

# Wargaming the “Arab Spring”: Predicting Likely Outcomes and Planning U.N. Responses

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## Introduction

Scholars have developed three prominent schools of thought on the Arab Spring, which emerged in Tunisia and spread to Egypt, Libya, Bahrain, Yemen, Syria, Iraq, Kuwait, and other countries. One school describes the Arab Spring as a “pristine” popular movement akin to the Civil Rights Movement in the United States, the anti-apartheid movement in South Africa, the fall of the Berlin Wall and communism in Eastern Europe and the Caucasus, the Tiananmen Square protests, the Democratic

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Russia Movement, or the Iranian Green Movement.<sup>1</sup> A second argues that it is a change directed and dictated by the great powers, especially the United States acting through the White House, the State Department, the Pentagon, the U.S. Agency for International Development, the International Republican Institute, and the National Endowment for Democracy. Two strands of this second theory exist: the first, popular among critics of the Arab Spring and of U.S. involvement, maintains that the United States has unwittingly allied itself with the Muslim Brotherhood and helped to topple relatively moderate and secular regimes with likely disastrous results;<sup>2</sup> and the second, popular among supporters of President Barack Obama and Secretary of State Hillary Clinton, characterizes U.S. policy as actively promoting democracy and freedom against dictators, torturers, and other forces holding back the prosperity and progress in the majority of Arab countries.<sup>3</sup> A third theory could be summarized with the phrase “Here Comes Everybody.” Under this theory, social media, the rise of the Muslim Brotherhood, and pan-Arab satellite television such as Al-Jazeera have empowered populations and made simultaneous revolutions possible in disparate contexts and at a rapid pace.<sup>4</sup>

This Article analyzes several key international legal instruments related to the Arab Spring, and attempts to bring greater local specificity to sweeping generalizations about the Arab Spring and its causes and consequences. Three findings emerge from this analysis. First, the role of the United States cannot be discounted, as various U.S. leaders have chosen divergent responses to crimes against humanity, such as torture and political persecution, in Egypt, Libya, Sudan, Syria, Iraq, Yemen, Kuwait, Saudi

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1. See, e.g., Thomas L. Friedman, *Hoping for Arab Mandelas*, N.Y. TIMES (Mar. 26, 2011), <http://www.nytimes.com/2011/03/27/opinion/27friedman.html>; Juan C. Zarate, *Al Qaeda Stirs Again*, N.Y. TIMES (Apr. 17, 2011), <http://www.nytimes.com/2011/04/18/opinion/18Zarate.html>.

2. See, e.g., Martin Gould & Ashley Martella, *Walid Phares: Obama, NATO Must Stop Libya's Hard-Line Islamists from Taking Power*, NEWSMAX (Aug. 22, 2011), <http://www.newsmax.com/Headline/WalidPhares-Libya-Gadhafi/2011/08/22/id/408231>. There are echoes of this strand in the position of the Russian Federation on Libya and Syria, a position that criticized states in the Security Council, such as the United States, Britain, and France, which refused to pressure the armed rebels of Libya and Syria to give up their plans of using violent means to bring about a “humanitarian catastrophe,” followed by external interference in potential violation of the U.N. Charter. Thomas Grove, *Russia Criticises Libya Contact Group* (Update 3), REUTERS (May 6, 2011), <http://uk.reuters.com/article/2011/05/06/libya-russia-idUKLDE7450IE20110506>; *Russia Accuses West of “Immoral” Stance on Syria*, BBC NEWS (Dec. 13, 2011), <http://www.bbc.co.uk/news/world-middle-east-16158584>.

3. See, e.g., E.J. Dionne, *Obama's New Focus on Democracy, Human Rights*, REAL CLEAR POL. (Dec. 12, 2011), [http://www.realclearpolitics.com/articles/2011/12/12/obama\\_abroad\\_democratic\\_realism\\_\\_112359.html](http://www.realclearpolitics.com/articles/2011/12/12/obama_abroad_democratic_realism__112359.html).

4. See, e.g., Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, FOREIGN AFF., Jan.-Feb. 2011, at 28-30, 32-33, 39-40. *This Time Is Different* is the sardonic title of a book chronicling centuries of similar patterns in financial and fiscal crises. See generally CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2009).

Arabia, and Bahrain, to name a few.<sup>5</sup> History has shown that, depending on U.S. economic and security interests with respect to a country and its military, crimes may be excused and tyrants granted a new lease on life despite overseeing a failed state and a resentful populace. This reprieve is most obvious in the case of Sudan, where the United States has not called for regime change despite far worse crimes against civilians, significantly harsher tyranny and social malaise, and greatly inferior economic and human development statistics than in Egypt, Libya, or Tunisia, where the United States has made such calls. Second, the Muslim Brotherhood and Al-Qaeda veterans have certainly played a unique role in the Arab Spring, as compared with prior social movements, but their interventions have been mediated by U.S. policy, social media, and Al-Jazeera and other satellite television networks. Focusing unduly on technology or foreign states and neglecting local political and religious movements detracts attention from the interdependence of these social and technological forces on one another. Third, the lessons of Iraq since 2003 and the Gaza Strip since 2005 should not be ignored in wargaming (or predicting the results of) what may be called the "Twitterlutions."<sup>6</sup> Reprisals against politicians and security forces that perpetrated or tolerated mass violence against civilians, chaos, religious extremism, and economic disaster may be inevitable after the abrupt collapse of regimes such as those in Libya or Yemen, just as these trends emerged in Iraq. These lessons suggest explanations for Washington's strong support for the central role of the military in Egypt, while also possibly foretelling a humanitarian disaster during and after a chaotic regime change in other countries. Armed with the lessons of history, the United Nations and its members should be prepared to act more swiftly, and wisely, than they did after regime changes in Iraq and elsewhere. I argue that existing international treaties, most notably those relating to genocide, war crimes, the political independence of states, refugee flows, and human rights, provide an adequate legal structure, despite some gaps, for responding to the Arab Spring's dangers.

