly pointed to selectivity in its application as problematic. States intervened in instances where they had an interest—humanitarian or otherwise—in intervening and the power to do so. The selectivity that seems to plague action under the frameworks of both humanitarian intervention and the responsibility to protect stems from the nature of the international system, and the lack of a realistic alternative to state action in support of either principle. While the responsibility to protect has advanced the debate about support for human rights in some key respects, it is nevertheless subject to some of the same pitfalls as humanitarian intervention with respect to implementation.

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This article begins with a brief overview of the two cases under consideration, Libya and Syria. It then surveys the evolution of the debate about the international community's role in responding to human rights violations, with an emphasis on the emergence of the responsibility to protect. Finally, it takes up the dynamics of the international system that frustrate a consistent application of the responsibility to protect, perpetuating the inconsistency that subjected the right of humanitarian intervention to criticism.

I. THE ARAB SPRING

On December 17, 2010, Tunisian fruit vendor Mohamed Bouazizi set himself on fire after the government confiscated his goods. Bouazizi's death brought to the forefront rage against the Tunisian government, which was widely viewed as oppressive and corrupt.[1] A coalition of intellectuals, human rights activists, and labor movements successfully toppled the government within a month of Bouazizi's self-immolation. The anti-government sentiment was not limited to Tunisia, and soon spread elsewhere throughout the Middle East and North Africa, including Libya and Syria.

A. The Libyan Uprising

The Libyan regime of Muammar Khadafy did not escape the groundswell of rebellion. On February 17, 2011, Libyans who were discontent with Khadafy's rule held a "day of rage" protest in response to the government's human rights abuses, which Amnesty International describes as having been a "hallmark" of the regime.[2] Protests continued in the city of Benghazi and quickly spread elsewhere throughout Libya, and they were met with brutal repression. In Benghazi, security forces killed at least 109 protestors, some of whom had been protesting peacefully.[3] Protests, and the ensuing brutal government crackdowns, spread throughout Libya, eventually reaching Tripoli. On February 22, after nearly a week of protests, Khadafy criticized the protests for threatening Libya's interests and pledged to "purge Libya inch by inch, room by room, household by household, alley by alley, and individual by individual until the country is purified."[4] In support of that pledge, government forces resorted to brutally repressive tactics against the opposition.

By late February, anti-government rebels controlled much of Libya, though government forces would eventually retake much of the territory that the rebels had gained. The brutality of the Libyan government's response, particularly its strategy of targeting civilians, led the international community to intervene on behalf of the rebel movement. In Resolution 1970, the U.N. Security Council

1. Kareem Fahim, *Slap to a Man's Pride Set Off Tumult in Tunisia*, N.Y. TIMES, Jan. 22, 2011, at A1, *available at* http://www.nytimes.com/2011/01/22/world/africa/22sidi.html?pagewanted=all.

2. Amnesty Int'l, *The Battle for Libya: Killings, Disappearances and Torture*, AI Index MDE 19/025/2011 (Sept. 13, 2011).

3. *Id.*

4. *Id.*

referred the Libyan situation to the International Criminal Court for prosecution.[5] In addition, the Security Council imposed a weapons embargo and implemented a travel ban and asset freeze for key individuals affiliated with the Khadafy regime and suspected of violence against the protestors.[6]

The following month, the Security Council adopted a second resolution on Libya, Resolution 1973.[7] This resolution authorized U.N. Member States to use "all necessary measures," including the use of force, to ensure protection of civilians in Libya.[8] The forcible intervention authorized by Resolution 1973 would be carried out by NATO, which began striking Libya's air defenses two days later.[9] NATO's intervention neutralized the government's advantage and paved the way for a military triumph by the rebel movement in August, when they seized control of Tripoli.

B. Rebellion in Syria

The Syrian government has also been beset by protests, and, like Libya, has responded with brutal and repressive acts against civilians. Anti-government protests began in Syria in March 2011, when a group of approximately 200 protestors called for the ouster of Syrian President Bashir al-Assad.[10] As in Libya, the government has responded harshly to the anti-government protests, not hesitating to open fire on civilian protestors. Estimates of the number killed vary widely, but even conservative estimates place the number of dead in the thousands.[11] In the words of Human Rights Watch, "the notorious security services, referred to generically as *mukhabarat*, and pro-government armed groups, whom Syrians refer to as *shabeeha*, regularly used force, often lethal force, against largely peaceful demonstrators, and often prevented injured protesters from receiving medical assistance."[12] According to witnesses, the security forces utilize lethal force against protestors even when they are not threatened by the protestors.[13]

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5. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

6. *Id.* ¶ 9-21.

7. S.C. Res. 1973, U.N. Doc. S/RES/1973 (March 17, 2011).

8. *Id.* ¶ 4.

9. David D. Kirkpatrick, Steven Erlanger, & Elisabeth Bumiller, *Allies Open Air Assault on Qaddafi's Forces in* Libya, N.Y. TIMES, March 20, 2011, at A1, *available at* http://www.nytimes.com /2011/03/20/world/africa/ 20libya.html?pagewanted=all.

10. Elizabeth Flock, *Syrian Revolution: A Revolt Brews Against Bashar al-Assad's Regime,* WASH. POST BLOG (March 15, 2011, 11:35 AM), http://www.washingtonpost.com/blogs/blogpost/post/ syria-revolution-revolt-against-bashar-al--assads-regime/2011/03/15/ABrwNEX_blog.html.

11. *Syria Uprising: UN Says Protest Death Toll Hits 3,000,* BBC NEWS (Oct. 14, 2011, 01:44 PM), http://www.bbc.co.uk/news/world-middle-east-15304741.

12. HUMAN RIGHTS WATCH, WE LIVE AS IN WAR: CRACKDOWN ON PROTESTORS IN THE GOVERNORATE OF HOMS 10 (2011).

13. *Id.* at 18.

Unlike Libya, the U.N. Security Council did not adopt a resolution on Syria because proposed action was blocked by Russia and China.[14] The failure of the U.N. to respond has, apparently, only emboldened the al-Assad regime in its brutal crackdown on protestors.[15] Although the Security Council has not adopted a resolution addressing the uprising in Syria, it did issue a presidential statement expressing concern about the deteriorating situation in Syria and urging the government to negotiate a ceasefire.[16] The statement also had the support of Russia and Syria, the two states that had vetoed previous Security Council efforts to act on the Syrian crisis. To secure that support, the presidential statement was devoid of threats or demands.[17] Undeniably, the response of the international community to the violence in Syria has been tepid when compared with the response to similar crimes in Libya.

II. FROM HUMANITARIAN INTERVENTION TO THE RESPONSIBILITY TO PROTECT

The responsibility to protect grows out of a longstanding right of humanitarian intervention. While state sovereignty has long included the right of states to exercise broad discretion with respect to the treatment of their nationals, this discretion has never been unlimited. Instead, international law has also recognized the right of states to intervene when a state's treatment of its nationals shocks the conscience of mankind. Originally, states exercised this right with respect to certain minority populations who were the targets of abuse by their governments. Over time, the nature of intervention changed as the concepts of humanity and human rights altered. Certainly, the instances of human rights violations have overwhelmed the occasions on which some state or group of states has intervened in response to those violations. The selective nature of outside intervention in response to humanitarian crises encouraged critics of the right to humanitarian intervention, including Thomas Franck and Nigel Rodley, who suggested that the existence of such a right would "come as a surprise to Biafrans, Rhodesians, and South Africans."[18] Particularly during the Cold War, those cases in which outside powers did intervene, such as India's intervention in East Pakistan, which resulted in the creation of Bangladesh, occurred without the authorization of the U.N. Security Council, raising issues regarding the legality of

14. Neil MacFarquhar & Anthony Shadid, *Russia and China Block U.N. Action on Crisis in Syria*, N.Y. TIMES, Feb. 5, 2012, at A1, *available at* http://www.nytimes.com/2012/02/05/world/middleeast/syria-homs-death-toll-said-to-rise.html.

15. Anthony Shadid, *Syrian Unrest After a Failure of Diplomacy*, N.Y. TIMES, Feb. 6, 2012, at A1, *available at* http://www.nytimes.com/2012/02/06/world/middleeast/syria-steps-up-crackdown-after-failed-un-motion.html? pagewanted=all.

16. Rick Gladstone, *U.N. Council Backs Plan for Ending Syria Conflict*, N.Y. TIMES, Mar. 22, 2012, at A12, *available at* http://www.nytimes.com/2012/03/22/world/middleeast/in-moment-of-unity-security-council-endorses-plan-to-halt-syria-conflict.html.

17. *Id.*

18. Thomas M. Franck & Nigel S. Rodley, *After Bangladesh: The Law of Humanitarian Intervention by Military Force*, 67 AM. J. INT'L L. 275, 296 (1973).

such operations under the U.N. Charter.[19] NATO's intervention in Kosovo, which was not sanctioned by the U.N. Security Council, also raised similar questions with respect to the legality of humanitarian intervention under the U.N. Charter.

A. Humanitarian Intervention during the post-Charter Era

The role of interest in motivating intervention emanates from the nature of the international system itself. In the absence of a central authority to implement norms such as human rights standards, the enforcement of these norms falls to states. A state's action is motivated by its interests. While these interests will certainly include an interest in human rights, humanitarian interests alone are rarely sufficient to motivate a state to intervene abroad. Forcible intervention in support of human rights requires that a state expend its resources and place at risk the lives of its military personnel, something a state will not likely do in the absence of self-interest. As Franck and Rodley note, "in a surprising number of instances where the humanitarian factor was great but no threat existed to the political or economic concerns of foreign powers, states have evinced little interest in forceful surgical intervention."[20] For Franck, the potential for abuse was a serious objection to the right of humanitarian intervention.[21] This absence of self-interest is one reason why states did not always intervene in instances of grave human rights violations, leading to uneven enforcement of human rights norms. Subsequent practice diminished this objection, but has not entirely overcome it.[22] The problem of selectivity remains.

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19. A number of legal scholars argued that the creation of the U.N. Charter, which does not explicitly address the question of humanitarian intervention, had extinguished any right to use force in response to human rights violations in the absence of Security Council approval. *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); Ian Brownlie, *Humanitarian Intervention*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 217 (John N. Moore ed., 1974); Franck & Rodley, *supra* note 18; Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984). This argument leads to the absurd result of diminishing the capacity of states to act in support of one of the U.N. Charter's major purposes, which is promoting respect for human rights. As such, a number of other scholars, including this author, supported a continuing right to humanitarian intervention even in the absence of Security Council authorization. Richard B. Lillich, *Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives*, *in* LAW AND CIVIL WAR IN THE MODERN WORLD 238 (John N. Moore ed., 1974); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967); Ved P. Nanda, Thomas F. Muther, Jr., & Amy E. Eckert, *Tragedies In Somalia, Yugoslavia, Haiti, Rwanda and Liberia - Revisiting the Validity of Humanitarian Intervention Under International Law- Part II*, 26 DENV. J. INT'L L. & POL'Y 827 (1998); W. Michael Reisman, *Comment: Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984).

20. Franck & Rodley, *supra* note 18, at 279.

21. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 172, 185-86 (2002); Thomas Franck, *Comments on Chapters 7 and 8*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 264, 265, 267 (Michael Byers & Georg Nolte eds., 2003); Thomas M . Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 204, 229-31 (J. L. Holzgrefe & Robert O. Keohane eds., 2003).

22. Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF., Nov./Dec. 2002 at 99, 100.

B. Responsibility to Protect

The stagnant nature of these debates prompted the emergence of the concept of a "responsibility to protect." The shift in terms of the debate was an attempt to transcend some of the ongoing disputes about the legality and the desirability of the right to humanitarian intervention.

1. ICISS Report

First articulated by the International Commission on Intervention and State Sovereignty ("ICISS"), the concept of responsibility to protect emphasizes that responsibility for individual welfare is shared.[23] The ICISS sought to shift the emphasis from sovereignty as control to sovereignty as responsibility for the lives and well-being of the state's citizens.[24] The primary responsibility for any particular individual lies with that person's own state. Where a state abdicates that responsibility, then the international community has a responsibility to act. The responsibility to protect encompasses three separate obligations. The first of these is the responsibility to prevent. The ICISS emphasized that this obligation also has an international dimension including development assistance, other forms of support, and efforts at conflict resolution like mediation or good offices.[25]

The second responsibility, which comes into play when the preventive measures fail, is the responsibility to react, which includes a range of different coercive measures. The ICISS includes political, economic, judicial or military measures, but it emphasizes that the latter should be deployed only in extreme circumstances.[26] With a view to defining these extreme circumstances, the ICISS proposed several criteria for the utilization of military coercion:

- Military intervention should be undertaken for a just cause, meaning to stop or prevent large scale loss of life or ethnic cleansing.[27]
- Intervention should occur pursuant to right authority.[28]
- Those employing military coercion should do so with the right intention, the existence of which is supported where intervention is multilateral rather than unilateral, and where interference with territorial integrity and political independence is minimized.[29]

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23. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 17 (2001) [hereinafter ICISS REPORT].

24. *Id.* at 13.

25. *Id.* at 19.

26. *Id.* at 29.

27. *Id.* at 32.

28. *Id.* at 53-54. The question of right authority is a complex question in light of the political obstacles that may preclude working through the U.N. Security Council. In the present cases under consideration, the Security Council supported intervention in Libya, but not in the equally grave situation in Syria. Where the Security Council fails to fulfill its own responsibilities, the ICISS allows for intervention under the authority of the General Assembly or regional organizations and, in exceptional cases, by *ad hoc* coalitions.

29. *Id.* at 35-36.

- Military force should be a last resort after prevention and peaceful means have failed.[30]
- The military intervention should be proportional to the humanitarian objective.[31]
- There should be a reasonable chance of success, meaning that actual protection should be achieved as a result of the military action.[32]

Finally, the responsibility to protect also includes a responsibility to rebuild following intervention.[33]

The ICISS points to three key advantages of this new conceptual framework. The first advantage over humanitarian intervention is that the responsibility to protect shifts the focus of action from the state that holds the right to those in need of protection.[34] Second, the responsibility to protect underscores the fact that primary responsibility remains with the state whose nationals are in need of protection.[35] Finally, the responsibility to protect is a much broader concept than humanitarian intervention.[36] The responsibility to protect seeks to broaden the scope of action taken in response to humanitarian crises, encompassing a range of various responses to a continuum of disasters. While it includes a duty to react to humanitarian crises, the responsibility to protect also includes obligations to prevent and to rebuild, which have been lacking in the discourse surrounding humanitarian intervention. The incorporation of measures other than the use of force diminishes the "all or nothing" nature of the choice between forcible intervention and inaction in response to humanitarian crises. Instead, states have a broader range of options from which to choose, many of which would apply at an earlier point in a crisis.

The key contribution of the ICISS report was to reframe sovereignty in such a way as to resolve the seemingly intractable opposition of sovereignty and human rights.[37] Subsequent interpretations of the responsibility to protect accepted this interpretation of sovereignty, but would differ from the ICISS report in important respects.

2. U.N. High-Level Panel

The norm of the responsibility to protect was subsequently affirmed by the U.N.'s High-Level Panel on Threats, Challenges, and Change, whose report echoed the ICISS treatment of sovereignty as a source of obligation, advocating collective responsibility where a state was unable or unwilling to fulfill its

30. *Id.* at 36.
31. *Id.* at 37.
32. *Id.*
33. *Id.* at 39.
34. Evans & Sahnoun, *supra* note 22, at 101.
35. *Id.*
36. *Id.*
37. Alex J. Bellamy, *The Responsibility to Protect and the Problem of Military Intervention*, 84 INT'L AFF. 615, 620 (2008).

responsibilities.[38] The panel recognized a growing consensus in favor of the responsibility to protect, as well as inconsistency on the part of the Security Council.[39] It outlined a set of criteria similar to the ICISS's for military intervention in support of the responsibility to protect, with one important exception. Where the ICISS was willing to confer legitimacy on actors other than the Security Council, the panel rejected this move. Instead, the panel recognized that "there is a collective international responsibility to protect, *exercisable by the Security Council* authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[40]

This statement constitutes a more restrictive view of right authority than that employed by the ICISS, but in other respects, most significantly with respect to just cause, the high-level panel echoed the proposals of the ICISS report. Both documents support the international community's responsibility to act in the face of large-scale humanitarian disasters that states are unwilling or unable to prevent.[41]

3. The Secretaries-General on the Responsibility to Protect

Secretary-General Annan subsequently endorsed the responsibility to protect as well, though he emphasized the non-military components of this obligation by placing his discussion of the responsibility to protect primarily within the context of freedom and dignity rather than the section on the use of force.[42] The Secretary-General endorsed the responsibility to protect as well as the concept of shared responsibility set forth by the ICISS and the high-level panel.[43] Later that year, the General Assembly also endorsed the responsibility to protect in two key paragraphs of its World Summit Outcome document, affirming that "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity."[44] The document goes on to recognize the shared responsibility of the international community to act, but rejected a systematic approach to implementing this responsibility, favoring instead a "case-by-case" approach.[45] The Security Council subsequently reaffirmed the relevant provisions of paragraphs 138 and 139 of the World Summit

38. HIGH-LEVEL PANEL ON THREATS, CHALLENGES, AND CHANGE, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY 17 (2004), *available at* www.un.org/secureworld/report2.pdf.