## I. The Cause of Peace

President Obama came into office promising to "promote the cause of peace," and "reclaim the American dream."<sup>7</sup> At his famous Cairo speech in June of 2009, he promised to end policies that "empower those who sow hatred rather than peace, and [which] promote conflict rather than the co-

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5. This Article must omit any analysis or description of events in Syria due to the editors' length limitations.

6. The BBC may have coined this term for use in reference to Middle Eastern opposition movements organized via social media in 2009, in the context of the Iranian post-election protests of 2009. Paul Mason, *The Iranian Twitter-lution?*, BBC News (June 15, 2009, 12:08 PM), [http://www.bbc.co.uk/blogs/newsnight/paulmason/2009/06/the\\_iranian\\_twitterlution.html](http://www.bbc.co.uk/blogs/newsnight/paulmason/2009/06/the_iranian_twitterlution.html).

7. *Transcript: 'This is Your Victory,' Says Obama*, CNN.COM (Nov. 4, 2008), <http://edition.cnn.com/2008/POLITICS/11/04/obama.transcript/>.

operation that can help all of our people achieve justice and prosperity.”<sup>8</sup>

However, by 2009 several historical forces had been set in motion that President Obama could only accelerate, contain, or divert – not control or terminate. The late Cold War saw several major powers back jihadist groups linked to the Muslim Brotherhood as a way of breaking up the Soviet bloc, and especially its allies in the Greater Middle East such as Afghanistan, the Palestine Liberation Organization (PLO), and Syria. Prior to 1984, the Muslim Brotherhood of Afghanistan generated the leaders of the Afghan *mujahideen* against the Afghan king, then the Afghan secular government, and then the Soviet occupation of Afghanistan.<sup>9</sup> Saudi Arabia financed the jihadists, including the Brotherhood, with \$3 billion, in addition to \$5 billion from the United States and \$2 billion from other sources.<sup>10</sup> Tens of thousands of Saudis and other nationals of Arab states had contact with the “holy war” in Afghanistan, which gave way to an “Islamic Revolution” in 1992 and an even more radical form of revolution with the rise of the Taliban between 1994 and 2000.<sup>11</sup> The CIA knew before 9/11 that Saudi charities financed Al-Qaeda.<sup>12</sup> By the time President Obama took office, Al-Qaeda enjoyed a sanctuary in Pakistan’s Federally Administered Tribal Areas (FATA), the North-West Frontier Province (NWFP), and surrounding towns; Osama bin Laden himself was living near Pakistan’s capital, Islamabad.<sup>13</sup> This occurred in the aftermath of Pakistan’s granting tribal areas the right to vote and holding elections in FATA and NWFP between 1997 and 2003.<sup>14</sup> The Taliban gained control of the FATA between 2004 and 2009, and eradicated the traditional system of autonomous tribal governance.<sup>15</sup> The Gulf Arab countries provided significant funding for weapons imports into the NWFP and Baluchistan for the Taliban.<sup>16</sup>

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8. *Full Text: Barack Obama’s Cairo Speech*, GUARDIAN (June 4, 2009), <http://www.guardian.co.uk/world/2009/jun/04/barack-obama-keynote-speech-egypt/print>.

9. See HANNIBAL TRAVIS, GENOCIDE IN THE MIDDLE EAST: THE OTTOMAN EMPIRE, IRAQ, AND SUDAN 380–81 (2010); S. Amjad Hussein, *Tranquillity and Turmoil: Afghans Don’t Give Up*, TOLEDO BLADE, Dec. 23, 1984, at B5.

10. See TRAVIS, *supra* note 9, at 385.

11. See *id.* at 487–94.

12. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING: STAFF REPORT TO THE COMMISSION 35 (2004), available at [http://govinfo.library.unt.edu/911/staff\\_statements/911\\_TerrFin\\_Monograph.pdf](http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf) (“The CIA obtained a very general understanding of how al Qaeda raised money. It knew relatively early on, for example, about the loose affiliation of financial institutions, businesses, and wealthy individuals who supported extremist Islamic activities. It also understood that . . . Saudi-based charities played a role in funding al Qaeda and moving terrorist-related money.”).

13. Bruce Hoffman, *A Counterterrorism Strategy for the Obama Administration*, 21 TERRORISM & POL. VIOLENCE 359, 359 (2009).

14. See *id.* at 367.

15. See *id.* at 366.

16. See TRAVIS, *supra* note 9, at 504; Eric Schmitt, *Many Sources Feed Taliban’s War Chest*, N.Y. TIMES (Oct. 18, 2009), [www.nytimes.com/2009/10/19/world/asia/19taliban.html](http://www.nytimes.com/2009/10/19/world/asia/19taliban.html) (“The C.I.A. recently estimated in a classified report that Taliban leaders and their associates had received \$106 million in the past year from donors outside Afghanistan, a figure first reported last month by *The Washington Post*. Private citizens

Conditions were little better in the Middle East itself when President Obama took office. During the 1980s, the Muslim Brotherhood of Palestine emerged as a rival to the PLO, with the Brotherhood funded and trained by Israel, some argue, as a counterweight to the more secular PLO.<sup>17</sup> By the early 1990s, Saudi Arabia and Kuwait funded the Brotherhood's successor, Hamas, to the tune of more than \$30 million, with Iran also providing some financing.<sup>18</sup> In a 2005 letter to Abu Musab al-Zarqawi, a leader of Al-Qaeda in Iraq, the current head of Al-Qaeda, Ayman al-Zawahiri argued that the endgame would be to create "a Muslim state . . . in the manner of the Prophet in the heart of the Islamic world . . . . The center would be in the Levant [including Palestine and Syria] and Egypt."<sup>19</sup> That year, President Bush encouraged Israeli Prime Minister Ariel Sharon to withdraw from Gaza in pursuit of an Israeli-Palestinian peace in Bush's second term.<sup>20</sup> In January 2006, Hamas won the Palestinian Legislative Council elections and claimed full control of all of Palestine. This led to a bloody power struggle with the PLO in 2007, in which Hamas won Gaza, and the PLO retained the West Bank.<sup>21</sup> The dwindling Christian populations of the Gaza Strip and the West Bank are expected to completely disappear by 2022.<sup>22</sup>

In Iraq, after the fall of the Ba'ath party in May 2003,<sup>23</sup> an inadequate military-to-population ratio existed to protect the civilian population.<sup>24</sup>

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from Saudi Arabia, Pakistan, Iran and some Persian Gulf nations are the largest individual contributors, an American counterterrorism official said." (emphasis added).

17. See SEAN F. McMAHON, *THE DISCOURSE OF PALESTINIAN-ISRAELI RELATIONS: PERSISTENT ANALYTICS AND PRACTICES* 135 (2009); QUINTAN WIKTOROWICZ, *ISLAMIC ACTIVISM: A SOCIAL MOVEMENT THEORY APPROACH* 137 n.12 (2004); see also Anat Saragosti, *Hamas Rally Our Fault*, YNETNEWS.COM (Dec. 15, 2008), <http://www.ynet.co.il/english/articles/0,7340,L-3638973,00.html>.

18. See SARA ROY, *HAMAS AND CIVIL SOCIETY IN GAZA: ENGAGING THE ISLAMIST SOCIAL SECTOR* 30 (2011).

19. William McCants, *Al Qaeda's Challenge: The Jihadists' War with Islamist Democrats*, FOREIGN AFF., Sept.-Oct. 2011, at 27.

20. Richard W. Stevenson, *Bush Supports Plan by Sharon for a Withdrawal From Gaza*, N.Y. TIMES (Apr. 12, 2005), <http://www.nytimes.com/2005/04/12/international/middleeast/12prexy.html?ref=arielsharon>.

21. *Gaza E.R.: Fatah vs. Hamas*, PBS.ORG (Aug. 14, 2007), <http://www.pbs.org/wnet/wideangle/episodes/gaza-er/fatah-vs-hamas/1227/>; Steve Inskeep & Eric Westervelt, *Hamas Gaining Control of Gaza*, NPR (June 14, 2007), <http://www.npr.org/templates/story/story.php?storyId=11043066>; Dana Weiss & Ronen Shamir, *Corporate Accountability to Human Rights: The Case of the Gaza Strip*, 24 HARV. HUM. RTS. J. 155, 163 (2011) ("In 2007, following a constitutional impasse that resulted from said elections, Hamas forcefully took over the administrative and the security apparatuses of the Palestinian Authority in the Gaza Strip.")

22. See Etgar Lefkovits, *Expert: 'Christian groups in PA to disappear'*, JERUSALEM POST (Dec. 4, 2007), <http://www.jpost.com/MiddleEast/Article.aspx?id=84181> ("Christian communities living in Palestinian-run territories in the West Bank and Gaza are likely to dissipate completely within the next 15 years.")

23. See LEONARD J. LAW, *RULE OF LAW IN IRAQ: TRANSITIONAL JUSTICE UNDER OCCUPATION* 11, 15-16 (2004), available at <http://handle.dtic.mil/100.2/ADA429242>.

24. See ALI A. ALLAWI, *THE OCCUPATION OF IRAQ: WINNING THE WAR, LOSING THE PEACE* 155-60 (2007); Canadian Broad. Corp., *Former US Administrator Blasts US Post-war Actions in Iraq*, CBCNEWS (Nov. 26, 2003), <http://www.cbc.ca/world/story/2003/11/26/jaygarner031126.html>; Georg Mascolo, *Interview with Bob Woodward: "A System-*

Tens of thousands of teachers and factory workers lost their jobs, while some judges who had been responsible for implementing laws that grossly violated international human rights stayed on.<sup>25</sup> Lists of Ba'athists began circulating in Baghdad, and death squads killed thousands of former officials, including teachers, professors, and doctors.<sup>26</sup>

The policies of the Coalition Provisional Authority and President Bush to empower religious parties in Iraq from the very start of the occupation brought the number of large Middle Eastern theocracies to three.<sup>27</sup> They created an Iraqi Governing Council stuffed with religious extremists, which issued a transitional constitution that established an official religion and banned secular laws that contradicted important religious laws.<sup>28</sup> The Iraqi Constitution, which passed by a nationwide referendum in 2005, stated that the Islamic religion would henceforth be a "fundamental source of legislation."<sup>29</sup>

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*atic State of Denial*", DER SPIEGEL (Oct. 10, 2006), <http://www.spiegel.de/international/spiegel/0,1518,441841,00.html>; John McChesney, *Millionaire-Turned-Filmmaker Traces Iraq War*, NPR (Aug. 23, 2007), <http://www.npr.org/templates/story/story.php?storyId=13903569>.

25. See LAW, *supra* note 23, at 15, 21–36; Ann Scott Tyson, *Iraqi Justice System Starts to Mend*, CHRISTIAN SCI. MONITOR (Aug. 1, 2003), <http://www.csmonitor.com/2003/0801/p06s01-woiq.html>; James Hider, *Saddam's Judge Is Accused of Being Leading Baathist*, TIMES (London), Jan. 23, 2006, at 30.

26. See ALLAWI, *supra* note 24, at 135–46; GILBERT BURNHAM ET AL., THE HUMAN COST OF THE WAR IN IRAQ: A MORTALITY STUDY, 2002–2006 (2006), [http://web.mit.edu/cis/pdf/Human\\_Cost\\_of\\_War.pdf](http://web.mit.edu/cis/pdf/Human_Cost_of_War.pdf); ECONOMIST INTELLIGENCE UNIT, IRAQ: COUNTRY PROFILE 2007 23, 25, 40 (2007), [http://www.eiu.com/FileHandler.ashx?issue\\_id=62523191&mode=pdf](http://www.eiu.com/FileHandler.ashx?issue_id=62523191&mode=pdf); IMAD HARB, HIGHER EDUCATION AND THE FUTURE OF IRAQ 1, 5 (2008), <http://www.usip.org/files/resources/sr195.pdf>.