39. *Id.* at 65-66.

40. *Id.* at 66 (emphasis added).

41. *Id.*; ICISS REPORT, *supra* note 23, at 69.

42. Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AM. J. INT'L L. 99, 107 (2007).

43. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All: Rep. of the Secretary-General*, ¶ 135, U.N. Doc. A/59/2005 (March 21, 2005).

44. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

45. *Id.* ¶ 139.

Outcome document in Resolution 1674,[46] which it recalled in its subsequent Resolution 1706 on the situation in Darfur.[47]

The current U.N. Secretary-General has also addressed the responsibility to protect, particularly the issues of developing early warning mechanisms and implementing the responsibility to protect.[48] With respect to the question of implementation, Ban Ki-Moon noted that institutions had failed in the past, particularly in the tragic case of Rwanda.[49] The Secretary-General attributed these failures partly to the conceptual framework of humanitarian intervention, which created what he called a "false choice" between using coercive force or standing by and observing unfolding human tragedies.[50] Drawing on paragraphs 138 and 139 of the Summit Outcome document, Moon suggests three pillars to the responsibility to protect:

- The first emphasizes the state's responsibility to protect its own population from genocide, war crimes, crimes against humanity, and ethnic cleansing, as well as the incitement of any of these offenses.[51]
- The second underscores the responsibility of the international community to assist states in meeting their obligations under the first pillar.[52]
- The third and final pillar requires U.N. Member States to respond in a "timely and decisive manner" when a state has manifestly failed to provide protection to its population, using the broad array of tools at their disposal.[53]

It is this third pillar that is implicated in the Libyan and Syrian crises. Within this pillar, Moon emphasizes the potential utility of referring situations to the International Criminal Court, in addition to other non-forcible measures. Moon attributes special responsibility to the permanent members of the U.N. Security Council, arguing that both their permanent representation on the Security Council and the privilege of the veto confer special responsibility on them. Because of this special responsibility, he urges these members to "refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect."[54] Certainly, the refusal to support a response to situations where states have failed to protect their populations is at odds with a consistent and meaningful approach to the responsibility to protect, but it underscores the problem that I take up here.

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46. S.C. Res. 1674, ¶ 4, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

47. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

48. U.N. Secretary-General, *Early Warning, Assessment and the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 19, U.N. Doc. A/64/864 (July 14, 2010).

49. U.N. Secretary-General, *Implementing the Responsibility to Protect: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. A/63/677 (Jan. 12, 2009).

50. *Id.* ¶ 7.

51. *Id.* ¶ 11.

52. *Id.*

53. *Id.*

54. *Id.* ¶ 61.

Moon's remarks on implementing the responsibility to protect suggest a divide between past state practice regarding humanitarian intervention and present and future practice regarding the responsibility to protect. Moon attributes inconsistency in the case of the former to conceptual problems with humanitarian intervention. I would suggest that the problem lies not with the concept, but is instead a feature of both humanitarian intervention and the responsibility to protect being carried out with a decentralized international system by states that are driven by interests and power.

III. THE ROLE OF THE INTERNATIONAL SYSTEM

The responsibility to protect has pushed the debate about humanitarian intervention forward in a number of respects. Particularly important is this shift of emphasis from a state holding a right to engage in humanitarian intervention to a state bearing responsibility for the well-being of individuals, both at home and abroad. These conceptual shifts have advanced the debate, but this does not always translate into an improved response from the international community. One point where the shift from humanitarian intervention to responsibility to protect has had little impact is on the question of consistency, particularly with respect to military intervention. Uneven application of the right to humanitarian intervention was a serious problem even for its supporters, but the responsibility to protect seems to fare little better in this regard. An interesting split within the documents discussed in the previous section hints at the reasons behind this. The ICISS report emphasizes the selection of certain criteria under which military intervention should take place.[55] As outlined above, the cornerstone of these criteria is the existence of just cause. In addition, the ICISS report takes into consideration the issue of authority and several precautionary principles.[56] By contrast, the World Summit Outcome document, which most closely represents the views of state leaders, rejects the imposition of systematic criteria, preferring instead to evaluate each case individually.[57] This speaks to the wish of heads of state, and by extension states, to maintain discretion over when forcible intervention will occur in response to human rights crises.

A more systematic approach would be consistent with the cosmopolitan morality implicit in the responsibility to protect. The difficulty lies in the fact that implementing this cosmopolitan morality falls to members of the international system, namely states—both in their individual capacity and as members of key institutions such as the Security Council. In the absence of a central authority in the international system, the implementation of rules falls to states.[58] It is states that would vote, as members of the Security Council, to authorize intervention, and it is states, individually or in concert with others, who would execute that decision.

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55. ICISS REPORT, *supra* note 23, at XII.

56. *Id.*

57. 2005 World Summit Outcome, *supra* note 44, ¶ 139.

58. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 72 (1977).

One of the key insights of the realist tradition of international relations is that states are driven by the pursuit of their interests. State interests certainly include humanitarian interests, but they also include other, more material and self-oriented interests, including the need to maintain their own security above all else. Intervening in humanitarian crises like those in Libya and Syria may further humanitarian interests, but, because such interventions require the expenditure of troops and other resources, they do so at a cost to the states' own security interests. This reality subjects the principle of the responsibility to protect to these dynamics of the international system, particularly states' pursuit of their own interests.

The differing treatment of Libya and Syria bears out the inconsistencies that are created by these features of the international system. In both states, the governments have committed crimes against humanity against their own populations by targeting civilians. In the parlance of the responsibility to protect, both of these states are unwilling to fulfill their responsibilities toward their citizens. Despite the fact that just cause exists in both cases, the Security Council engaged in judicial intervention and authorized military intervention against Libya, while declining to exercise the international community's responsibilities with respect to Syria. The differing outcomes stem not from differences in terms of the respective governments' treatment of their citizens, but from differences in the international community's willingness to intervene. This willingness stems from considerations like power and interest and, as these two cases suggest, they can vary even in circumstances that are quite comparable. Entrusting the responsibility to protect to self-interested states operating within a self-help environment, in which their security interests trump other pursuits, means that the responsibility to protect will not be applied any more consistently or systematically than was the right of humanitarian intervention.

In these particular cases, there are differences in the strategic situation that would render intervention in Syria more difficult, making the cost to states' security interests higher. Intervention would not be so difficult as to raise problems with the probability of success, one of the precautionary principles in the ICISS report,[59] but it would render military intervention more difficult. NATO was able to intervene in Libya through the use of air power, without putting troops on the ground. This would not be the case in Syria, where effective intervention would require the deployment of ground forces. If the members of the Security Council are unwilling to authorize military intervention, one might think that they would authorize judicial measures, in the form of a referral to the International Criminal Court, as they did with the Libyan situation. This refusal points to another set of factors that undermines the willingness of the Security Council to act, namely the political interests of Security Council members. In the Syrian case, the interests of Russia and China, both permanent members of the Security Council with veto power, precluded the Security Council from taking even this step. Russia and Syria enjoy a longstanding alliance, as evidenced by Syria's use of

59. ICISS REPORT, *supra* note 23, at 37.

Soviet weapons against rebels.[60] If intervention were to occur, it would likely be without the approval of the Security Council, and it would put those states carrying out the intervention at odds with Russia. Beyond these ties between Syria and Russia, even other states acknowledge that military action in Syria would be more difficult and costly than it was in Libya.[61] U.S. defense officials propose that even an operation to protect civilians would require a sizable contingent of ground troops. This stands in contrast to Libya, where NATO was able to intervene without putting forces on the ground by relying on air power and weapons launched from offshore.

The dynamics of the international system mean that state interests permitted intervention in Libya, where intervention could be carried out at a relatively low cost through air power, but they are so far obstructing intervention in Syria, despite the existence of comparable crimes. Intervention in Syria would require a more significant compromise of the security interests of Security Council members, which has impeded the international community's ability to respond to the atrocities being carried out by Syria. To date, the international community has yet to respond to the Syrian government's systematic attacks on its own population even with significant and effective non-forcible measures.

IV. CONCLUSION

Despite key conceptual differences between humanitarian intervention and the responsibility to protect, implementation of the latter has not escaped the unevenness and inconsistency of the former. The unevenness of states' assumption of the responsibility to protect stems not from conceptual problems about humanitarian intervention, but instead from features inherent in the international system. As long as implementation of the responsibility to protect falls to states, states will be guided by their interests, even in the performance of their responsibilities vis-à-vis civilian populations abroad. In this sense, the problems with humanitarian intervention were more than merely conceptual, and they continue to plague the responsibility to protect.

While states are always guided by interests, it is important to note that those interests are not always the same.[62] State interests can change over time, and future developments within the international system may prompt a formulation of state interests that is more consistent with a more even-handed approach to the responsibility to protect. As Finnemore argues, the nature of intervention and the rationale behind intervention abroad has changed over time, in part as the interests

60. David M. Herszenhorn, *For Syria, Reliant on Russia for Weapons and Food, Old Bonds Run Deep*, N.Y. TIMES, Feb. 18, 2012, at A13, *available at* http://www.nytimes.com/2012/02/19/world/middleeast/for-russia-and-syria-bonds-are-old-and-deep.html?pagewanted=all&_moc.semityn.www.

61. Elisabeth Bumiller, *Military Points to Risks of a Syrian Intervention*, N.Y. TIMES, March 11, 2012, at A10, *available at* http://www.nytimes.com/2012/03/12/world/middleeast/us-syria-intervention-would-be-risky-pentagon-officials-say.html?pagewanted=all&_moc.semityn.www.

62. *See* MARTHA FINNEMORE, THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE 5 (2003).

of states evolved. The reasons for state intervention will continue to evolve, as will states' conception of their interests. Without such evolution, the conceptual advances embodied in the concept of the responsibility to protect will not likely lead to a more consistent state practice.

SOSA'S SILENCE: *KIOBEL* AND THE FALLACY OF THE SUPREME COURT'S LIMITATION ON ALIEN TORT LIABILITY

*Webster C. Cash III**

I. INTRODUCTION

In *Kiobel v. Royal Dutch Petroleum Co.*,[1] the United States Court of Appeals for the Second Circuit held that corporations could not be liable under the Alien Tort Statute ("ATS") for human rights abuses.[2] The decision has stunning implications for contemporary human rights litigation.[3] Indeed, in the short time since *Kiobel* was decided in September 2010, a large volume of scholarship has examined the case's potential to upset the delicate balance of international law.[4] Moreover, rare for any circuit court opinion, *Kiobel* is the subject of considerable mainstream media coverage.[5] Whether lawyer or newsman, one fact remains

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1. 621 F.3d 111 (2d Cir. 2010), *reh'g denied*, 642 F.3d 268 (2d Cir. 2011), *cert. granted*, 132 S. Ct. 472 (2011).

2. *Id.* at 149.

3. *See* Jonathan Drimmer, Kiobel v. Royal Dutch Shell Petroleum Co. *and the Alien Tort Statute*, LEXISNEXIS COMMUNITIES (Dec. 10, 2010), http://www.lexisnexis.com/community/international-foreignlaw/blogs/internationalandforeignlawcommentary/archive/2010/12/14/jonathan-drimmer-on-kiobel-v-royal-dutch-shell-petroleum-co-and-the-alien-tort-statute.aspx ("Without question, *Kiobel*, breaking with 20 years of federal court decisions on the ATS, is a significant decision. Some 30% of all corporate ATS cases to date have been brought in the Second Circuit, more than any other. Should the decision stand, it is a near certainty that federal courts . . . will follow suit.").

4. *See, e.g.*, Samuel Estreicher & Meir Feder, *Second Circuit Rejects Corporate Liability Under Alien Tort Statute*, N.Y. L.J. (Nov. 5, 2010), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=120 2474420042&Second_Circuit_Rejects _Corporate_Liability_Under_Alien_Tort_Statute; Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 353, 356 (2011); Michael C. Lynch & Lystra Batchoo, *What are the Implications of* Kiobel v. Royal Dutch Petroleum? *Is the Decision a Definitive Statement Against Corporate Liability under the Alien Tort Statute?*, 22 NO. 1 PRAC. LITIGATOR 57, 57-58 (2011).

5. *See* John B. Bellinger III, *Shortening the Long Arm of the Law*, N.Y. TIMES (Oct. 8, 2010), http://www.nytimes.com/2010/10/09/opinion/09iht-edbellinger.html?_r=0 ("Although the court's decision is at present binding only in the New York region, it may be the death knell for most human rights litigation against multinational companies in U.S. courts."); Grant McCool, *US Judges Dismiss Nigerian Violence Case vs. Shell*, REUTERS (Sept. 17, 2010), http://www.reuters.com/article/2010/09/17/royaldutchshell-nigeria-ruling-idUSN1717331220100917; Kevin Anthony Stoda, *Will U.S. Supreme Court Exempt Corporations from Alien Tort Law—Even as U.S. States Can Still Be Brought to Court?*,

clear: to many, *Kiobel* stands for the shallow proposition that corporate profits stemming from business-related human rights abuses may be shielded from victims through the simple act of incorporation.[6] Opponents also assert that absent Congressional action, *Kiobel* will undermine general principles of corporate accountability.[7] They argue that freedom from concern over multi-million dollar class action lawsuits will invite corporations to downgrade their efforts to prevent human rights abuses.[8] Though individual corporate perpetrators—such as Directors and CEOs—remain susceptible to civil damages under the ATS, the general reaction to *Kiobel* appears to be one of cynicism on account of the corporate protection it imparts.

Others yet have focused less on the decision's press-worthy rule relating to corporate damages. Instead, they emphasize *Kiobel*'s seemingly unremarkable holding: "[t]hat international law . . . and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[9] That is, despite virtual unanimity among civilized nations in recognizing tort actions against corporate entities, it is the law of nations ultimately controlling *who* is liable under the ATS. Though this legalese is somewhat unrevealing, the practical effect of the language will be "deeply relevant in other settings"—i.e., when the United States Supreme Court revisits the scope of the ATS.[10]

Accordingly, this Article will discuss this perhaps more sedentary aspect of *Kiobel*—ostensibly, to uncover the court's reasoning and justification for this ruling. In reaching its position, this Article will show that the Second Circuit's interpretation of ATS liability was based partly on an improper reading of footnote twenty in the Supreme Court's seminal ATS case, *Sosa v. Alvarez-Machain*.[11] Importantly, this Article does not suggest that the *Kiobel* court was necessarily incorrect in its conclusion that customary international law precludes juridical

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OPED NEWS (Oct. 1, 2010), http://www.opednews.com/articles/WILL-U-S-SUPREME-COURT-EX-by-Kevin-Anthony-Stod-100930-11.html.

6. *See generally* Bellinger, *supra* note 5; *see also Kiobel*, 621 F.3d at 149-50 (Leval, J., concurring) ("[O]ne who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting the heinous operation in the corporate form.").

7. *See* Marco Simons, *Making Sense of the* Kiobel *Decision and Corporate Liability for Human Rights Abuses*, EARTHRIGHTS INT. (Sept. 22, 2010), https://www.earthrights.org/blog/making-sense-kiobel-decision-and-corporate-liability-human-rights-abuses ("Beyond the U.S., we need to expand the scope of accountability for human rights abuses, both geographically and institutionally. . . .'the U.S. judiciary alone cannot shoulder the burden of providing a forum for adjudicating human rights claims against companies that arise abroad.' If Shell were subject to a strong accountability regime in Nigeria—or even in England, or the Netherlands, where it is headquartered—it wouldn't matter whether it could be sued in the United States.").

8. *See id.*

9. *Kiobel*, 621 F.3d at 126.

10. *See* Marta Requejo, *Kenneth Anderson on* Kiovel [sic] v. Royal Dutch Petroleum, CONFLICT OF LAWS.NET (Sept. 18, 2010), http://conflictoflaws.net/2010/kenneth-anderson-on-kiovel-v-royal-dutch-petroleum/.

11. 542 U.S. 692 (2004).

entities from ATS liability. Instead, it argues simply that the Supreme Court was silent in *Sosa* regarding the scope of the ATS' reach. Because the high Court did not address this issue, it is of course problematic that the Second Circuit augmented its decision by claiming the Court had ruled squarely on the matter. Thus, this Article serves as a warning for future litigants to avoid *Sosa*, as well as portions of *Kiobel*, as the sole legal basis for asserting corporations are immune from liability under the ATS.