27. See *In Defense of Human Dignity: The International Religious Freedom Report: Hearing Before the H. Subcomm. on Africa, Global Human Rights and Int'l Operations of the H. Comm. on Int'l Relations*, 109th Cong. 143 (2005) (statement of Nina Shea, Director, Center for Religious Freedom, Freedom House) (noting that the Iraqi constitution is the only constitution other than those of Afghanistan, Iran, and Saudi Arabia in which the Supreme Court directly reviews laws for compliance with religious "provisions"); Hayat Alvi, *The Human Rights of Women and Social Transformation in the Arab Middle East*, 9 MIDDLE E. REV. INT'L AFF. 142, 143 (2005), <http://www.gloria-center.org/meria/2005/06/Alvi%20Hayat%20pdf.pdf>; Peter W. Galbraith, *Iraq: Bush's Islamic Republic*, N.Y. REV. BOOKS (July 14, 2005), [www.nybooks.com/articles/archives/2005/aug/11/iraq-bushs-islamic-republic/?pagination=false](http://www.nybooks.com/articles/archives/2005/aug/11/iraq-bushs-islamic-republic/?pagination=false).

28. See LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD [CONSTITUTION] Mar. 8, 2004, art. 7, 26(A), *available at* [http://www.servat.unibe.ch/icl/iz00000\\_.html](http://www.servat.unibe.ch/icl/iz00000_.html); YIFAT SUSSKIND, PROMISING DEMOCRACY, IMPOSING THEOCRACY: GENDER-BASED VIOLENCE AND THE US WAR ON IRAQ 3 (2007), *available at* <http://issuu.com/madre/docs/iraqreport?mode=embed&documentId=081008022806-8a52f11650474c9abcda04a5c62eb20e&layout=white>; Hannibal Travis, *After Regime Change: United States Law and Policy Regarding Iraqi Refugees, 2003–2008*, 55 WAYNE L. REV. 1007, 1054 (2009).

29. See Articles 2, 90–91, DOUSTOUR JUMHOURIAT AL-IRAQ [THE CONSTITUTION OF THE REPUBLIC OF IRAQ] of 2005; ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION: THE POLITICS OF IMPOSED REVOLUTION IN IRAQ 236–37 (2009) (summarizing these provisions and their dangers for Iraq's then-existing secular laws); Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT'L L. 645, 730 (2006) ("Regardless of whether Sunnis or Shiites are responsible for this judicial activism, arguably the Iraqi positive law supports [some] religious discrimination in favor of Islamic insurgents.").

Another development with significant momentum when Obama took office was the U.S. "democracy-promotion" policy and its flotilla of related institutions and offices. The great powers, especially the United States, have accelerated regime change in undemocratic societies. The White House, the State Department, the Pentagon, the U.S. Agency for International Development, the International Republican Institute, and the National Endowment for Democracy have stood out as architects of such regime change, although legions of other actors and agencies no doubt played their part.<sup>30</sup> Official press releases and dominant mass media narratives describe U.S. policy as actively promoting democracy and freedom against dictators, torturers, and other retrograde actors in the Middle East and Africa.<sup>31</sup>

The period between 2004 and 2010 was something of a pause or even a rollback for the cause of democracy. United States democracy-promotion efforts stalled in China, Russia, Iran, Iraq, Jordan, Azerbaijan, Belarus, Tajikistan, Turkmenistan, and Uzbekistan, as governments prohibited the activities and arrested the leaders of NGOs and even killed activists linked to U.S. democracy-assistance spending.<sup>32</sup> The Orange Revolution in

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30. The process began, perhaps, with Armenia and the Baltics in 1988, and in Poland with the Solidarity movement, moving to East Germany with protests that brought about the fall of the Berlin Wall and the reunification with West Germany, leading to democratic transitions in Czechoslovakia, Hungary, and Bulgaria, the fall of Milošević in Yugoslavia in 2000, and the "color revolutions" against post-Soviet autocracy in Georgia, Ukraine, and Kyrgyzstan after that. See LINCOLN A. MITCHELL, *UNCERTAIN DEMOCRACY: U.S. FOREIGN POLICY AND GEORGIA'S ROSE REVOLUTION* 117 (2009); Brian Grodsky, *Lessons (Not) Learned: A New Look at Bureaucratic Politics and U.S. Foreign Policy-Making in the Post-Soviet Space*, 56 *PROBS. POST-COMMUNISM* 43, 43 (2009); Alexander J. Motyl, *Identity Crisis in the Soviet West*, *BULL. ATOMIC SCIENTISTS* 21, 22 (Mar. 1989); Gerald Sussman & Sascha Krader, *Template Revolutions: Marketing U.S. Regime Change in Eastern Europe*, 5 *WESTMINSTER PAPERS COMM. & CULTURE* 91, 93, 95-96 (2008). One NGO that is often mentioned as working to common purposes with the U.S. government is the Open Society Institute, especially regarding Serbia and Yugoslavia in 2000, and Poland and Bulgaria before that. See *id.* at 95-96, 98. Germany's political party-based "democracy assistance" foundations also spend hundreds of millions of dollars annually. See NED, *infra* note 31, at 10.

31. See, e.g., NAT'L ENDOWMENT FOR DEMOCRACY, *THE BACKLASH AGAINST DEMOCRACY ASSISTANCE: A REPORT PREPARED BY THE NATIONAL ENDOWMENT FOR DEMOCRACY FOR SENATOR RICHARD G. LUGAR, CHAIRMAN COMMITTEE ON FOREIGN RELATIONS, UNITED STATES SENATE 8* (2006) [hereinafter NED], available at <http://www.ned.org/docs/backlash06.pdf>; *Overview of America's National Strategy for Combating Terrorism*, THE WHITE HOUSE: PRESIDENT GEORGE W. BUSH (Sept. 5, 2006), <http://web.archive.org/web/20090112133041/http://www.whitehouse.gov/nsc/nsct/2006/sectionI.html>; President George W. Bush, Second Inaugural Address (Jan. 20, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4460172> ("[I]t is the policy of the United States to seek and support the growth of democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world.").

32. See NED, *supra* note 31, at 15-38; ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT* 6, 14, 26-27 (2010), [http://graphics.eiu.com/PDF/Democracy\\_Index\\_2010\\_web.pdf](http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf). The NED includes Venezuela with Russia as a severe violator of democratic norms, but fails to note that Venezuela allowed a number of other candidates to face Hugo Chavez in the 1997 and 2005 elections. Compare *id.* at 39-40, with MARINA OTTAWAY, *DEMOCRACY CHALLENGED: THE RISE OF SEMI-AUTHORITARIANISM* 88-89 (2003) and ELIZABETH GACKSTETTER NICHOLS & KIMBERLY J. MORSE, *VENEZUELA* 105 (2010).

Ukraine fizzled out in 2010 amid charges of massive corruption.<sup>33</sup> In Kyrgyzstan, post-election violence erupted into enormous massacres in 2010, especially of ethnic Uzbeks.<sup>34</sup>

Africa was a particularly disappointing site of confrontation between democrats and autocrats, as illustrated by Table 1, which is a partial list.

**Table 1 - The State of Democracy in the Thirty-Five Largest African Nations (by Area) in 2009<sup>35</sup>**

Countries	Undemocratic Countries	Years Before 2009 in Which Last Change of Leadership Occurred in Country
Gabon, Libya	Gabon, Libya	38+
Angola, Equatorial Guinea, Republic of the Congo	Angola, Equatorial Guinea, Republic of the Congo	28+
Burkina Faso, Cameroon, Egypt, Ethiopia, Guinea, Sudan, Tunisia, Uganda, Zimbabwe	Burkina Faso, Cameroon, Egypt, Ethiopia, Guinea, Sudan, Tunisia, Zimbabwe	18+
Algeria, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Morocco, Niger, Rwanda, Senegal, Western Sahara	Algeria, Chad, Cote d'Ivoire, Democratic Republic of the Congo, Morocco, Niger, Rwanda, Western Sahara	8+
Botswana, Central African Republic, Kenya, Namibia, Ghana, Madagascar, Mali, Mauritania, Mozambique, Nigeria, Somalia, South Africa, Tanzania, Zambia	Central African Republic, Madagascar, Mauritania, Nigeria, Somalia	0-8

The primary exception to the 2004–2010 trend was Latin America, where new social movements and continuing economic misery ensured democratic transitions in Bolivia, Peru, and Ecuador.<sup>36</sup> Still, a poll con-

33. See, e.g., Christian Caryl, *Yanukovych Won. Get Over It.*, FOREIGN POL. (Feb. 8, 2010), available at [http://www.foreignpolicy.com/articles/2010/02/08/yanukovich\\_won\\_get\\_over\\_it](http://www.foreignpolicy.com/articles/2010/02/08/yanukovich_won_get_over_it).

34. See Catherine A. Fitzpatrick, *Uzbekistan Weekly Roundup*, EURASIANET.ORG (July 24, 2010), <http://www.eurasianet.org/node/61596>; *Kyrgyzstan: Azimbek Beknazarov Reports Over 800 People Massacred in Osh and Jalal-Abad*, FERGHANA (July 12, 2010), <http://enews.ferghananews.com/news.php?id=1762&mode=snews>.

35. CENT. INTELLIGENCE AGENCY, WORLD FACTBOOK 2008 (2008), available at <https://www.cia.gov/library/publications/download/download-2008>; ECONOMIST INTELLIGENCE UNIT, *supra* note 32. The Economist's classification of "Authoritarian" countries was used to generate undemocratic classification.

36. See *Commentary: A Good Precedent Set by Convicting Peru's Fujimori*, MIAMI HERALD (Apr. 15, 2009), <http://www.mcclatchydc.com/2009/04/15/66201/commentary-a-good-precedent-set.html>; *Man of the People Closes in on Presidency*, SCOTSMAN (Oct. 14, 2006), [http://www.scotsman.com/news/international/man\\_of\\_the\\_people\\_closes\\_in\\_](http://www.scotsman.com/news/international/man_of_the_people_closes_in_)

ducted in 2005 found that half of all Americans did not necessarily support using their tax dollars to promote democracy abroad.<sup>37</sup> Though the situation was grim, something was coming that promised to help break the logjam.

A third development confronting the incoming president was the rise of search engines, social media, and broadband Internet access. Internet usage more than doubled in Egypt, for example, from 2005–2010, with 30% of the population having access in 2010.<sup>38</sup> Broadband connections increased at an even more rapid pace, but from a very low base, so access was still rare.<sup>39</sup> By April of 2011, Egypt had more than seven million Facebook users, along with hundreds of thousands of Twitter users. In the first quarter of 2011, Twitter hash tags such as #egypt, #jan25, #libya, #bahrain, and #protest garnered hundreds of thousands or millions of mentions.<sup>40</sup> Even Libya, where the government heavily restricted the Internet and social media, had tens of thousands of Twitter users by then.<sup>41</sup> Although not often classed with other "social media" projects, as of 2008 Google and Yahoo! operated in a way that leveraged the social network of humanity, by transmuted into a link structure the World Wide Web pages that individuals and institutions posted, allowing Internet users to rapidly find what their fellow humans thought was "worth looking at."<sup>42</sup>

Social media enabled activists to follow breaking events (especially Twitter), create groups of like-minded persons (especially Facebook), organize mass protests and other revolutionary actions (especially Facebook), and broadcast mass demands for change along with images and videos of regime repression around the world (especially Google and YouTube).<sup>43</sup> Twitter arguably emerged out of innovations by peace and eco-