Part II will analyze the relevant history of the ATS, as well as the two primary cases that set forth modern ATS jurisprudence—*Filártiga v. Peña-Irala*[12] and *Sosa*. Additionally, Part II will provide necessary background on the widespread pattern of corporate human rights abuses, such that the full magnitude of the *Kiobel* decision can be understood in context. Part III will provide a comprehensive summary of the Second Circuit's disposition of *Kiobel*. Specifically, a detailed analysis of the facts leading up to the plaintiffs' suit in federal court, the district court's holding, the majority opinion, and Judge Leval's stinging concurrence—a separate opinion endorsing the majority's final judgment, but strident enough in its terms to be classified as nothing other than a dissent. In Part IV, this Article will argue that a key ingredient of the Second Circuit's holding—its interpretation of footnote twenty from Justice Souter's landmark opinion in *Sosa*—was fundamentally incorrect and misapplied Supreme Court dicta. Primarily, this Article will show that the Second Circuit misconstrued *Sosa*'s discussion regarding the contours of ATS liability with the separate consideration of whether international law requires that the State serve as the tortfeasor. This Article will conclude by stressing that litigants should not rely on *Kiobel*'s interpretation of *Sosa* alone while not necessarily ignoring the possible crystallization of such a rule through other relevant sources of international law.

II. BACKGROUND

The ATS was enacted by the first Congress as a provision contained in the Judiciary Act of 1789.[13] Despite its prevalence today, the ATS was seldom used after its passage in 1789. During the first 200 years of its existence, the statute was invoked in federal court only twice.[14] Though the ATS underwent a major resurgence in 1980 following *Filartiga*, it was this rather dormant existence that came to define the ATS. Judge Friendly, speaking to the ATS' mysterious origins, noted in his oft-cited remark that "[t]his old but little used section is a kind of legal

12. 630 F.2d 876 (2d Cir. 1980).

13. Philip A. Scarborough, *Rules of Decision for Issues Arising Under the Alien Tort Statute*, 107 COLUM. L. REV. 457, 463 (2007).

14. *See* Andrew M. Scoble, *Enforcing the Customary International Law of Human Rights in Federal Court*, 74 CALIF. L. REV. 127, 133 n.37 (1986).

Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came."[15]

As one scholar surmised, the ATS "is one of the most widely discussed provisions in modern international law."[16] Due to its relatively simple terms, it is surprising that the ATS has been the basis for both countless civil actions and vigorous legal debate. Nevertheless, the ATS serves as the primary tool for foreigners seeking redress concerning international harms. The elegant simplicity of the ATS—in its entirety—is comprised of nothing more than the following text: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[17] In other words, under the statute, an ATS plaintiff (1) must be an alien and not of U.S. citizenship, (2) the complaint must sound in tort, and (3) the underlying claim must violate the law of nations.[18] While the first two components seldom serve as a source of disagreement, the third prong—whether the law of nations was violated—is the genesis of endless controversy.[19]

A. Filartiga v. Peña-Irala

The true birth of modern ATS jurisprudence began in 1980, when the United States Court of Appeals for the Second Circuit issued its decision in *Filartiga v. Peña-Irala*. *Filartiga* involved a claim by Dr. Joel Filartiga and his daughter Dolly Filartiga—both of whom were of Paraguayan origin—against a third Paraguayan national for the alleged torture and death of a Filartiga family member.[20] Specifically, the Filartigas asserted that the defendant Peña-Irala, while holding the office of chief of police in Asuncion, Paraguay, kidnapped Dr. Filartiga's son and subsequently tortured him to death.[21] The complaint also alleged that Peña-Irala had brought a Filartiga family member to the home of Peña-Irala to show them the mutilated and tortured corpse.[22] The Filartigas maintained that the killing was in response to their family's known political dissidence against the Paraguayan government.[23] Other attempts by the Filartigas to hold Peña-Irala accountable for his actions resulted only in death threats, intimidation, and the disbarment of Dr. Filartiga's attorney.[24]

15. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), *abrogated by* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869 (2010).

16. William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 221 (1996).

17. 28 U.S.C. § 1350 (2006).

18. Nicholas Joy, *Debate: Did Founders Want U.S. Courts to Look Abroad for Monsters to Destroy?*, THE REC. (Nov. 19, 2009), http://hlrecord.org/?p=9920.

19. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).

20. Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d Cir. 1980).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

By the late 1970s, Dolly Filartiga had immigrated to the United States. She learned that Peña-Irala was visiting New York.[25] She filed suit in federal court, invoking the ATS as her basis for jurisdiction, for alleged acts of torture in violation of the law of nations.[26] On appeal from a lower court's dismissal, the Second Circuit found that official state torture was a "clear and unambiguous" violation of customary international law.[27] The court held the ATS provided district courts with jurisdiction when "an alleged torturer is found and served with process by an alien within our borders."[28] Also significant was the *Filartiga* court's emphasis that the new body of international human rights—following the events at Nuremberg—was now included in the amorphous definition of the "law of nations."[29]

Thus, *Filartiga* reinvigorated the dormant ATS into a jurisdictional avenue that opened the federal courts to aliens seeking damages for human rights violations constituting a breach of the law of nations. Though the *Filartiga* decision remains highly controversial—and was overruled in some aspects by the Supreme Court in *Sosa*—its basic holding served as the needed catalyst for alien plaintiffs to bring suit in federal courts for human rights violations. Indeed, as Professor Kontorovich has written,

> *Filartiga* transformed the statute into a tool for foreigners to seek redress in federal courts for a variety of abuses committed by governments around the world. While only a few courts of appeals adopted the Second Circuit's view of the statute, this was enough to allow a wide-ranging docket of ATS cases.[30]

B. Sosa v. Alvarez-Machain

Due to a flood of ATS litigation sparked by *Filartiga*, the various circuit courts interpreted the ATS in varying ways—leading to major disparities in the statute's application.[31] In *Sosa v. Alvarez-Machain*, the United States Supreme Court was given the opportunity to clarify some of the confusion among the lower courts and aid in the creation of a uniform approach to the ATS.

In *Sosa*, Mexican national Humberto Alvarez-Machain filed a civil action against the United States Drug Enforcement Administration and several Mexican nationals under, *inter alia*, the ATS for damages resulting from his abduction and transfer to the United States for interrogation related to criminal activity.[32] Alvarez's primary ATS claim was that one of the Mexican nationals who aided in

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25. *Id.* at 878-79.
26. *Id.* at 879.
27. *Id.* at 884.
28. *Id.* at 878.
29. *Id.* at 880.
30. Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 116 (2004).
31. *See id.*
32. Sosa v. Alvarez-Machain, 542 U.S. 692, 698 (2004).

the abduction was liable for a tort committed in violation of the law of nations.[33] The United States Court of Appeals for the Ninth Circuit upheld Alvarez's ATS claim.[34] The Supreme Court granted certiorari and reversed.[35]

The Court held that the ATS was solely a jurisdictional statute, and as such, did not create causes of action based on newly accepted aspects of international law.[36] While the Court said Congress could pass legislation to create new claims under the ATS, the Court settled on the interpretation that a "very limited set of claims" were acceptable under the ATS—namely, piracy, offenses against ambassadors, and violations of safe passage.[37] As the Court stated in its own terms:

> [A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.[38]

Additionally, the Court held that the ATS covers newer customary international law claims so long as those claims resemble the "historical paradigms" important to and recognized by the framers of the original 1789 Act.[39] To meet this test, the Court noted that the contended aspect of customary international law must be both universal in its acceptance among civilized nations and specific in its definition.[40] The Court, applying the test, declined to condone Alvarez's claim that arbitrary arrest and abduction lacked the requisite universality and specificity to satisfy the new test.[41]

Sosa can thus be seen as a limitation on the seemingly wide-open grant of authority to litigate ATS claims flowing from *Filartiga.* Though *Kiobel* focuses primarily on the extent of *liability* under the ATS, the background of *Sosa*'s facts and holding is central to better understanding how the Second Circuit misinterpreted a key piece of dicta contained in the *Sosa* opinion—especially because it is in *Sosa's* dicta that *Kiobel* formed its conclusion that corporations are immune for liability under the ATS.

33. *Id.*
34. *Id.* at 699.
35. *Id.*
36. *Id.* at 714.
37. *Id.* at 720.
38. *Id.* at 724.
39. *Id.* at 732.
40. *Id.* at 725.
41. *Id.* at 738.

C. A Brief Primer on Contemporary Corporate Human Rights Abuses

Though *Filartiga* and *Sosa* focused on ATS violations perpetrated by individuals or the State, *Kiobel* represents a different breed of ATS claim; those committed by multinational corporations. While many international corporations have worked tirelessly to ensure that human rights are respected and preserved at the hands of company business, this has certainly not been the case in many instances.[42] In the past few decades, several high profile cases of corporate human rights abuses have occurred vis-à-vis environmental disasters—most glaringly, the BP oil spill, the Exxon Valdez oil disaster, and the tragic gas leak in Bhopal, India. Additionally, multinational corporations have also committed large-scale human rights violations in the labor, social, economic, and political contexts. According to a recent United Nations report, a survey of 320 corporate human rights incidents found that corporate entities are involved in "the full range of human rights" abuses.[43]

The ATS has been the most potent tool foreigners have used to sue corporations for harms sustained by company operations.[44] Though the examples are countless, many ATS claims arise from well-known American military entanglements. For instance, in relation to grievous injuries sustained during the Vietnam War, an ATS claim was filed against Dow Chemical for "knowingly providing the U.S. government with a poisonous agent (Agent Orange) to be sprayed on civilians in Vietnam."[45] Likewise, as a byproduct of the longstanding Israeli-Palestinian dispute, suit was filed against Caterpillar Incorporated "for selling D9 bulldozers to the Israel Defense Forces, knowing they would be used to destroy homes and injure or kill the [Palestinian] inhabitants."[46] During the height of the genocide in the Sudan, Talisman Energy was sued under the ATS for "for conspiring to commit human rights violations, including war crimes, while engaged in oil operations . . . ."[47] Last, and in the backdrop of the more recent Iraq War, ATS claims were brought against Blackwater Corporation for firing weapons on Iraqi civilians and Titan Corporation and CACI International for allegedly

42. RALPH G. STEINHARDT, PAUL L. HOFFMAN & CHRISTOPHER N. CAMPONOVO INTERNATIONAL HUMAN RIGHTS LAWYERING: CASES AND MATERIALS 663 (2009).

43. U.N. Special Representative of the Secretary General, *Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*, 2-3, 29, U.N. Doc.A/HRC/8/5/Add.2 (May23,2008), *available at* http://daccess-ddsny.un.org/doc/UNDOC/GEN/G08/136/61/PDF/G0813661.pdf?OpenElement.

44. CTR. FOR CONSTITUTIONAL RIGHTS, CORPORATE HUMAN RIGHTS ABUSE 3 (2010), *available at* http://ccrjustice.org/files/CCR_Corp.pdf; *see also* Bellinger, *supra* note 5 ("Plaintiffs have filed suits against ExxonMobil, Chevron, Talisman Energy, Rio Tinto and most of the major oil, gas and mining companies for their activities in Indonesia, Burma, Sudan and Papua New Guinea. Suits have also been brought against Coca Cola, Pfizer, Caterpillar and Yahoo for actions in Columbia, Nigeria, Gaza, and China, and against more than 30 companies that did business in apartheid-era South Africa.").

45. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 44, at 3.

46. *Id.*

47. *Id.*

"conspiring with U.S. officials to torture and abuse people in U.S. custody in Iraq, including the detainees at Abu Ghraib."[48]

While the alleged actions of the corporate and government defendants in *Kiobel* are certainly alarming, as discussed in the next section, similar conduct by multinationals corporations is sadly far from rare. Similarly, application of the ATS as a means of reparation for such harms is an equally prodigious endeavor.

III. *KIOBEL V. ROYAL DUCTCH PETROLEUM CO.*

Since 1958, the Shell Petroleum Development Company of Nigeria ("SPDC")—a subsidiary of Royal Dutch Petroleum ("Royal Dutch") and Shell Transport and Trading Company PLC ("Shell")—has been involved in oil exploration and production in Nigeria's Ogoni region.[49] Due to the environmental implications of oil extraction, locals of the Ogoni region organized the "Movement for Survival of Ogoni People" ("Movement") in order to protest the resulting degradation of the region's land.[50] According to the Ogoni residents, in 1993 SPDC countered the Movement "by enlisting the aid of the Nigerian government to suppress the Ogoni resistance."[51] Between 1993 and 1994, Nigerian military personnel were "alleged to have shot and killed Ogoni residents and attacked Ogoni villages—beating, raping, and arresting residents and destroying or looting property—all with the assistance of defendants [SPDC, Royal Dutch, and Shell]."[52]

To seek both compensation and justice for the ills afflicted upon them, a number of Ogoni region residents brought suit against the SPDC—as well as Royal Dutch and Shell as the parent companies of the SPDC—under the ATS for "aiding and abetting" the Nigerian forces in "alleged violations of the law of nations."[53] Specifically, the plaintiffs focused their ATS claims on "(1) extrajudicial killing; (2) crimes against humanity; (3) torture or cruel, inhumane, and degrading treatment; (4) arbitrary arrest and detention; (5) violation of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[54]

A. Procedural History

In September of 2002, the plaintiffs initiated their lawsuit via a putative class action complaint filed in the United States District Court for the Southern District of New York.[55] In March 2003, the defendants "moved to dismiss the Complaint .

48. *Id.*

49. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 123 (2d Cir. 2010).

50. *Id.*

51. *Id.*

52. *Id.* According to the majority, the plaintiffs alleged specifically that the "defendants, *inter alia,* (1) provided transportation to Nigerian forces, (2) allowed their property to be utilized as a staging ground for attacks, (3) provided food for soldiers involved in the attacks, and (4) provided compensation to those soldiers."

53. *Id.*

54. *Id.*

55. *Id.* at 124.

. . on the grounds that Plaintiffs' claims (1) [we]re barred by the act of state doctrine; (2) [we]re barred by the doctrine of international comity; and (3) fail[ed] to state claims on which relief c[ould] be granted."[56] After Magistrate Judge Henry B. Pitman recommended that the motion to dismiss "be denied in all respects," plaintiffs filed an amended complaint in May 2004.[57] The defendants responded to the amended complaint by filing a second motion to dismiss all ATS claims, relying heavily on the *Sosa*.[58]

In September of 2006, the District Court announced that it had denied the defendants' motion to dismiss, and instead, "decided to consider Defendants' *Sosa*-related arguments in support of their assertion that Plaintiffs fail[ed] to state a claim."[59] The court dismissed four of the plaintiffs' original seven claims (aiding and abetting property destruction; forced exile; extrajudicial killing; and violations of the rights to life, liberty, security, and association) because "customary international law did not define those violations with the particularity required by *Sosa*."[60] Alternatively, however, the court allowed the plaintiffs' claims to proceed for the alleged violations centered on "aiding and abetting arbitrary arrest and detention; crimes against humanity; and torture or cruel, inhuman, and degrading treatment."[61] With regard to the remaining three ATS claims, the court "[r]ecogniz[ed] the importance of the issues presented and the substantial grounds for difference of opinion . . . ."[62] In other words, the district court found that these three purported human rights violations did not "clearly run afoul of *Sosa*."[63]

The court certified an interlocutory appeal to the United States Court of Appeals for the Second Circuit to decide whether the remaining three ATS claims were permissible under *Sosa*.[64]

B. The Majority Opinion

On account of the district court's limited role in certifying the validity of plaintiffs' ATS claims, the Second Circuit's approach to *Kiobel* took on a wholly different form. Judge Jose A. Cabranes—writing for the majority—narrowed the issue to the following summation: "Does the jurisdiction granted by the ATS extend to civil actions brought against corporations under the law of nations?"[65] In other words, the court indicated that unlike most other ATS cases—that is, the ones that hinge on whether a particular harm is recognized under the *Sosa* and customary international law ethos—*Kiobel* turned on how far ATS *liability*

56. Kiobel v. Royal Dutch Petroleum Co., 456 F. Supp. 2d 457, 459 (S.D.N.Y. 2006).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Kiobel*, 621 F.3d at 124.
61. *Id.*
62. *Id.*
63. *Kiobel*, 456 F. Supp. 2d at 463.
64. *Id.* at 465-68.
65. *Kiobel*, 621 F.3d at 117.

extended. In the eyes of the reviewing appellate court, the dispositive issue in *Kiobel* was not whether the plaintiffs' claims under the ATS were compatible with *Sosa*, but rather if aliens could bring ATS suits in federal court for alleged harms against juridical persons—namely, corporations.[66]

The court noted that the vast majority of applicable ATS precedent following *Filartiga* focused on suits brought against *individuals*, a fact that prevented appellate courts from discerning the relationship between the ATS and juridical entities.[67] Though many modern legal systems—including the United States—subject corporations to tort liability under their own domestic law, the court stated that the jurisdictional scope of the ATS is governed not by the particular substantive law of *any* nation, but by the contours of "a limited number of offenses defined by customary *international law* . . . ."[68] Thus, as discussed above, the ATS' jurisdictional grant is limited to only a cause of action crystallized under customary international law—conditioned by *Sosa*'s methodology for deriving new tort actions.