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on\_presidency\_1\_721165; *Revolution! Please Give Generously*, *ECONOMIST* (Apr. 23, 2009), [http://www.economist.com/node/13527399?story\\_id=13527399](http://www.economist.com/node/13527399?story_id=13527399); *Victory for the Andean Chameleon*, *ECONOMIST* (June 9, 2011), <http://www.economist.com/node/18805443>; Donna Lee Van Cott, *Radical Democracy in the Andes: Indigenous Parties and the Quality of Democracy in Latin America* 1 (Kellogg Inst., Working Paper No. 333, 2006), available at [kellogg.nd.edu/publications/workingpapers/WPS/333.pdf](http://kellogg.nd.edu/publications/workingpapers/WPS/333.pdf).

37. See NED, *supra* note 31, at 9.

38. See Anne Miroux, Dir., Div. on Tech. & Logistics, UNCTAD, Opening Address at the Launch of the ICT Policy Review of Egypt: UNCTAD ICT Policy Review of Egypt (Oct. 26, 2011).

39. See *id.*

40. Racha Mourta & Fadi Salem, *Civil Movements: The Impact of Facebook and Twitter* 1 ARAB SOCIAL MEDIA REPORT 15, 16 (2011), available at [http://www.dsg.ae/en/publication/Pdf\\_En/DSG\\_Arab\\_Social\\_Media\\_Report\\_No\\_2.pdf](http://www.dsg.ae/en/publication/Pdf_En/DSG_Arab_Social_Media_Report_No_2.pdf).

41. See *id.* at 29.

42. SERGEY BRIN & LAWRENCE PAGE, THE ANATOMY OF A LARGE-SCALE HYPERTEXTUAL WEB SEARCH ENGINE § 2.1.2 (1998), available at <http://ilpubs.stanford.edu:8090/361/1/1998-8.pdf> (introducing Google at the Seventh International World-Wide Web Conference in Brisbane, Australia).

43. Jared Cohen, Posting to Twitter (Jan. 27, 2011, 11:36 AM), <http://twitter.com/JaredCohen/statuses/3066540707756224> ("One Egyptian says, 'facebook used to set the date, twitter used to share logistics, youtube to show the world, all to connect people.'"); Paul Seaman, *Egypt's Protests Owe Little to Social Media*, 21ST CENTURY PR ISSUES: PAUL SEAMAN (Jan. 31, 2011), <http://paulseaman.eu/2011/01/egypts-protests-owe-little-to-social-media/>.

nomic-reform activists protesting the national political conventions in the United States in 2004 and was intended to create a platform for text-messaging across crowds of protesters, with copies sent to the mass media.<sup>44</sup> Tweets, Facebook postings, and YouTube videos spread virally by such means as shares, favorites, “Likes,” and “Retweets,” all forms of many-to-many communication.<sup>45</sup> During President Obama’s term in office, the U.S. State Department and various NGOs funded efforts to train Middle-Eastern activists in the use of blogs and social media for democracy-promotion purposes.<sup>46</sup>

Along with the rise of the Muslim Brotherhood and pan-Arab satellite television stations such as Al-Jazeera, these new technologies have made simultaneous revolutions possible in disparate contexts in a manner not seen since the 1989–1991 period, if ever.<sup>47</sup> The Muslim Brotherhood and Al-Jazeera are powerful political and social phenomena, the former existing in perhaps seventy countries but working towards a more or less consistent objective; and the latter built with seed money in the hundreds of millions of dollars by the Emir of Qatar, and then distributed worldwide by Dish Network and Rupert Murdoch’s Sky Digital, among others.<sup>48</sup> The Emir of Qatar used Al-Jazeera to distract attention from Qatar’s security and diplomatic links to Israel and the United States. The network has urged “martyrs” from other Islamic countries to wage war on Israel and the United States, promoted the financing of Al-Qaeda and Hamas, and disseminated the rhetoric of these groups.<sup>49</sup> These developments converged to make the Arab Spring more successful than it might have been in the 1980s or 1990s, when Middle Eastern and African peoples also insisted on change, but torture and massacres muffled their cries with no YouTube and few

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44. See *Digital Darkness: U.S., U.K. Companies Help Egyptian Regime Shut Down Telecommunications and Identify Dissident Voices*, DEMOCRACY NOW! (Feb. 1, 2011), [http://www.democracynow.org/2011/2/1/digital\\_darkness\\_us\\_uk\\_companies\\_help](http://www.democracynow.org/2011/2/1/digital_darkness_us_uk_companies_help).

45. See, e.g., Frederic I. Solop, “RT @BarackObama We Just Made History”: Twitter and the 2008 Presidential Election, in *COMMUNICATOR-IN-CHIEF: HOW BARACK OBAMA USED NEW MEDIA TECHNOLOGY TO WIN THE WHITE HOUSE* 39 (John Allen Hendricks & Robert E. Denton, Jr. eds., 2010); Interview by Terry Gross, NPR, with Biz Stone, co-founder, Twitter (Feb. 16, 2011), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=133775340>.

46. MINORITY STAFF OF S. COMM. ON FOREIGN RELATIONS, 112TH CONG., ANOTHER U.S. DEFICIT—CHINA AND AMERICA—PUBLIC DIPLOMACY IN THE AGE OF THE INTERNET 37, 41–42 (Comm. Print 2011); PATRICIA MOLONEY FIGLIOLA ET AL., CONGRESSIONAL RESEARCH SERVICE, U.S. INITIATIVES TO PROMOTE GLOBAL INTERNET FREEDOM: ISSUES, POLICY, AND TECHNOLOGY 15 (2011), available at [http://assets.opencrs.com/rpts/R41120\\_20110103.pdf](http://assets.opencrs.com/rpts/R41120_20110103.pdf); Indira A. R. Lakshmanan, *Supporting Dissent with Technology*, N.Y. TIMES (Feb. 23, 2010), <http://www.nytimes.com/2010/02/24/us/24iht-letter.html>.

47. See HUGH MILES, AL-JAZEERA: THE INSIDE STORY OF THE ARAB NEWS CHANNEL THAT IS CHALLENGING THE WEST 28, 36, 42 (2005); Interview by Lawrence R. Velvel with Hugh Miles, author, AL-JAZEERA: THE INSIDE STORY OF THE ARAB NEWS CHANNEL THAT IS CHALLENGING THE WEST, in *Bos. Mass.*, available at <http://www.youtube.com/watch?v=liPHpLwFGf0>.

48. See MILES, *supra* note 47, at 28, 36.

49. TAL SAMUEL-AZRAN, AL-JAZEERA AND U.S. WAR COVERAGE 31–34 (2010).

satellites being used to mobilize global support.<sup>50</sup>

A fourth development was the ongoing articulation of the Responsibility to Protect (RTP) civilians from genocide, crimes against humanity, or war crimes perpetrated by their own governments. The modern version of the RTP, independent of Security Council authority, and working to avert genocide or crimes against humanity, emerged in the global South with India's invasion of East Pakistan to end a genocide in 1971, continuing with Vietnam's invasion of Cambodia to end a genocide in 1978, Tanzania's invasion of Uganda in 1979, the Economic Community of West African States' actions in Liberia and Sierra Leone in the 1990s, the North Atlantic Treaty Organization (NATO) intervention in northern Iraq in 1991, the U.S. invasion of Somalia in 1993, the French invasion of Rwanda in 1994, the British invasion of Sierra Leone in 2000, the NATO bombing of Kosovo and Yugoslavia and backing of Kosovar Albanian rebels in 1999, the Australian invasion of East Timor in 1999, and the Russian invasion of Georgia in 2008.<sup>51</sup> From 1999 to 2001, Canadian Foreign Minister Lloyd Axworthy advocated for change within the United Nations to bring about intervention against "extreme abuse[s]," with an international commission on intervention issuing a report in 2001 entitled *The Responsibility to Protect*.<sup>52</sup> In 2005, the World Summit Outcome Document labeled the RTP an emerging principle of customary international law.<sup>53</sup> The details of the RTP doctrine are the subject of Part VII.D, *infra*.

The remarkable speed of changes in some countries during the Arab Spring stands in palpable contrast to the failed revolutions within majority-Arab countries from the 1970s through the 1990s. One potential explanation, explored below in a country-specific, chronological fashion, is that

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50. Examples of past failed uprisings in the Middle East include the events surrounding the assassination of Egyptian President Anwar Sadat in 1981, the civil war in Syria in 1984, the violent strife within Iran and Iraq during the 1980s, the revolt in northern and southern Iraq in 1991, the resistance to Moroccan rule in Western Sahara since at least the 1980s, the Houthi and socialist rebellions in Yemen in the 1990s, and the long struggle of Bahrain's and Saudi Arabia's Shi'a Arab populations. Notable exceptions include the "Cedar Revolution" of Lebanon in 2006, the Palestinian intifada of the late 1980s and early 1990s, which resulted in the establishment of an increasingly large and powerful Palestinian Authority in the mid-to-late 1990s, and the secession of Kurdish regions from northern Iraq with U.N. and NATO backing in the 1990s.

51. See Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177 (J. L. Holzgrefe & Robert O. Keohane eds., 2003); JOSHUA S. GOLDSTEIN, WINNING THE WAR ON WAR 146, 237 (2011); INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT: RESEARCH, BIBLIOGRAPHY, BACKGROUND 49-126 (2001); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 343-65 (1998); Jeremy Levitt, *Pre-Intervention Trust-Building, African States and Enforcing the Peace: The Case of ECOWAS in Liberia and Sierra Leone*, 24 LIBER. STUD. J. 1-26 (1999).

52. LLOYD AXWORTHY, NAVIGATING A NEW WORLD: CANADA'S GLOBAL FUTURE 190-92 (2004).

53. ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT 6-7 (2009); U.N. Secretary-General, *In Larger Freedom: Toward Development, Security and Human Rights for All*, ¶ 135, U.N. Doc. A/59/2005 (Mar. 21, 2005).

the Internet and Al-Jazeera mobilized international opinion to demand selective regime change, sometimes by force, in 2011.

## II. Wargaming the Arab Spring: General Principles

Economic and military disputes are comparable in their abstract form to multi-move games between two or more sides.<sup>54</sup> The moves of the game may be attacks or other allocations of resources.<sup>55</sup> An attack may be conducted by various operations, such as offensive infantry, air, or sea operations, or counter-infantry, counter-air, or counter-sea operations.<sup>56</sup> Depending on its parameters, a game may have a solution for a given number of moves, defined as the “optimal pure strategies” for the sides.<sup>57</sup> A player must assess the advantages and disadvantages of a strategy given the capabilities and resources of an adversary or series of adversaries.<sup>58</sup> Mixtures of strategies or random choices are also available.<sup>59</sup> Games of imperfect information, most similar to real life, involve ignorance or error about the content of one’s adversaries’ prior moves and as to their available resources.<sup>60</sup>

Game theory also has something to say about the interactions of large nations subject to a governing framework like the United Nations, or other “balance of power” treaty arrangement. Alexander Hamilton once argued that one of the most powerful nations on earth, France, was interfering so often and so effectively in its neighbors’ affairs that these powers would “make common cause to resist and control the state which manifests a disposition so suspicious and exceptionable.”<sup>61</sup> Game theory bears out Hamilton’s observation that the arbitrary and oppressive actions of large nations may violate the independence interests of smaller neighboring nations and invite coalitions of other nations to retaliate.<sup>62</sup>

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54. See MELVIN DRESHER, GAMES OF STRATEGY: THEORY AND APPLICATIONS 1, 145 (1961), available at [http://www.rand.org/content/dam/rand/pubs/commercial\\_books/2007/RAND\\_CB149-1.pdf](http://www.rand.org/content/dam/rand/pubs/commercial_books/2007/RAND_CB149-1.pdf).