As Judge Cabranes opined:

> [T]he ATS requires federal courts to look beyond rules of domestic law, however well-established that may be, to examine specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*. As Judge Friendly carefully explained, customary international law includes only "those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se*."[69]

Essentially, the court honed a subtle yet crucial distinction in ATS jurisprudence—"the fact that corporations are liable as juridical persons under domestic law does not mean that they are liable under international law (and, therefore, under the ATS)."[70]

The court dispelled the notion that mere consensus or agreement among civilized nations regarding the validity of a legal norm constitutes its recognition as a viable piece of customary international law.[71] Alternatively, the court made plain that controlling precedents—stemming from *Filartiga*—command that "the nations of the world . . . demonstrate[]" that the legal norm in question be "mutual, and not merely several concern" before rising to the level of an "international law violation within the meaning of the [ATS]."[72] Analyzed in this manner, the majority restated the inquiry in *Kiobel* to center on "whether a plaintiff bringing an

66. *Id.* at 116.
67. *See id.* at 116-17.
68. *Id.* at 117-18 (emphasis added).
69. *Id.* at 118 (emphasis added).
70. *Id.*
71. *Id.*
72. *Id.* (citing Filartiga v. Pena-Irala, 630 F.2d 876, 888 (2d Cir. 1980)).

ATS suit against a corporation has alleged a violation of customary international law."[73]

1. Emphasis on the Individual, Not the Juridical

In furtherance of the customary international law analysis required by any valid ATS claim, the court emphasized that the contemporary focus of international human rights law after Nuremberg—and more specifically, attaining *justice* for international human rights violations—had shifted away from states and towards individuals.[74] Before the Second World War, the only subjects held accountable for violations of international law and international human rights were States.[75] After the events of World War II and the Holocaust, however, the prosecutors at Nuremberg created a new international norm that would hold individuals personally accountable for their complicity with State functions.[76] The old method had unduly precluded international tribunals from attaining individual liability against government officials responsible for the illegal actions taken under color of state law.[77] As such, the close of the Second World War and the adjoining Nuremberg trials ushered in a major change in international legal jurisprudence: individuals, and not simply states, were now held responsible for violations of international law.[78]

Despite this resounding victory for victims of human rights abuses, the *Kiobel* court qualified use of the term "individual" to relate to its traditional meaning as employed by the Nuremberg prosecutors.[79] According to the court,

> from the beginning . . . the principle of individual liability for violations of international law has been limited to natural persons—not 'juridical' persons such as corporations—because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an "international crime" has rested solely with the individual men and women who have perpetrated it.[80]

The court concluded that this basic framework continued into the second half of the 20th century, as well as into present day practice of modern international

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73. *Id.*

74. *Id.* at 119.

75. *Id.* at 118.

76. *Id.* at 118-19 (citing Robert H. Jackson, *Final Report to the President Concerning the Nurnberg War Crimes Trial*, 20 TEMP. L.Q. 338, 342 (1946)).

77. *Id.* at 118-19 (citing Jackson, *supra* note 76).

78. *Id.* at 119 (citing Jackson, *supra* note 76).

79. *Id.*

80. *Id.* The court quoted the original words of the Nuremberg attorneys to further their argument: "'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'" *Id.* (quoting *The Nurnberg Trial (United States v. Goering)*, 6 F.R.D. 69, 110 (Int'l Military Trib. at Nuremberg 1946)).

tribunals.[81] As a prime example, the court cited the formation of the International Criminal Court ("ICC")—in which a proposal to confer the ICC with jurisdiction over juridical entities was "soundly rejected."[82]

2. *Sosa* and the Limited Scope of ATS Liability

As discussed *supra*, the ATS empowers federal courts with jurisdiction over claims "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[83] In the wake of Justice Souter's majority opinion in *Sosa*, the ATS has been classified definitively as a jurisdictional provision that does not in and of itself create a cause of action.[84] Though the Supreme Court recognized the validity of ATS claims based on safe conduct, violation of the rights of ambassadors, and piracy—three categories of customary international law applicable at the time of the ATS' passage—the *Sosa* Court "held that federal courts *may* recognize claims 'based on the present-day law of nations' provided that the claims rest on 'norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [the Court had] recognized.'"[85]

More directly related to the disposition of *Kiobel*, however, was the Second Circuit's emphasis on the text contained in footnote twenty of the *Sosa* opinion. Because the main issue before the court turned on the scope of ATS liability, the majority honed its attention to *Sosa's* limited discussion of the matter: "The Court also observed that 'a related consideration is whether *international law* extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or an individual.'"[86] As a cursory conclusion that foreshadowed their coming analysis, the court "conclude[d]—based on international law, *Sosa*, and our own precedents—that international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[87]

i. Domestic Law Does Not Define the Scope of ATS Liability

According to the court—citing well-known international treatises—"'the concept of international person is . . . derived from international law.'"[88] The court found it visibly apparent, particularly from the experience of the Nuremberg

81. *Id.*
82. *Id.*
83. 28 U.S.C. § 1350 (2006).
84. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004).
85. *Kiobel*, 621 F.3d at 125-26 (quoting *Sosa*, 542 U.S. at 725) (emphasis added).
86. *Id.* at 126 (quoting *Sosa*, 542 U.S. at 732 n.20).
87. *Id.*
88. *Id.* (quoting 1 *Oppenheim's International Law* § 33, at 120). The court quoted a portion of the Restatement of International Law: "Individuals and private juridical entities can have any status, capacity, rights, or duties *given them by international law or agreement* . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. II, at 70 (emphasis added).

Tribunal, that "the subjects of international law are determined by international law, and not individual States."[89] Therefore, under the court's analysis, the defendants in *Kiobel* could be liable under the ATS only if customary international law acknowledged corporations and other juridical persons as entities capable of perpetrating international harms.

ii. *Sosa* and Other Relevant Precedent Mandates International Law "Determine the Scope of Liability"

In addition to footnote twenty in *Sosa*'s majority opinion, the court reemphasized the importance of international law as the guardian of which actors may be liable under the ATS by noting a section of Justice Breyer's concurrence. Specifically, the court cited Justice Breyer's language that stated "[t]he norm [of international law] must extend liability to the *type of perpetrator* (e.g., a private actor) the plaintiff seeks to sue."[90] Said in its own words, the Second Circuit opined that "[a]lthough the text of the ATS limits only the category of *plaintiff* who may bring suit (namely, 'aliens'), its requirement that a claim be predicated on a 'violation of the law of nations' incorporates any limitation arising from customary international law on who properly can be named a *defendant*."[91]

This approach, the court concluded, was consistent not only with *Sosa*, but also with long heeded Circuit precedent. Beginning with *Filartiga*[92]—and followed by the prominent ATS cases *Khulumani v. Barclay Nat'l Bank Ltd.*,[93] *Kadic v. Karadzic*,[94] and *Tel-Oren v. Libyan Arab Republic*[95]—the court noted that federal judges consistently linked the scope of the ATS' liability to the precepts of customary international law.[96] The most recent example, the Second Circuit cited its 2009 case, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*,[97] which held that "footnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international law."[98] Thus, *Presbyterian Church* stands for the proposition that both the scope of the ATS and any substantive tort

89. *Id.* at 126-27.

90. *Id.* at 127-28 (emphasis added).

91. *Id.* at 127 n.30 (emphasis added).

92. Filartiga v. Pena-Irala, 630 F.2d 876, 889 (2d Cir. 1980) ("[T]he question of federal jurisdiction under the Alien Tort Statute . . . requires consideration of the law of nations . . . .").

93. 504 F.3d 254, 269 (2d Cir. 2007) (Katzmann, J., concurring) ("We have repeatedly emphasized that the scope of the [ATS's] jurisdictional grant should be determined by reference to international law.").

94. 70 F.3d 232, 236 (2d Cir. 1995) (holding that international law governs in terms of deciding whether liability attaches to international law violations committed by non-state actors).

95. 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) (stating the view that private entities could not be held liable under the ATS for torture).

96. *See Kiobel*, 621 F.3d at 128.

97. 582 F.3d 244 (2d Cir. 2009).

98. *Id.* at 258.

actions be a product of settled customary international law—with both prongs carrying equal weight in an ATS analysis.[99]

Due to the precedent that adhered to the footnote twenty requirement, the court was confident to say it had "little difficulty holding that, under international law, *Sosa*, and our three decades of precedent, we are required to look to international law to determine whether corporate liability for a 'violation of the law of nations'" constituted a part of customary international law.[100] Consequently, the court reasoned that in order to resolve the issue, it had to identify whether corporate liability for international law violations constituted "a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS."[101]

3. Corporate Liability vis-à-vis the Customary International Law Analysis

To begin its analysis of whether corporate liability for violations of the law of nations amounted to a norm of customary international law, the court stressed the difficult task and immense scrutiny involved for such a norm to "attain the status" required.[102] Specifically, in any customary international law analysis, the penultimate process is to consult the correct sources.[103] The mainstay approach to surveying nations for a recognized legal norm—and the primary method used by the court in *Kiobel*—stems from the now famed passage from *Paquete Habana*, a case from the early twentieth century:[104]

> Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.[105]

Heeding this approach, the court said that "with those principles [of *Paquete Habana*] in mind, we consider whether the sources of international law reveal that corporate liability has attained universal acceptance as a rule of customary international law."[106] The court then split its customary international law analysis

99. *Id.* at 259 (noting that "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place [under the ATS].").

100. *See Kiobel*, 621 F .3d at 128-30.

101. *Id.* at 130 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004)).

102. *Id.* at 131.

103. *See id.* at 131-32.

104. 175 U.S. 677 (1900).

105. *Id.* at 700.

106. *Kiobel*, 621 F.3d at 132.

in to individual sub-categories and analyzed the different sources and their respective treatment of corporate liability in the international arena.

i. International Tribunals

As the bodies primarily responsible for imposing liability for violations of international law, the court first turned its attention to international tribunals and their relationship with corporate liability.[107]

As discussed above, the court placed great emphasis on the history of the Nuremberg Tribunals—largely due to the Nuremberg experience serving as the first instance in which a tribunal prosecuted individuals in addition to states.[108] The Nuremberg Tribunals—authorized through the London Charter—were emphatic that jurisdiction for violations of the law of nations extend to "*natural persons* only."[109] As its bright line example, the court focused on the Nuremberg Tribunals' obvious demurral regarding liability for the well-known Nazi chemical supplier I.G. Farben.[110] The corporation is best remembered for producing "among other things, oil, rubber, nitrates, and fibers . . . harnessed to the purposes of the Nazi state."[111] Additionally, I.G. Farben engaged in widespread human rights violations: "[I]t is no exaggeration to assert that the corporation made possible the war crimes and crimes against humanity perpetrated by Nazi Germany, including its infamous programs of looting properties of defeated nations, slave labor, and genocide."[112] However, the more direct link for the purposes of the Nuremberg prosecutors was I.G. Farben's production of Zyklon B, a lethal insecticide used in Auschwitz's gas chambers.[113]

On account of the obvious human rights violations, twenty-four individuals affiliated with I.G. Farben were indicted and brought before the tribunal.[114] Nevertheless, I.G. Farben itself was not named a defendant at Nuremberg. The court, quoting original materials that covered I.G. Farben's role at Nuremberg, described the thought process of the Nuremberg officials in rendering this decision:

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107. *Id.*

108. *Id.* at 118-19.

109. *Id.* at 133.

110. *Id.* at 134-36.

111. *Id.* at 134.

112. *Id.* The court elaborated further on the relationship between Nazi officials and I.G. Farben:

> The depth of the partnership [between the Nazi state and I.G. Farben] was reached at Auschwitz, the extermination center [in Poland], where four million human beings were destroyed in accordance with the "Final Solution of the Jewish Question," Hitler's plan to destroy an entire people. Drawn by the almost limitless reservoir of death camp labor, I.G. [Farben] chose to build a great industrial complex at Auschwitz for the production of synthetic rubber and oil. *Id.* at 135.

113. *Id.* at 135.

114. *Id.*

> We have used the term "Farben" as descriptive of the instrumentality of cohesion in the name of which the enumerated acts of spoliation were committed. But corporations act through individuals and, under the conception of personal individual guilt . . . the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it.[115]

Due partly to this strong language, the Second Circuit stated that "[i]t is thus clear that, at the time of the Nuremberg trials, corporate liability was not recognized as a 'specific, universal, and obligatory' norm of customary international law."[116]

In addition to its analysis of Nuremberg, the court also discussed the applicability of corporate liability for international law violations in the context of modern international tribunals.[117] Specifically, the court focused on the governing charters of the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court.[118] In the case of the former Yugoslavia, a relevant report submitted by the tribunal to the Secretary-General of the United Nations showcased the tribunal's explicit rejection of jurisdiction over juridical persons—confining its reach to natural persons only.[119] Likewise, though the history of the Rwanda tribunal did not include an express rejection of juridical jurisdiction similar to the Yugoslavia tribunal, its grant of jurisdiction extended only to natural persons as well.[120]

Moreover, the court focused on the powerful example of the International Criminal Court ("ICC"). The Rome Statute—which sets forth the ICC's jurisdiction—limits the ICC's authority to adjudicate "natural persons" only, aligning it with the approach taken in Nuremberg, Yugoslavia, and Rwanda.[121] Perhaps even more damaging to the plaintiffs' case was a fact steeped in the legislative history of the Rome Statute. According to the court, during promulgation of the statute's terms, the French delegation attempted to add language that would have endowed the ICC with jurisdiction over juridical entities—specifically "corporations."[122] The court then cited the commentators who "have explained, the French proposal was rejected in part because 'criminal liability of corporations is still rejected in many national legal orders' and thus

115. *Id.* (quoting 7 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 ("THE FARBEN CASE") 11-60 (1952)).

116. *Id.* at 135-36.

117. *Id.* at 136.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 137.

would pose challenges for the ICC's principle of 'complementarity.'"[123] According to another treatise detailing the creation of the ICC's jurisdiction, the proposal "was finally withdrawn by the French delegation when it became clear that there was no possibility that a text could be adopted by consensus . . . . [f]or some delegations the whole notion of corporate criminal responsibility was simply 'alien', raising problems of complementarity."[124]

From this commentary, the court was able to derive a simple conclusion regarding the possible customary international law status of corporate liability vis-à-vis international tribunals: "[t]he history of the Rome Statute therefore confirms the absence of any generally recognized principle or consensus among States concerning corporate liability for violations of customary international law."[125]

ii. International Treaties

To further its customary international law analysis—that is, through the method set forth in *Paquette Habana*—the court turned to international treaties and the works of publicists to decipher any cognizable trend in corporate liability under international law.[126] Treaties serve as evidence of customary international law when "an overwhelming majority of States have ratified the treaty, and those States uniformly and consistently act in accordance with its principles."[127] Though, the court emphasized, "[t]hat a provision appears in one treaty (or more) . . . is not proof of a well-established norm of customary international law."[128] The court conceded that while there were numerous ratified treaties centered on "specialized questions" (e.g. a treaty against "Transnational Organized Crime") that included provisions extending corporate liability, the treaties themselves were limited in subject matter and did not adequately incorporate the purpose of protecting human rights.

As the court explained:

> Even if those specialized treaties had been ratified by an "overwhelming majority" of states . . . the fact that those treaties impose obligations on corporations in the context of the treaties' particular subject matter tells us nothing about whether corporate liability for, say, violations of human rights, which are not a subject of those treaties, is universally recognized as a norm of customary international law. Significantly, to

123. *Id.* As defined by the *Kiobel* court "'[c]omplementarity' is the principle, embodied in the Rome Statute, by which the ICC declines to exercise jurisdiction over a case that is simultaneously being investigated or prosecuted by a State having jurisdiction over it." *Id.* at 137 n.39.

124. *Id.* at 137 (quoting Andrew Clapham, *The Question of Jurisdiction Under International Criminal Court over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, *in* LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW 139, 157 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000)).

125. *Id.*

126. *Id.* at 137, 140.

127. *Id.* at 137 (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 256 (2d Cir. 2003)).

128. *Id.* at 138 (emphasis omitted).

> find that a treaty embodies or creates a rule of customary international law would mean that the rule applies beyond the limited subject matter of the treaty and to nations that have not ratified it. To construe those treaties as so-called 'law-making' treaties—that is, treaties that codify existing norms of customary international law or crystallize an emerging rule of customary international law—would be wholly inappropriate and without precedent.[129]

Because the court found these specialized treaties failed to ripen into a generalized rule of customary international law, basing the existence of a new international norm on a few select treaties would "create friction in our relations with foreign nations and, therefore, would contravene the international comity the statute [ATS] was enacted to promote."[130]

4. Conclusion and Disposition

The majority opinion concluded by holding that the above analysis led to the inevitable disposition that the plaintiffs' claim against the defendants must be dismissed for lack of subject matter jurisdiction under the ATS.[131] Accordingly, the Second Circuit affirmed the lower court's ruling related to its dismissal of the claims against the corporate defendants and reversed the lower court "insofar as it declined to dismiss" the outstanding claims against the defendants.[132]

C. The Concurring Opinion

Judge Leval issued a separate opinion concurring only in judgment. Though he believed the majority correctly dismissed the claims against the defendants—albeit on grounds that the plaintiffs failed to "plead a violation of the law of nations"[133]—the bulk of Judge Leval's concurrence was designed to undermine the majority opinion's primary holding.[134] Judge Leval's disagreement with the majority's approach to ATS liability was strident in both its terms and language.[135] Indeed, even the majority opinion mentioned from the outset of its analysis that they were "perplexed by Judge Leval's repeated insistence that there is no 'basis'" for their holding.[136] According to Judge Leval, the majority's approach would usher in a system where "one who earns profits by commercial exploitation of abuse of fundamental human rights can successfully shield those profits from victims' claims for compensation simply by taking the precaution of conducting

129. *Id.* (emphasis omitted) (citations omitted).
130. *Id.* at 141.
131. *Id.* at 149.
132. *Id.*
133. *Id.* at 188, 196 (Leval, J., concurring).
134. *See id.* at 149-88.
135. *See id.*
136. *Id.* at 120 (majority opinion) (quoting *id.* at 151) (Leval, J., concurring) (noting that the majority's position lacked support from adequate precedent and scholarship).

the heinous operation in the corporate form."[137] In a sense, Judge Leval argued, *Kiobel* would usher in a new era of "unscrupulous businesses advantages . . . never before dreamed of."[138]

The main thrust of Judge Leval's concurrence rested on the simple difference between criminal and civil liability.[139] Though the majority cited rather persuasive authority claiming international law is generally blind to the later distinction,[140] Judge Leval found the majority's reliance on *criminal* tribunals to discern a lack of international consensus regarding corporate liability to be wholly misplaced in ATS jurisprudence.[141] This conclusion stemmed from the basic scope and structure of the ATS—a device designed to award plaintiffs civil tort damages for aliens who have been harmed by a violation of the law of nations.[142] If viewed alone as a creature of civil tort law, then ATS liability—according to Judge Leval—cannot be reconciled with the majority's reliance on the refusal of international tribunals to *criminally prosecute* corporations.[143] As Judge Leval opined:

> The reasons why international tribunals have been established without jurisdiction to impose *criminal* liability on corporations have to do solely with the theory and the objectives of *criminal punishment*, and have no bearing on civil compensatory liability. The view is widely held among the nations of the world that criminal punishments (under domestic law, as well as international law) are inappropriate for corporations. This view derives from two perceptions: First, that criminal punishment can be theoretically justified only where the defendant has acted with criminal intent—a condition that cannot exist when the defendant is a juridical construct which is incapable of having an intent; and second, that criminal punishments are pointless and counterproductive when imposed on a fictitious juridical entity because they fail to achieve the punitive objectives of criminal punishment. For these reasons many nations in their domestic laws impose criminal punishments only on natural persons, and not on juridical ones. In contrast, the imposition of civil liability on corporations serves perfectly the objective of civil liability to compensate victims for the wrongs inflicted on them and is practiced everywhere in the world. The fact that international tribunals do not impose *criminal punishment* on corporations in no way supports the inference that corporations are outside the scope of international law and therefore can incur no *civil*

137. *Id.* at 149-50 (Leval, J., concurring).
138. *Id.* at 150.
139. *See id.* at 151.
140. *See id.* at 146-47.
141. *Id.* at 151-52.
142. *Id.* at 151.
143. *See id.*

> *compensatory liability* to victims when they engage in conduct prohibited by the norms of international law.[144]

He then noted that "[i]nternational law distinguishes clearly between them [criminal and civil liability] and provides differently for the different objectives of criminal punishment and civil compensatory liability."[145] The majority's purported legal flaw, that there was no dividing line between the two, prompted Judge Leval to believe that "international law takes no position" and thus grants each nation individual discretion whether they wish to impose civil liability on international tortfeasors.[146]

In addition to his conclusion that criminal punishment of corporations is not a recognized aspect of criminal law, the concurrence also claimed that the majority opinion was inconsistent with *Sosa*, argued that corporations are "subjects" of international law, and took *Sosa*'s footnote twenty out of context.[147] A large portion of Judge Leval's concurrence regarding footnote twenty will be used to develop the main thesis of this Article's analysis in Section IV.

IV. ANALYSIS

As noted above, the Second Circuit relied heavily on footnote twenty of the *Sosa* opinion in holding that liability under the Alien Tort Statute was governed by international, and not domestic, legal norms.[148] This Article will argue that the court's interpretation of footnote twenty was incorrect.

It is crucial to better understand the background of footnote twenty, as the Second Circuit offered little in its majority opinion. Justice Souter's opinion in *Sosa* can be categorized—at least in relevant part to Alvarez's ATS claims—into three main prongs. In the first prong, the Court held the ATS was jurisdictional in nature, affirmed that it had "practical effect the moment it became law"—thus granting jurisdiction for claims based on piracy, safe conduct, and ambassador relations—and devised a historical test for federal courts to confer jurisdiction over additional international "norm[s] of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[149]

In the second prong, the Court argued against Justice Scalia's concurrence. Though Justice Scalia agreed that the three 18th century claims were applicable under the ATS, he disagreed that "today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action."[150] In other words, Justice Scalia believed that the historical test created by the majority—

144. *Id.* at 151-52.
145. *Id.* at 152.
146. *Id.*
147. *Id.* at 164-78.
148. *See id.* at 126 (majority opinion).
149. Sosa v. Alvarez-Machain, 542 U.S. 692, 724-25 (2004).
150. *Id.* at 729.

designed to ensure that "the door [to the federal courts] is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today"—was incompatible without further legislation.[151] In response to this argument, Justice Souter noted that the courts "would welcome any congressional guidance in exercising jurisdiction . . . [yet] nothing Congress has done is a reason for us to shut the door to the law of nations entirely."[152]

The third and final prong of *Sosa*—the one in which footnote twenty appears—is the portion of the opinion that applies the Court's new historical test against the specific arbitrary detention claim raised by Alvarez-Machain under the ATS.[153] Footnote twenty appears in the first paragraph of this section—as part of its third and closing sentence—following a series of standard legal principles discussing the criteria for applicable norms of customary international law.[154] In fact, the entire paragraph is devoted to elaborating, more or less, on the *Paquette Habana* approach to discerning customary international law.[155] For instance, the Court noted in the second sentence that an actionable norm of customary international law must be accepted among civilized nations, and quoted *Filartiga*'s well-known passage that "for purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind."[156]

In the third and final sentence of the paragraph, the Court included additional substance to its historical test, opining that "the determination whether a norm is sufficiently definite to support a *cause of action* should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts."[157] It is right after the "to support a cause of action" language that Justice Souter inserted footnote twenty. The full text of footnote twenty is as follows:

> A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (C.A.D.C.1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic v. Karădzic*, 70 F.3d 232, 239-241 (C.A.2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).[158]

151. *Id.*
152. *Id.* at 731.
153. *Id.* at 731-32.
154. *Id.* at 732.
155. *See id.*
156. *Id.*
157. *Id.* at 732-33 (emphasis added).
158. *Id.* at 732 n.20.

A. Liability Distinct from Cause of Action

From the outset, it is obvious that the surrounding text of footnote twenty is focused on one subject only: the requisite methodology for determining whether an ATS *cause of action* is viable. In this sense, the cause of action emphasis is related to the *Paquette Habana* approach for identifying international claims. Nowhere, however, does the opinion's text relate—even remotely—to the issue of ATS *liability*. That is, if the Second Circuit's interpretation of footnote twenty is correct, the language of the footnote is at the very least wholly independent from the text of the opinion itself. It is not a sufficient legal basis to assume the two are linked inextricably; the viability of a substantive legal norm under the ATS is simply a distinct concept from the list of possible defendants subject to ATS liability. The language of the footnote, it then follows, must justify the Second Circuit's position—a requirement that is not met.

The one and only sentence of footnote twenty states that "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual."[159] If read in a vacuum, and without any further guidance, it would perhaps be understandable as to why the Second Circuit felt so strongly that *Sosa* prohibited ATS claims against corporations. In a sense, the language of the footnote is ambiguous with regard to its application of ATS *claims* versus ATS *liability*. Certainly, if other indicators were absent, the Second Circuit would have stronger justification for its holding. The footnote does make clear in simple language that (1) international law controls issues of liability under the ATS and (2) juridical entities, such as corporations, as non-state actors are not definitively liable if international law so directs. The Second Circuit took this language as the basis for engaging in a customary international law analysis to determine whether juridical persons are liable for violations of the law of nations. As discussed *supra* in Part III, the Second Circuit found that the pertinent treaties, norms, and sources indicated the law of nations did not mandate that such entities are liable for international harms.

This analysis is changed, however, when one considers the citations on which footnote twenty relies. Justice Souter included reference to two major ATS circuit court cases—the concurring opinion in *Tel-Oren v. Libyan Arab Republic* and the majority opinion in *Kadic v. Karădzíc*. In *Tel-Oren*, the D.C. Court of Appeals discussed and held, *inter alia*, that torture committed by private individuals does not violate customary international law.[160] Likewise, in *Kadic*, the Second Circuit held that the act of genocide, even if committed by private actors, is a violation of the law of nations.[161] And though these cases appear to discuss the divide between juridical and State actors, they both represent a different premise than the issue

159. *Id.*

160. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring).

161. Kadic v. Karadzic, 70 F.3d 232, 239-41 (2d Cir. 1995).

presented in *Kiobel*: whether the law of nations holds corporate defendants liable for violations of international harms. As Judge Leval said in his dissent, "[n]othing in the *Tel-Oren* or *Kadic* opinions suggests in any way that the law of nations might distinguish between conduct of a natural person and of a corporation. They distinguish only between private and State action."[162] In other words, while *Kiobel* is concerned with the appropriateness of ATS liability for corporations—converse from Nuremberg's jurisdictional grant covering individuals exclusively—the case law serving as the basis for footnote twenty is related uniquely to whether the laws of nations *is still violated*, for a particular internationally recognized harm, *when the perpetrator is a private party rather than the State.*

We are then left with a basic equation for understanding the distinction between footnote twenty and *Kiobel*: footnote twenty pertains to whether an international law violation is *triggered by a particular actor* while *Kiobel* rests on whether a juridical *defendant can successfully be sued under the law of nations.*

B. Applying the Formula to Typical ATS Claims

The distinction outlined above is best understood when applied practically. As an illustrative example, consider two separate cases with an identical fact pattern. In the first case, the issue is controlled by *Kiobel*, and in the second, footnote twenty, *Kadic*, and *Tel-Oren* is the dispositive law.

1. The Private Defendant

The facts are as follows: plaintiff, a man of Sudanese nationality, brings suit in federal district court under the ATS seeking tort damages for genocide. Plaintiff names, among others, a corporation that aided the Sudanese government in carrying out the killings by financing parts of the State's operation. Assume also that the plaintiff can show injury (i.e., the death of a family member), and the corporation is deemed to be complicit in the genocide.

In the first case, we apply *Kiobel.* Since the defendant is a corporation, the issue would turn on whether international law mandates dismissal of the ATS claim by virtue of the defendant's juridical nature. Here, international law has spoken clearly on the extent of liability for genocide. Because those who commit the act of genocide are considered *hostis humani generis* (an enemy of all mankind), a corporate entity may be liable for commission of such an offense. Culpability for the defendant would thus be a foregone conclusion.

Conversely, assume the same set of facts, but footnote twenty is the dispositive law. If applied with due deference to *Kadic* and *Tel-Oren*, plaintiff's claim would now turn on the character of the perpetrator. Instead of *Kiobel*'s concern of whether the corporation could be liable under the law of nations,

162. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 165 (2d Cir. 2010) (Leval, J., concurring).

footnote twenty would seek to ensure that the underlying claim—genocide, in this instance—was itself a cause of action that the juridical entity in question could commit and, irrespective of that entity's private or public composition, still rise to the status of a customary international law violation. In the case of our plaintiff, under the *Kadic* rule, the international norm condemning genocide is so pronounced that it is considered a violation of the law of nations when committed either by a juridical entity or the State. In other words, the private corporation is capable of committing the offense so as to render it a violation of customary international law. This is dissimilar from *Kiobel*, in that it is concerned with a workable cause of action and not potential liability of the defendant.

The key distinction is more evident when analyzing an ATS violation that fails because a private actor cannot serve as the culprit. Assume in *arguendo*, the cause of action brought by the Sudanese plaintiff is torture rather than genocide. Torture, unlike genocide, is a violation of customary international law only when inflicted by State actors. If this were the case, plaintiff's ATS claim against the corporate defendant would clearly not survive as a consequence of footnote twenty and *Tel-Oren*. More precisely, plaintiff will have failed to state a claim recognized under international law because private corporations are precluded from violating the law of nations by engaging in torture. While the result under *Kiobel* is unchanged, the altered claim demonstrates the competing motivation for footnote twenty.

The difference is certainly subtle, but nonetheless persuasive and important. When re-read in this context, footnote twenty takes on another meaning. As Judge Leval wrote:

> If the violated norm is one that international law applies only against States, then "a private actor, such as a corporation or an individual," who acts independently of a State, can have no liability for violation of the law of nations because there has been no violation of the law of nations. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or a private actor, then "a private actor, such as a corporation or an individual," has violated the law of nations and is subject to liability in a suit under the ATS.[163]

2. The State Defendant

Consider now the case of an ATS claim involving a State-actor defendant with an unsettled cause of action. In this example, plaintiff brings suit against the Sudanese government for accepting bribes to initiate oil operations in various Sudanese villages. Some time after drilling begins, plaintiff alleges an oil company murdered and tortured his family for protesting the negative environmental impact of the company's operations. Plaintiff also names the

163. *Id.* (emphasis omitted).

Sudanese government in the ATS complaint for purported violations of customary international law by aiding and abetting the company by accepting kickbacks to secure corporate oil leases in the region.

Through *Kiobel*, it is clear the Sudanese government is a plausible defendant under international law. As noted above, the ATS clearly delineates the authority of federal courts to hear cases against public actors for violations of customary international law. However, footnote twenty and its related case law would beg the following questions: (1) does international law recognize a cause of action for killings and tortures perpetrated by private companies, and, (2) under international law, does a cause of action exist against a State-actor that aids and abets a private company commit murder and torture? By flipping the issue in *Kiobel*—that is, placing emphasis on the cause of action rather than the defendant—one can better see that footnote twenty controls possible claims instead of possible defendants.

C. Revisiting the Second Circuit's Approach Through a New Lens

A different view of footnote twenty was also supported by an influential *amici*—the European Commission. According to the Commission:

> [O]nly a subset of norms recognized as customary international law applies to non-state actors, such as corporations, and hence only that subset may form the basis of liability against such actors. For example, non-state actors may be liable for genocide, war crimes, and piracy, while torture, summary execution, and prolonged arbitrary detention do not violate the law of nations unless they are committed by state officials or under color of law.[164]

Possible negative reaction to *Kiobel*'s interpretation of footnote twenty should not be surprising. After all, it was contained in a section of *Sosa* devoted entirely to espousing the validity of ATS *claims*. The footnote even follows the phrase "cause *of action*."[165]

To point out the inaccuracy of the Second Circuit's approach, we return to the specific language in *Kiobel*: "based on international law, *Sosa*, and our own precedents—that international law, and not domestic law, governs the scope of liability for violations of customary international law under the ATS."[166] Though other sources of international law may eventually validate the holding of *Kiobel*, what is concerning about the case is that it places undue influence on *Sosa* and internal circuit precedent. The Second Circuit did not interpret the difference between footnote twenty and the issue in *Kiobel* as narrowly as this Article. Citing *Talisman*, the Second Circuit argued that "footnote 20 of *Sosa*, while nominally concerned with the liability of non-state actors, supports the broader principle that the scope of liability for ATS violations should be derived from international

164. *Id.* at 165 n.17.

165. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

166. *Kiobel*, 621 F.3d at 126.

law."[167] It would be hard for the Supreme Court, on review of an appellate decision, to agree that footnote twenty is only "nominally concerned" with liability of non-state actors. The Second Circuit in *Talisman*, like *Kiobel*, appears to have interpreted footnote twenty to turn on whether the law of nations recognizes a cause of action instead of whether a particular defendant is liable for such a violation.

Thus, the Second Circuit's conclusion that footnote twenty controls the issue in *Kiobel* is a clear misinterpretation of the Supreme Court's emphasis on *Tel-Oren* and *Kadic*. It appears the court read the language through the lens of *Kiobel*, and failed to understand the true motivation for Justice Souter's insertion of footnote twenty into *Sosa*. At first blush, the text of the footnote is supportive of *Kiobel*'s holding but, upon further inspection, pertains to a separate issue of ATS jurisprudence. Though other sources of international law—such as the Second Circuit's reliance on international tribunals and the work of scholars—may vindicate *Kiobel*, litigants should be wary of citing *Kiobel* for the proposition that juridical defendants are shielded from liability under the ATS. Instead, they should undergo a typical customary international law analysis, mimicking other portions of the Second Circuit's opinion.

V. CONCLUSION

The purpose of this Article was twofold. First, to provide an objective analysis of the *Kiobel* case—including the factual background, court rulings, and majority and concurring opinions. Second, this Article was designed to show the fallacy that the Second Circuit relied on to bolster its holding that international law dictates the boundaries of ATS liability. Footnote twenty of the *Sosa* opinion, though illuminating in other aspects, is not applicable to the disposition of *Kiobel*. On account of this fallacy, it is important for future ATS litigants to be mindful of the trap *Kiobel* has laid.

The conclusion of this article rests on the following premise: both the *Kiobel* decision and footnote twenty should not serve as the primary basis for asserting the law of nations governs ATS liability. Instead, a wise litigant would be mindful of the Second Circuit's other arguments—the ones flowing from the traditional *Paquette Habana* approach—such as the use of international tribunals, treaties, and academic treatises to either support or undermine the claim that the law of nations is binding on ATS liability and defendants.

167. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 258 (2d Cir. 2009).

IN PRINCIPLE BUT NOT IN PRACTICE: THE EXPANSION OF ESSENTIAL STATE INTERESTS IN THE DOCTRINE OF NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW

*Jonathan Bellish**

I. INTRODUCTION

Suppose that two sailors, A and B, are shipwrecked in the middle of the ocean. Both sailors simultaneously notice a floating plank, but it is only big enough to support one of the two men. Exhausted, Sailor A swims to the plank first, but Sailor B, facing certain death, decides to push A off of the plank and A drowns. Does B have a legally valid defense for his actions? Around 155 B.C., the Greek philosopher Carneades set forth this hypothetical situation, known today as "the plank of Carneades," to posit that strict necessity could serve as a valid defense for an otherwise unlawful action.[1] Indeed, the concept of necessity in law is as old as Western society itself.

Over the years, the doctrine of necessity has moved beyond the municipal realm, and now plays an integral role in the law of nations. Regardless of whether the defense of necessity is a stated exception to the laws of war or a *post facto* excuse for a breach of international obligations, essential state interests are at the heart of the doctrine's invocation and application. Until the late twentieth century, a state's "essential interests" were limited to those necessary to maintaining the existence of a state in the face of foreign or domestic violence of a military nature. This paper explores the expansion of the concept of essential state interests during the late twentieth century, as it grew to include both ecological and economic interests. Surprisingly, this nominal expansion did little in the way of expanding the applicability of the doctrine of necessity as a whole.

Part II tracks the historical development of the doctrine of necessity under customary international law from a mere diplomatic pronouncement to a formally recognized doctrine capable of overriding express treaty obligations. Part III expounds upon the role of essential state interests in the modern application of the doctrine of necessity, showing that their primary function is to limit the use of the doctrine. Part IV shows that the initial expansion of essential state interests to include ecological interests, as seen in the *Case Concerning the Gabčíkovo* -

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1. *See, e.g.*, Khalid Ghanayim, *Excused Necessity in Western Legal Philosophy*, 19 CAN. J. L. JURIS. 1 (2006), *available at* http://ssrn.com/abstract=995343.

Nagymaros Project, will not likely lead to a near term increase in the successful use of the doctrine to protect such interests. Part V moves from ecological interests to economic ones, and seeks to explain the dichotomy in the International Centre for the Settlement of Investment Dispute's ("ICSID") holdings in *CMS v. Argentina* and *LG&E v. Argentina*; the former ruled that the Argentine financial crisis of the late 1990's created a state of necessity while the latter ruled that it did not. Part VI suggests that ICSID jurisprudence following the *CMS* and *LG&E* is proof that economic interests, despite their characterization as "essential state interests" in *LG&E v. Argentina*, will not lead to an expansion of the successful use of the doctrine. Part VII discusses the future of the doctrine of necessity as it relates to ecological and economic necessity. Part VIII concludes.

II. THE DEVELOPMENT OF THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW

The first case to mention the concept of necessity in the context of international law was in fact not a case at all. Rather, it was a diplomatic dispute between Great Britain and the United States of America. Nevertheless, "[i]t was in the *Caroline Case* that self-defence was changed from a political excuse to a legal doctrine."[2] Accordingly, the modern doctrine of necessity under customary international law can be traced directly to the end of the Canadian Rebellion of 1837.[3]

After the Canadian insurgents had been largely defeated, two rebels, McKenzie and Rolfe, travelled to Buffalo, New York where they assembled a force of several hundred men to carry out a rebellion.[4] The group, made up primarily of American citizens, openly invaded and took control of Navy Island, a possession of the British, and held the island for seventeen days.[5] During the siege, the insurgents used an American steamship, "The Caroline," to make trips between Navy Island and Fort Schlosser, an American military base in Buffalo, to supply the rebels with weapons and ammunition.[6] On the seventeenth night of the siege, a British Colonel boarded "The Caroline" with approximately seventy-five men and set the vessel on fire, sending it over Niagara Falls and killing two Americans in the process.[7]

Initially, the British acted as if there would be no repercussions for their taking of "The Caroline," but when the Americans arrested Alexander McLeod and charged him with murder and arson in connection with the taking, it became a serious diplomatic incident.[8] The British raised three defenses in response to the charges against them, namely, (1) the piratical character of "The Caroline," (2) that the ordinary laws of the United States were not being enforced, and (3) the defense

2. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938).
3. *Id.*
4. *Id.*
5. *Id.* at 83.
6. *Id.*
7. *Id.* at 84.
8. *Id.* at 85.

of self-preservation.[9] During negotiations between Mr. Webster, the American Secretary of State, and Mr. Fox, the British Minister at Washington D.C., the British quickly dropped the first two defenses and only spoke of self-preservation in vague terms.[10] However, during the course of the diplomatic negotiations, Secretary of State Webster sent the British a now-famous note clarifying the concept of self-preservation as a defense. According to Webster, the necessity of self-defense must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[11] Furthermore, it must be shown that the moment of necessity authorized the Canadian officials to enter the territory of the United States, that once inside United States territory the Canadian officials did nothing unreasonable or unnecessary, and that all other options were either unpractical or would be unavailing.[12]

In response, Lord Ashburton was able to fit the facts of the taking of "The Caroline" into the framework provided by Webster.[13] As a preliminary matter, the taking of "The Caroline" was necessary because the insurgent forces were assembled in America and the American government was either unwilling or unable to stop them.[14] Additionally, when the British went looking for "The Caroline" they expected her to be moored off of Navy Island, and it was not until the last minute that they realized that she was moored in American territory leaving them no time for deliberation.[15] Finally, Lord Ashburton justified the measures taken as being reasonable, necessary, and narrowly tailored to the exigencies of the situation. He claimed that the British forces attacked at night in order to minimize casualties, set the ship on fire because they feared that the current alone would not be strong enough to carry the ship away, and brought the ship to the middle of the river to prevent injuries to persons or properties on the bank.[16]

Although Lord Ashburton's response could be seen as an "ingenuous attribution of altruistic motives to acts of a doubtful character,"[17] Daniel Webster accepted the apology with which Lord Ashburton closed his letter.[18] In the end, the two governments agreed on the principle of non-intervention and recognized the narrowness of its exceptions.[19]

This chain of events is important to the development of the doctrine of necessity under customary international law in that it moved away from a loosely defined natural-rights conception of a state's primordial right to self-preservation

9. *Id.*
10. *Id.* at 86.
11. *Id.* at 89.
12. *Id.*
13. *Id.*
14. *Id.* at 90.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 91.
19. *Id.*

and replaced it with more concrete principles. Through Daniel Webster's framework for self-preservation and Lord Ashburton's acquiescence to that framework, the parties defined the limits of self-preservation, sought to establish some substantive content to fill the framework, and subjected self-preservation in violation of international customary law to the limiting condition of strict necessity. It took almost one hundred years for the principles established in *The Caroline Case* to enter a judicial opinion.[20] As is so often the case, they appeared for the first time in a dissent.[21]

The Case of the S.S. Wimbledon involved an English steamship chartered by a French company shortly after World War I.[22] The ship, carrying 4,200 tons of munitions, was headed for the Polish Naval Base at Danzig when, on the morning of March 21, 1921, it approached the Kiel Canal in Germany.[23] At that point, the *S.S. Wimbledon* was denied passage through the canal because Germany had declared itself a neutral in the ongoing Russo-Polish War and had issued Neutrality Orders on July 25, 1920 stating that no ships carrying munitions destined for Poland or Russia would be allowed to pass through the Canal.[24] The delay cost the ship thirteen days.[25]

On its face, the denial of passage on the part of the German government directly contradicted Article 380 of the Peace Treaty of Versailles, a treaty that Germany signed and ratified at the end of the First World War, which read, "[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[26] The Permanent Court of International Justice agreed that this provision was binding notwithstanding German neutrality.[27]

According to the majority, the effect of Article 380 was that the Kiel Canal ceased to be an internal waterway under the sovereign control of the riparian power and instead became an international waterway intended to provide universally available access to the Baltic Sea.[28] The only condition affecting the provision was that the nation seeking passage be at peace with Germany.[29] The *S.S. Wimbledon*, "belonging to a nation at that moment at peace with Germany, was entitled to free passage,"[30] and no claims of neutrality or sovereignty could override the international obligations created by the treaty provision in question.[31]

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20. S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 36 (Aug. 17).
21. *Id.*
22. *Id.* at 16.
23. *Id.* at 19.
24. *Id.*
25. *Id.*
26. Treaty of Versailles art. 380, June 28, 1919, 3 U.S.T. 3714.
27. S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 39 (Aug. 17).
28. *Id.* at 22.
29. *Id.*
30. *Id.*
31. *Id.* at 29.

Accordingly, the Permanent Court of International Justice held that Germany was required to pay all costs associated with the delay, with interest.[32]

In a dissent, Judges Anzilotti and Huber articulated for the first time that the notion of necessity could allow a nation to abrogate its treaty obligations.[33]

> If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application [of a treaty] in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention.[34]

The dissenters went on to state that "[t]he right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it."[35] Thus, the dissent concluded that a state of necessity overrode Article 380 and allowed Germany to protect its interests as a neutral power.[36]

Anzilotti's and Huber's dissent in *The Case of the S.S. Wimbledon* advanced the doctrine of necessity under customary international law in two important ways. First, it announced that a state of necessity could excuse a nation from its treaty obligations. In *The Caroline Case*, necessity was used as an exception to uncodified custom, and it is unclear whether such a defense would have been valid if the actions taken in *The Caroline Case* contradicted an express treaty obligation. Second, the dissent in *The Case of the S.S. Wimbledon* advanced the notion that the protection of essential state interests was the underlying rationale for invoking necessity in abrogating international obligations. In this case, Germany's interest in maintaining its security and integrity was seen as essential enough to merit a defense of necessity.[37] Indeed, until the late twentieth century, national security was seen as the only state interest essential enough to merit a valid necessity defense.[38] However, it took considerably less time for the doctrine of necessity—at least as it relates to existential interests and express treaty obligations—to move from the dissent to the majority.

The Lawless Case was the first of its kind in two important respects. In addition to being the first opinion delivered by the European Court of Human Rights, it was the first successful necessity defense raised by a country found to have violated express treaty provisions.[39] In 1939, the Parliament of the Republic of Ireland passed the Offenses Against the State Act in response to violent acts

32. *Id.* at 31.
33. *Id.* at 36.
34. *Id.*
35. *Id.* at 37.
36. *Id.* at 40.
37. *Id.*
38. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 68 (Sept. 25).
39. *See* Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 34 (1961).

perpetrated by the Irish Republican Army ("IRA").[40] This act outlawed membership in any "unlawful organization" and allowed for the arrest and detention, without warrant, of any person suspected of carrying out or conspiring to carry out violent acts on behalf of an unlawful organization.[41] On June 23, 1939, nine days after the Offenses Against the State Act entered into force, the IRA was declared an unlawful organization under the meaning of the Act.[42] Many arrests and detentions were made but were subsequently declared unconstitutional by the High Court.[43] As a result, Parliament passed an amended version of the Act in 1940 which allowed for detention without trial "if and whenever and so often as the Government makes and publishes a proclamation declaring that the Powers conferred by this part of this Act are necessary to secure the preservation of the public peace and order."[44]

From 1940 through the early 1950's, there was little IRA activity, but in 1954, an outbreak of IRA violence led to the destruction of railway bridges, attacks on police barracks, sabotage of telephone wires, and robberies of munitions stores.[45] In response to the attacks, the Irish government activated the power of arrest and detention from Section 3, Subsection 2 of the 1940 Act and published its proclamation in the Official Gazette on July 5, 1957.[46]

On July 11, 1957, G.R. Lawless, a known member of the IRA, was arrested for being a member of an unlawful organization while he was about to embark on a ship to England.[47] Though he was supposed to be held for only forty-eight hours, he was instead transferred to a military prison in the Currah, County Kildare, known as "The Glass House."[48] He was subsequently transferred to a nearby internment camp where he was detained for five months without formal charges or a trial.[49] After exhausting his domestic appeals with no avail, Lawless introduced an application to the newly formed European Court of Human Rights seeking his immediate release from detention, payment of compensation and damages for his detention, and payment of all legal costs incurred.[50] Though he was released shortly after his appeal was filed, Lawless continued to pursue his claim against the government for compensation, damages, and reimbursement in the European Court of Human Rights.[51]

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40. *Id.* at 5.

41. Offences Against the State Act, 1939 (Act No. 13/1939) § 30(1) (Ir.), *available at* http://acts.oireachtas.ie/en.act.1939.0013.1.html.

42. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 7 (1961).

43. *Id.*

44. Offences Against the State (Amendment) Act, 1940 (Act No. 2/1940) § 3(2) (Ir.), *available at* http://www.irishstatutebook.ie/1940/en/act/pub/0002/index.html.

45. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 8 (1961).

46. *Id.* at 9.

47. *Id.* at 12.

48. *Id.*

49. *Id.*

50. *Id.* at 14.

51. *Id.*

As a preliminary matter, the European Court of Human Rights held that Lawless' detention violated Article 5 of the European Convention on Human Rights, which states that "[e]veryone has the right to liberty and security of person,"[52] and that no person shall be deprived of that liberty unless "the lawful arrest or detention of a person [is] effected for the purpose of bringing him before a competent legal authority."[53] Additionally, Article 5 provides that "[e]veryone arrested or detained . . . shall be brought promptly before a judge . . . and shall be entitled to trial within a reasonable time or to release pending trial."[54] Because Lawless was not arrested for the purposes of bringing him before a judge and was not, in fact, brought before a judge within a reasonable time, the court found that Government of the Republic of Ireland violated Article 5 (1)(c) and 5(3).[55]

However, Article 15 of the European Convention on Human Rights provides for a necessity defense, and the European Court of Human Rights found that Ireland acted within the bounds of Article 15.[56] Section 1 of Article 15 states that:

> [i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[57]

According to the Court, the three prongs of a necessity defense under Article 15—the existence of an emergency threatening the life of a nation, the measures taken being strictly required by the state of necessity, and the measures taken not being in violation of any other obligations under international law—were all met by the Republic of Ireland.[58]

First, the Court found that the existence of a secret army carrying out unconstitutional acts and operating both within and outside of the territory of Ireland constituted a state of emergency that threatened the existence of Ireland under the meaning of Article 15.[59] Second, alternative measures—such as the application of ordinary criminal law, the institution of special criminal courts or military tribunals, or the sealing of the border between the Republic of Ireland and Northern Ireland—would not have been effective in mitigating IRA violence.[60] These alternative measures would not have worked, according to the Court, because of the difficulty in amassing evidence against the IRA due to its secret nature and the fear it instilled among the general population.[61] Sealing the border

52. European Convention on Human Rights art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 221.
53. *Id.* art. 5(1)(c).
54. *Id.* art. 5(3).
55. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 7 (1961).
56. *Id.* at 27.
57. European Convention on Human Rights, *supra* note 52, art. 15(1).
58. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (Ser. A) at 34 (1961).
59. *Id.* at 27.
60. *Id.* at 29.
61. *Id.*

would have burdened the general population beyond the extent required.[62] Finally, the Court found no evidence suggesting that the acts carried out by the Republic of Ireland violated other obligations under international law.[63] As a result, the Court unanimously held that there was no violation due to a successful necessity defense under Article 15 of the European Convention on Human Rights.[64]

The Lawless Case continued in the vein of the dissenting opinion in *The Case of the S.S. Wimbledon* by basing a necessity defense on the protection of an essential state interest—in this case described as "the life of the nation."[65] It also followed *The Case of the S.S. Wimbledon* in holding that a state of necessity can allow a nation to abrogate an express treaty provision. It differs markedly, however, from both *The Case of the S.S. Wimbledon* and *The Caroline Case* in that *The Lawless Case* relied on an express provision in the European Convention on Human Rights rather than an excuse under customary international law. Nonetheless, Article 15 of the European Convention on Human Rights likely crystallized the already-existing custom of necessity as a defense; it certainly did not announce the custom itself. Thus, the doctrine of necessity is available to states as an express exception in positive law and as an implied custom of the law of nations. Regardless of the form the defense takes, essential state interests remain at the heart of the doctrine of necessity.

III. THE ROLE OF ESSENTIAL STATE INTERESTS IN THE DOCTRINE OF NECESSITY

As already alluded to, essential state interests play a central role in the doctrine of necessity. Simply put, the primary function of the concept of essential state interests is to limit a state's ability to invoke the doctrine. Article 25 of the International Law Committee's Articles on the Responsibility of States for Intentionally Wrongful Acts illustrates the importance of essential state interests. Section 1(a) of Article 25 says that the state attempting to invoke the doctrine (the invoking state) can only do so if it is protecting an essential interest. Similarly, Section 1(b) says that the invoking state can only invoke the doctrine if it does not impair an essential interest of the state against whom the doctrine is being invoked (the victim state) or of the international community as a whole.[66] Thus, whether an interest is characterized as "essential" by an international tribunal is dispositive in deciding whether the doctrine of necessity can be invoked. Only if the invoking state is protecting an essential interest *and* is not infringing on the essential interests of the victim state or the international community as a whole may the doctrine be successfully employed.

At the outer bounds of the doctrine lie peremptory norms. Peremptory norms are defined as "a norm accepted and recognized by the international community of

62. *Id.*

63. *Id.*

64. *Id.* at 34.

65. European Convention on Human Rights, *supra* note 52, art. 15(1).

66. Articles on the Responsibility of States for Intentionally Wrongful Acts, G.A. Res. 56/83, art. 25, U.N. Doc. A/56/49 (Dec. 12, 2001) [hereinafter Draft Articles on State Responsibility].

States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[67] Where the doctrine of necessity is concerned, peremptory norms are essential state interests that are inviolable except by subsequent peremptory norms. Accordingly, Article 33 of the International Law Commission's Draft Articles on the International Responsibility of States say that under no circumstances may the doctrine of necessity be invoked if the breached international obligation is considered a peremptory norm. [68]

At bottom, customary international law imposes five distinct requirements on the successful invocation of the doctrine of necessity. First, the doctrine must be invoked to protect an essential state interest.[69] Second, the essential state interest in question must be threatened by "grave and imminent peril."[70] Third, the act being challenged must be the only means of safeguarding the essential state interest.[71] Fourth, the act must not seriously impair the essential state interest of the state towards which the breached obligation existed.[72] Fifth, the state invoking the doctrine of necessity must not have contributed to the occurrence of the state of necessity.[73]

Until quite recently, states only invoked the doctrine of necessity in the face of existential threats resulting from physical violence. Whether responding to the exigencies of formally declared war,[74] domestic terrorism,[75] or informal

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67. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

68. *Report of the Commission to the General Assembly on the Work of its 32nd Session*, [1980] 2.Y.B. Int'l L. Comm'n 1, 34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) [hereinafter *Report of the Commission*]:

> 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> a. the act was the only means of safeguarding an essential state interest of the State against grave and imminent peril; and
>
> b. the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> a. if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
>
> b. if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking a state of necessity with respect to that obligation; or
>
> c. if the State in question has contributed to the occurrence of the state of necessity.

69. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 40 (Sept. 25).

70. *Id.* at 41.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See generally* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9).

75. *See generally* Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 4-5 (1961) ("On several occasions since the foundation of the Irish Free State, armed groups, calling themselves the 'Irish

insurgency,[76] the threat leading to the invocation of the doctrine of necessity had always been primarily military in nature.[77] However, in 1997, the International Court of Justice considered expanding the concept of essential state interests for the first time in the *Case Concerning the Gabčíkovo-Nagymaros Project.*[78] Though the International Court of Justice ("ICJ") declined to find that the doctrine of necessity was successfully invoked, in holding that a state's ecological interests can be considered essential for the purpose of invoking the doctrine of necessity,[79] the ICJ signaled to many that the concept of essential state interestswas being extended beyond military use.

IV. THE EXPANSION OF ESSENTIAL STATE INTERESTS IN THE *CASE CONCERNING THE GABČÍKOVO-NAGYMAROS* PROJECT WAS AN EXPANSION IN PRINCIPLE BUT NOT IN PRACTICE

The *Case Concerning the Gabčíkovo-Nagymaros Project* arose out of a treaty signed in 1977 between the governments of Hungary and Czechoslovakia ("the 1977 Treaty").[80] The 1977 Treaty provided for the construction of a system of locks in Gabčíkovo, Czechoslovakia and Nagymaros, Hungary aiming to generate hydroelectricity and improve navigation on the River Danube.[81] The project, which commenced in 1978, was to be jointly and equally financed, constructed, and operated by both contracting parties.[82] In the late 1980's, however, the project came under intense scrutiny from the people of Hungary who feared the ecological impact of the project.[83] As a result of this criticism, Hungary terminated its work on the locks and Czechoslovakia petitioned the ICJ to issue an opinion on the matter.[84]

When the case came before the International Court of Justice, both parties stipulated that the 1977 Treaty was fully in force when Hungary terminated its work and that the 1977 Treaty did not allow for unilateral suspension or abandonment of the project.[85] To justify its conduct, Hungary relied on a "state of ecological necessity."[86] This state of necessity was based on fears concerning reduced groundwater levels, the contamination of groundwater coming from an increase of silt, the extinction of flora and fauna relying on silt-free water supply, threats to aquatic ecosystems stemming from the irregular flow of water coming

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Republican Army' ("IRA"), have been formed, for the avowed purpose of carrying out acts of violence to put an end to British sovereignty in Northern Ireland.").

76. *See, e.g.*, R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-83 (1938) (explaining that the Caroline case was the result of a rebel uprising).

77. *Id.* at 91.

78. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 36 (Sept. 25).

79. *Id.* at 41-42.

80. *Id.* at 17.

81. *Id.* at 17-18.

82. *Id.* at 24.

83. *Id.* at 25, 31.

84. *Id.* at 27.

85. *Id.* at 35.

86. *Id.*

from the dams, erosion of downstream riverbeds, and a limitation and contamination of Budapest's water supply.[87] Compounding this state of ecological necessity, Hungary argued, was Czechoslovakia's unwillingness to examine the ecological impact of the project in light of scientific findings suggesting that the impact would be more severe than expected.[88]

The Court began its necessity analysis by stating that it would apply the doctrine of necessity as characterized by the International Law Commission in Article 33 of the Draft Articles on the Responsibility of States and the international customs reflected therein.[89] It went on to unequivocally expand the concept of essential state interests:

> The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.[90]

The International Court of Justice echoed the International Law Commission in holding that essential state interests should not be reduced to interests concerning the existence of a state, reiterating the fact that, between 1960 and 1980, "safeguarding the ecological balance has come to be considered an 'essential interest' of all States."[91]

However, the International Court of Justice held that Hungary did not successfully invoke the doctrine of necessity, despite the invocation's basis in a now-recognized essential state interest, because Hungary could not prove that there existed the "grave and imminent peril" necessary to invoke the doctrine.[92] According to the Court, apprehension of possible peril does not suffice to invoke the doctrine of necessity.[93] Even if the ecological effects of the project constituted a grave peril, such effects were not imminent since the completion of the project was too remote, the ecological effects would only be realized over the long term, and the specific nature of the ecological effects remained uncertain.[94]

In barring Hungary's defense of ecological necessity based on the notion that the ecological effects of the dam would only be realized over the long term and that the full extent of these effects remained uncertain, the Court expanded the concept of essential state interests to include ecological interests in principle but not in practice.

With very few exceptions, ecological threats will only materialize over the long term, and it is specifically because of their long-term nature that the full

87. *Id.* at 36.
88. *Id.*
89. *Id.* at 40-41.
90. *Id.* at 41.
91. *Id.*
92. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 42 (Sept. 25).
93. *Id.*
94. *Id.* at 43.

extent of ecological damage will be uncertain until that damage takes place.[95] It is difficult to imagine a scenario in which a governmental or scientific organization could state with certainty the exact extent of the ecological damage resulting from a project before such damage reaches full fruition, or at least begins to cause the damage sought to be avoided. It is even more difficult to imagine adverse ecological impacts that would immediately be felt upon the completion of such a project.

With respect to the Gabčíkovo-Nagymaros Project, the Court seemed to hold that for Hungary to have successfully invoked the doctrine of necessity based on ecological interests, it would have had to complete the project despite its reservations and wait for the ecological effects to sufficiently materialize. At that point, it could tear down the dam it had created, thereby breaching the 1977 Treaty. Only then could a successful invocation of the doctrine of necessity take place. This result would be both economically inefficient and ecologically disastrous.

On one hand, this course of action would force Hungary to expend economic resources to finish construction of a project that it no longer sees as being in its self-interest only to expend more resources undoing the damage done. In such a case, an efficient breach of contract would be in the economic interest of any party faced with the false choice of breaching this contract and the duplicitous expenditure of resources followed by an uncertain ruling in an international tribunal. Additionally, it is clear that ecological damage, once done, is difficult and often impossible to undo. With riverbeds permanently changed, species of plants and animals permanently extinct, and water supplies severely contaminated, it would take decades to return to the pre-project status quo.[96]

The *Case Concerning the Gabčíkovo-Nagymaros Project* appears to present a scenario perfectly tailored to the invocation of the doctrine of necessity. A state faced with two options—ecological damage and breach of contract—chose the latter in hopes of invoking customary international law frequently applied in cases of existential necessity. At first blush, it would appear that the expansion of essential state interests to include ecological interests would be the highest hurdle between Hungary and a successful invocation of the doctrine. However, by barring the invocation of the doctrine of necessity in the face of ecological dangers that are not perfectly scientifically predictable or that would unfold over the long term, the Court effectively excludes all ecological dangers readily imaginable. It expands essential state interests to include ecological interests in principle, but left the doctrine unavailable for these purposes in practice.

95. *Id.* at 43-44.
96. *Id.* at 35-36.

V. MIXED MESSAGES IN *CME V. ARGENTINA* AND *LG&E V. ARGENTINA* REGARDING THE EXPANSION OF ESSENTIAL STATE INTERESTS TO INCLUDE ECONOMIC INTERESTS

In the late 1980's the Argentine Republic experienced a financial crisis characterized by extreme price inflation accompanied by a deep economic recession.[97] As a result, the Argentine Government passed the State Reform Law,[98] the purpose of which was to privatize government-owned monopolies in order to stimulate the economy.[99] One of the monopolies broken up was *Gas del Estado S.E.*, a company that controlled Argentina's natural gas resources.[100] In addition to the State Reform Law, the Argentine government passed the Convertibility Law and the *Ley de Gas* in 1991 and 1992, respectively.[101] The former of these laws pegged the *austral* (the precursor to the Argentine Peso) to the U.S. Dollar, while the latter created a regulatory structure for the newly privatized natural gas industry.[102]

Though this private structure worked well for both Argentine government and investors for almost a decade, as the 1990s came to a close, Argentina was hit by another economic crisis.[103] This economic predicament proved to be even more serious than that of the late 1980's, causing panic among consumers, creditors, and government officials alike.[104] As a result of this second crisis, the government of Argentina breached the Bilateral Investment Treaty ("BIT") it had signed with the United States of America.[105] In response, two companies that had been investing in Argentina's private natural gas market, CMS Gas Transmission Company ("CMS") and LG&E Energy Corp. ("LG&E"), filed suit at the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C.[106] Although these cases were nearly identical from a factual and legal standpoint, their results were completely divergent. The government of Argentina invoked the doctrine of necessity in both instances and was successful in its dispute with LG&E. It was unsuccessful, however, in its dispute with CMS.[107] This divergence stems from the stark difference in the characterization of the facts in *CMS v. Argentina* and *LG&E v. Argentina*.

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97. LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 35 (Oct. 3, 2006), 21 ICSID Rev.-FILJ 203 (2006).

98. Law No. 23.696, Aug. 18, 1989, B.O. (Arg.).

99. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 35.

100. *Id.* ¶ 37.

101. *Id.* ¶¶ 36, 38.

102. *Id.*

103. *Id.* ¶ 54.

104. *See Argentina's Collapse: A Decline without Parallel*, THE ECONOMIST, Feb. 28, 2002, *available at* http://www.economist.com/node/1010911.

105. Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW. 363, 394-95 (2008).

106. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Annulment Proceeding, ¶¶ 1-2 (Sept. 25, 2007), https://icsid.worldbank.org/ICSID/FrontServlet; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 1-3.

107. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 163.

CMS v. Argentina and *LG&E v. Argentina* are virtually identical with respect to the nature of the parties, the parties' claim against Argentina, the jurisdiction of the disputes, and the legal arguments presented. Both CMS and LG&E are groups whose investors had ownership interests in the remnants of *Gas del Estado*. CMS had a 29.42% interest in Transportadora de Gas del Norte ("TGN"),[108] and LG&E owned 45.9% of Centro, 14.4% of Cuyana, and 19.6% of GasBan,[109] all of which were newly privatized Argentine natural gas companies.[110] Additionally, both parties had identical causes of action against the government of Argentina. Both CMS and LG&E claimed that Argentina violated two provisions of a bilateral treaty which stipulated that gas tariffs would be calculated in U.S. Dollars and that tariffs would be re-adjusted every six months in accordance with the United States Products Price Index ("US-PPI").[111] They argued that Argentina breached these obligations through the passage of the Public Emergency and Foreign Exchange System Reform Law as well as through subsequent executive orders. The net effect of which was the "pesafication" of the Argentine economy and forced renegotiation of all public and private contracts.[112]

The government of Argentina presented the same legal argument during both arbitrations. The Argentine government argued that it had not breached the bilateral treaty, and, if the tribunal found that it had breached the treaty, the government of Argentina invoked the doctrine of necessity under Article XI of the U.S.-Argentina BIT and under customary international law, thereby excusing them from the breach.[113]

The ICSID took these similar sets of facts and, through a highly divergent characterization of such facts, reached completely different conclusions. The tribunal in *CMS v. Argentina* found that the government of Argentina was precluded from using the doctrine of necessity under both Article XI of the BIT and customary international law.[114] Conversely, in *LG&E v. Argentina*, the tribunal held that the doctrine of necessity was indeed properly invoked under both the BIT and customary international law.[115]

In *CMS v. Argentina*, the tribunal's characterization of the facts surrounding Argentina's breach was done on a purely historical level. The tribunal offered a description of the privatization process, the structure of CMS, the stipulations

108. *Id.* ¶ 33.

109. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 52.

110. *Id.* ¶ 44.

111. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 34; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 60.

112. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 156; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 64.

113. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 139; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 260-61.

114. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 105.

115. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 264-66.

created by the parties, and the financial crisis that precipitated Argentina's breach.[116]

In applying the facts to the Draft Articles on the Responsibility of States, the tribunal found that the invocation of the doctrine of necessity was improper.[117] Under Article 25 of the Draft Articles on the Responsibility of States, the doctrine of necessity may only be invoked if it is the "only way for the State to safeguard an essential interest against a grave and imminent peril" and "does not impair the essential interests of the State towards which the obligation exists, or the international community as a whole."[118] Furthermore, a state cannot invoke necessity under Article 25 if the state has contributed to the situation of necessity.[119]

In the end, the tribunal concluded that economic interests do not constitute an essential interest of a State, that Argentina did not face grave or imminent peril, that the measures taken were not the only choice offered to Argentina,[120] and that the government's "shortcomings significantly contributed to the crisis."[121] The tribunal awarded CMS damages in the amount of $133.2 million, plus interest, along with all of Argentina's shares in TGN.[122]

Conversely, the tribunal took a more expansive approach to factual considerations in *LG&E v. Argentina.*[123] Rather than merely stating as a matter of historical fact that the Argentine financial crisis of the late 1990s took place, the tribunal in *LG&E* examined the economic and social implications of the crisis.[124] For example, the tribunal noted that as a result of the financial crisis of the late 1990's, Argentina's gross domestic product ("GDP") fell markedly, which led to a decrease in domestic prices, widespread price deflation, and a devaluation of Argentine assets across the board.[125] This, in turn, led to a drastic increase in Argentina's country risk premium, which excluded Argentina from the international credit market.[126] As the crisis deepened in 2001, the Argentine public made a run on the banks, forcing the government to pass a law limiting bank withdrawals.[127] The passage of the law limiting withdrawals led to massive civil and political unrest, culminating in deadly riots and a rapid succession of five different presidents within a matter of weeks.[128]

116. *See* CMS Gas Transmission Co., ICSID Case No. ARB/01/8.
117. *Id.* ¶¶ 101-02, 107.
118. Draft Articles on State Responsibility, *supra* note 66, art. XV.
119. *Id.* art. XV, ¶ 2(b).
120. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 103.
121. *Id.* ¶ 106.
122. *Id.* ¶¶ 38-39.
123. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 33-38.
124. *Id.* ¶ 55.
125. *Id.*
126. *Id.* ¶ 232.
127. *Id.* ¶ 63.
128. *Id.* ¶¶ 235-36.

This characterization of the Argentine financial crisis was reflected in the tribunal's necessity analysis. The tribunal in *LG&E* analyzed necessity through Article XI of the BIT between the United States and Argentina, which stipulates that the BIT does not preclude either Party from fulfilling its obligations to international peace and security or its own essential state interests.[129]

In deciding to allow Argentina to invoke the doctrine of necessity, the tribunal characterized the Emergency Law as a "stop-gap measure"[130] and a "swift, unilateral action against the economic crisis that was necessary at the time."[131] The tribunal went on to say that the Emergency Law was necessary to maintain public order and to protect Argentina's essential security interests.[132] As an offer of evidence that an essential interest was threatened, the tribunal cited a massive 10-15% increase in GDP decline,[133] a 60% drop in the Merval Index, which serves as a metric for monitoring the Argentine stock market,[134] a 40% drop in the liquid reserves of the Central Bank of Argentina,[135] almost half of the population living below the poverty line,[136] an extreme shortage in healthcare supplies and affordable food,[137] and deadly looting and rioting in the streets.[138] The tribunal concluded, "[w]hen a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[139] Accordingly, the Republic of Argentina was excused from all damages accrued between December 1, 2001 and April 26, 2003.[140]

Taken alone, these two decisions provide little guidance regarding whether or not economic interests should be considered "essential" for the purposes of the doctrine of necessity. Further examination of ICSID decisions considering breaches of bilateral investment treaties in the face of the Argentine financial crisis shows that the expansion of essential state interests in *LG&E v. Argentina* did not survive subsequent ICSID jurisprudence. Accordingly, it was a temporary expansion in principle that never materialized as a matter of practice.

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129. Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124, http:// www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

130. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 241.

131. *Id.* ¶ 240.

132. *Id.* ¶ 226.

133. *Id.* ¶ 232.

134. *Id.*

135. *Id.* ¶ 233.

136. *Id.* ¶ 234.

137. *Id.*

138. *Id.* ¶ 235.

139. *Id.* ¶ 238.

140. *Id.* ¶ 266.

VI. THE EXPANSION OF ESSENTIAL STATE INTERESTS IN *LG&E V. ARGENTINA* WAS AN EXPANSION IN PRINCIPLE BUT NOT IN PRACTICE

Subsequent ICSID decisions concerning Argentina's breaches of BITs as the result of its financial crisis have taken the approach used in *CMS v. Argentina*, holding that Argentina was not in a state of necessity at the time of the breach and suggesting that economic interests are not "essential" within the meaning of the doctrine of necessity. In *Sempra Energy International v. Argentine Republic*, the ICSID held that a defense of necessity was inapplicable in the situation at hand.[141] The ICSID went further in *Enron Corp. and Ponderosa Assets v. Argentina* when it stated that "[t]he argument that [a domestic financial crisis] compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing."[142] In categorically rejecting economic interests as "essential state interests," the ICSID underestimated the severity of Argentina's financial crisis and did a disservice to the doctrine of necessity as a whole.

By the end of 2001, every aspect of Argentine society was reeling from the financial crisis. Inflation was skyrocketing, over a quarter of the country was unemployed, personal income shrunk by half, and every bank in the country was on the verge of collapse.[143] People were rioting in the streets.[144] The social consequences of the Argentine economic crisis are among the most severe imaginable. There are currently forty-eight cases filed against Argentina before the ICSID,[145] and if the current trend in ICSID jurisprudence continues—and there is no reason to think that it will not—the Argentine Republic is slated to lose more than USD $8 billion in judgments against it, a sum far larger than its entire financial reserve.[146]

At the heart of the doctrine of necessity is the notion that "[t]he right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it."[147] As developing countries continue to liberalize their economies and attract foreign investment, the

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141. Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award, ¶ 388 (Sept. 28, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.

142. Enron Corp. and Ponderosa Assets, L.P. v. Arg. Republic, ICSID Case No. ARB/01/3, Award, ¶ 306 (May 22, 2007), http://arbitrationlaw.com/files/free_pdfs/Enron%20v%20Argentina%20-%20Award.pdf.

143. *See Argentina's Collapse: A Decline without Parallel*, *supra* note 104, *available at* http://www.economist.com/node/1010911.

144. *Id.*

145. *See* List of Pending Cases, Int'l Ctr. For Settlement of Inv. Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last updated Sept. 24, 2012) (including at least forty-eight cases at the ICSID filed against Argentina).

146. William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 204 (2008).

147. *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 37.

state must retain the power to act as a stabilizing force. An economic crisis as severe as the one experienced by Argentina at the turn of the twenty-first century poses a clear and imminent threat to both the security and the integrity of the state. Thus, the reasoning employed in *LG&E v. Argentina* is highly preferable to that employed in *CMS v. Argentina*.

Unfortunately, the ICSID has chosen a path that provides insufficient protection for the interests of developing nations despite the presence of the doctrine of necessity at customary international law, a device that has developed over the last two and a half centuries specifically to protect the interests of a sovereign state facing an existential threat. In choosing such a course, the ICSID ignores the fact that "[w]hen a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[148] In the end, an initial expansion of essential state interests to include economic interests in *LG&E v. Argentina* has proven to be an anomaly in the face of subsequent ICSID decisions. It was a temporary expansion in principle but not in practice.

VII. THE FUTURE OF ECOLOGICAL AND ECONOMIC NECESSITY

The Case Concerning the Gabčíkovo-Nagymaros Project and the line of cases stemming from *CMS v. Argentina* and *LG&E v. Argentina* leave the future of the doctrine of necessity as it relates to ecological and economic interests unclear. In both instances, international adjudicatory bodies have held the respective state interests at issue to be essential for the purposes of the doctrine, but in neither instance was the doctrine held to be fully applicable. While there are several commonalities between the respective futures of ecological and economic necessity, in the end, ecological necessity is more likely to survive as a viable application of the doctrine than its economic counterpart.

Several things are clear regarding the future of both ecological and economic necessity. Most basically, the International Law Committee's interpretation of the doctrine of necessity in Article 33 of the Articles on the Responsibility of States for Internationally Wrongful Acts will continue to provide the basic framework for the invocation and application of the doctrine of necessity. As such, there will continue to be five inherent limitations to the doctrine. First, the doctrine will only be useful in guarding an essential state interest in the face of grave and imminent peril.[149] Second, the doctrine cannot be invoked if invocation impairs the essential state interests of the country against whom the doctrine is being used or those of the international community as a whole.[150] Third, the doctrine will not be available if its invocation impairs a peremptory norm.[151] Fourth, binding treaty language can expressly state that the doctrine will not be available.[152] Fifth, the doctrine will

148. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 238.
149. *Report of the Commission*, *supra* note 68, art. 33.
150. *Id.*
151. *Id.*
152. *Id.*

not be available to a state that contributed to its own state of necessity.[153] As customary international law develops in this area, it will do so against the backdrop of Article 33, whose inherent limits to the invocation of the doctrine will remain intact.

Similarly, whether a specific ecological or economic crisis suffices in creating the state of necessity required to invoke the doctrine will continue to be a question of fact, or a mixed question of law and fact, to be characterized and applied by international judges and arbitrators. Successful invocation of the doctrine will therefore inevitably rest on the shoulders of the judges and arbitrators themselves. The inherent factual nature underlying essential state interests as they relate to the doctrine of necessity has both its advantages and disadvantages. As can be seen in the dichotomy between *LG&E v. Argentina* and *CMS v. Argentina*, the possibility of two sets of judges looking at the same set of facts and reaching divergent conclusions based on their interpretation of such facts leads to uncertainty in customary international law, hindering the eventual crystallization of the custom. On the other hand, the factual nature of the concept of essential state interests allows for the interpretation of such interests to expand as the judicial perception of such interests changes. As the human rights regime of international law continues to develop, ecological and economic interests will play a more prominent role in the years to come.

Finally, there are three types of conflicts that can give rise to assertions of ecological and economic necessity: (1) good faith mistakes by sovereign states, (2) good faith business transactions that go awry, and (3) cases of exploitation by multinational corporations over developing nations. While these three classifications are treated slightly differently in the realms of ecological and economic necessity, they play an important role in both arenas. Keeping in mind the Article 33 framework, the inherent factual nature of ecological and economic interests, and the three classes of conflict that may give rise to invocation of the doctrine illuminates, to a certain extent, the future of the doctrines of ecological and economic necessity.

The biggest barrier facing the successful invocation of ecological necessity is the requirement in Article 33(1)(a) that the threat to a nation's ecology be both "grave" and "imminent."[154] As discussed, the scale and time frame in which ecological disasters take place does not lend itself to concrete predictions. Nonetheless, as humanity's understanding of the science used to model and predict ecological change improves, scientists—and the legal advocates who rely on their findings—will be able to predict the gravity and imminence of actions affecting the environment with much more accuracy. In the end, the expansion of the doctrine of ecological necessity seems as inevitable as scientific progress itself.

In the case of a good faith mistake on the part of a sovereign nation, a situation similar to the one faced in *The Case Concerning the Gabčíkovo-*

153. *Id.*
154. *Id.* at 34.

Nagymaros Project, the doctrine of ecological necessity is highly likely to expand as our ability to measure and predict environmental impact improves. When two sovereigns begin a project in good faith and one wants to abandon the project for ecological reasons, international courts have failed to apply Article 33(2)(c), which says that a state cannot invoke the doctrine of necessity if it has contributed to its own state of necessity. Leaving the door open to the invocation of ecological necessity, in this instance, allows governments to exercise greater control over their economic resources. This is especially important in light of the fact that, as our understanding of the environment improves, projects can be started under the assumption that they will be ecologically benign. If this assumption proves to be false in light of improved information, reevaluation of the environmental implications of any project after it has begun will be necessary. Additionally, while this expansion might appear to increase the moral hazard involved in ecological assessment, if a state is found to have been careless in its initial consideration of the project, 33(2)(c) would undoubtedly bar the invocation of the doctrine. Thus, at least in this context, the doctrine is highly likely to expand with the global community's understanding of ecological impact, and this is an unmitigated good.

The second class of conflict, a good faith business transaction that happens to lead to a state of ecological necessity, will be rare. Multinational corporations are profit-maximizing entities who seek to minimize the degree to which they must pay for the externalities they create. As such, many transactions are carried out abroad precisely *because* of lower environmental standards. In any event, 33(2)(c) comes squarely into play in the case of a good faith business transaction that leads to a state of ecological necessity. It would be difficult to argue that a state, in pursuing its perceived economic interests, did not contribute to the state of necessity resulting directly from that transaction. Ecological necessity is unlikely to expand in this arena, but there is little reason to believe that a lack of expansion in this context will have much of an impact on international custom overall.

Applying the doctrine of ecological necessity to cases in which a multinational corporation exploits a developing nation for the use of its natural resources, and this exploitation leads to a state of ecological necessity, amounts to an unconscionability doctrine at customary international law. The creation of such a doctrine would have several positive policy implications. It would serve to protect natural resources, punish exploitative multinational corporations and protect developing nations. It would also allow international tribunals to police international trade, as it becomes an increasingly important part of the global economy. On the other hand, expansion of the doctrine in this context would have the negative effects of decreasing foreign investment by limiting the protection corporations receive abroad. Furthermore, allowing developing nations the opportunity to breach contracts into which they freely entered offends the traditional notion of freedom of contract. On balance, proving bad faith on the part of a multinational corporation will be difficult, but if a state can prove bad faith, there is no reason the doctrine of ecological necessity should remain unavailable provided that the other criteria are met.

When it comes to economic necessity, the future is less clear. There is no doubt that the global understanding of markets and economic crises is in flux. From the United States' housing crisis and resulting global asset meltdown to the European sovereign debt crisis, economists all over the world are taking a fresh look at the security and stability of markets. It is unclear, however, where public opinion will rest or what effect it will have on the doctrine of economic necessity. As such, the ICSID's treatment of Argentina in the line of cases already discussed will play a large role in the continued limited applicability of the doctrine of economic necessity.

While the three classes of conflict that could give rise to economic necessity are the same as those giving rise to ecological necessity, it makes sense to subsume the second two classes into one analysis. Thus, the future of economic necessity should be thought of in terms of public versus private debt instead of the three classes of conflicts mentioned above.

Simply put, sovereign debt crises lie outside the scope of the doctrine of necessity. Sovereign states can already default on their sovereign debt or simply print money to cover their outstanding debt. These actions are governed by the Bank for International Settlements, the International Monetary Fund, and the sovereign bond market itself. States are already highly incentivized not to default on their public debts, and the doctrine of necessity will do little to change that fact.

Due to the inherent nature of economic crises, it makes little sense to differentiate between good faith dealings between multinational corporations and developing nations and exploitation of the latter by the former. Unlike a state of ecological necessity, economic necessity can rarely be traced to one single deal. In the case of economic necessity, a combination of macro- and microeconomic factors leads to a state of necessity. If the underlying state of necessity is present, the nature of the specific deals leading to such a state will be irrelevant.

Because the facts necessary to invoke a state of economic necessity will be rare, the custom developed in *CMS v. Argentina* and its progeny suggest that the doctrine of necessity will remain unavailable to states despite the superiority of the *LG&E* decision. The main difference between the ICSID's opinions in *LG&E* and *CMS* is that the ICSID endeavored to characterize the social consequences of Argentina's economic collapse in the former and wholly overlooked such consequences in the latter. Nonetheless, the rationale employed in *CMS* carried the day and developed a custom which suggests that economic interests are unavailable for protection as essential state interests under the meaning of Article 33. Moreover, even if such interests were theoretically available, 33(2)(c) bars a state from successfully invoking them. The custom developed in *CMS* and its progeny effectively shuts the door to the future invocation of the doctrine of necessity to protect economic interests.

In sum, the doctrine of ecological necessity is likely to expand as the science behind ecological impacts improves. The scientific community's increased ability to predict and quantify environmental impacts will surely result in an increase of the availability of the doctrine of ecological necessity. However, the ICSID's

jurisprudence in *CMS v. Argentina* and its progeny is likely to close the door on the availability of the doctrine of economic necessity.

VIII. CONCLUSION

The history of the doctrine of necessity has seen three types of interests qualify as "essential state interests": territorial interests, ecological interests, and economic interests. Of these three sets of interests, only one, territorial interests in the face of a military or quasi-military attack, has yielded a successful invocation of the doctrine. Textually speaking, it would appear that once an interest has been deemed "essential" for the purposes of the doctrine, a grave threat to such interests would easily lead to a successful invocation of the doctrine, but that clearly is not the case.

In holding that an ecological interest can only lead to a successful invocation of the doctrine of necessity if the ecological disaster will occur immediately and with certainty, the International Court of Justice woefully ignores the inherent nature of environmental degradation, thereby effectively barring the invocation of the doctrine despite the presence of a threat to an essential state interest. Similarly, after declaring economic interests to be essential, the ICSID reneged on that declaration by refusing to apply the doctrine of necessity in the face of the gravest and most imminent threat to a nation's economy imaginable. As our understanding of the science behind environmental degradation improves, ecological necessity will become a viable doctrine. However, the door to economic necessity appears to be shut for the foreseeable future.

The development of customary international law is, by its very nature, a slow process. Declaring that ecological and economic interests are "essential" within the meaning of the doctrine of necessity is an important step towards the liberalization of the use of the doctrine of necessity. However, if customary international law seeks to keep pace with modern realities, it would do well to recognize the long term and uncertain nature of ecological considerations and the existential threat posed by the collapse of a nation's economy. Once this recognition takes place, these realities should be incorporated into the doctrine of necessity at customary international law.

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