55. See *id.* at 145.

56. See *id.*

57. *Id.* at 2, 150.

58. See *id.* at 4.

59. See *id.* at 4-5.

60. See *id.* at 13-15.

61. Alexander Hamilton, *Pacificus No. 2*, in THE FEDERALIST 415 (Hallowell ed., 1852).

62. See, e.g., ADRIAN HYDE-PRICE, EUROPEAN SECURITY IN THE TWENTY-FIRST CENTURY 49-51 (2007); see also Matteo Dian, *Dilemmas of the Asymmetry: The Evolving Dynamic of the Alliance between the US and Japan* 3-6, 13-14, 24-26 (2010), (unpublished manuscript) (on file with author) (citing, *inter alia*, Robert Jervis, *Cooperation Under Security Dilemma*, 30 WORLD POLITICS., no. 2 (Jan. 1978); James D. Morrow, *Arms Versus Allies: Trade-offs in the Search for Security*, 47 INT’L ORG. 207, 215 (1993); Mancur Olson, Jr. & Richard Zeckhauser, *An Economic Theory of Alliances*, 48 REV. ECON. & STAT. 266, 273 (1966); ROBERT E. OSGOOD, ALLIANCES AND AMERICAN FOREIGN POLICY 21 (1968); Bruce M. Russett, *An Empirical Typology of International Military Alliances*, 15 MIDWEST J. POL. SCI. 262, 270-72 (1971)). Paul W. Schroeder calls this dynamic one of the four key strategies of international relations: “seeking protection.” Paul W. Schroeder, *The Neo-*

Game theory posits that in the absence of a credible threat of retaliation by other sufficiently powerful nations, a large nation may succumb to the temptation to violate international law to achieve its short-term preferences.<sup>63</sup> In this respect, compliance with international law is understandable as a prisoner's dilemma: while universal compliance with international law would result in the best outcome overall, a given nation's optimal strategy is to violate international law, regardless of whether the other nation will comply, if the first nation believes that this will be a single confrontation, without expectation of a recurrence. This helps to explain why some nations destroy other nations completely, preventing the opportunity for the smaller or weaker nation to retaliate in the future.

When nations have repeated interactions (or "iterations" in game theory terms), such as those pursuant to the U.N. Charter or a free-trade agreement, cooperation and compliance may emerge as a given nation's optimal strategy, so long as nations punish one another's violations of the pact fairly consistently.<sup>64</sup>

A provocative example of a wargame is the Army Transformation Wargame of 2000.<sup>65</sup> It involved a hypothetical war in 2015 between NATO and a combined Iran and Iraq over access to water at the headwaters of the Tigris and Euphrates rivers in Syria and Turkey, and multiple moves including warfare and post-conflict operations.<sup>66</sup> In the wargame, the Chief of Staff of the Army had implemented a strategy aimed at preserving "full spectrum" dominance.<sup>67</sup> Other notable wargames include the Japanese wargame of 1940-1941 in anticipation of the attack on the United States and the waging of World War II, and the U.S. wargame of 1955 simulating nuclear war with the Soviet Union in the period leading up to 1958.<sup>68</sup>

A wargame more analogous to modeling the risks posed by the Arab Spring is the "Wargaming the Asymmetric Environment" program of the Defense Advanced Research Projects Agency. It was designed to "develop and demonstrate specific, predictive technology to better anticipate and act against terrorists" by "identifying predictive indicators of terrorist-specific

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*Realist Theory of International Politics: A Historian's View*, ACDIS OCCASIONAL PAPERS (2001).

63. George Norman & Joel P. Trachtman, *The Customary International Law Supergame: Order and Law* 13-14, 20-22, 36 (Tufts Univ. Dep't of Econ., Working Paper, Mar. 2004), available at [ase.tufts.edu/econ/research/documents/2004/papers15.pdf](http://ase.tufts.edu/econ/research/documents/2004/papers15.pdf).

64. Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 255 (2011).

65. See WALTER PERRY ET AL., RAND CORP., A REPORT ON ARMY TRANSFORMATION WARGAME OF 2000 (2001), available at [http://www.rand.org/content/dam/rand/pubs/monograph\\_reports/2007/MR1335.pdf](http://www.rand.org/content/dam/rand/pubs/monograph_reports/2007/MR1335.pdf).

66. See *id.* at xi, xiv.

67. *Id.* at 1.

68. ROBERT D. SPECHT, RAND CORP., WAR GAMES 1-5, 14-15 (1957), available at <http://www.rand.org/pubs/papers/2005/P1041.pdf>.

attacks and behaviors” in a cultural and ideological context.<sup>69</sup> It developed an early warning model that was used “operationally, to predict an active terrorist group’s next action (attack/no attack, target characteristics, location characteristics, tactical characteristics, timeframes, and motivating factors).”<sup>70</sup> Among other techniques, it used data mining to extract signatures of terrorist operations.<sup>71</sup> Although a comparable data analysis was not possible to conduct in this Article, the approach of deriving early warning of future events which may require the United Nations and its member states to act, motivates much of the analysis that follows.

This Article attempts to conduct a broad-based analysis of the possible course of the Arab Spring and necessary responses by the United Nations and other actors. It draws on the lessons of strategic planning by war-games in the past, including: accounting for adversaries’ available resources in planning responses, mining as much information as possible for trends and styles of adversary operations, and conducting a multi-move and multi-actor analysis of potential ramifications of operations and strategies. Taking a page from the U.N. Department of Peacekeeping Operations, it also seeks to develop templates that will make U.N. responses to the Arab Spring and related humanitarian and human rights crises more effective.<sup>72</sup>

### III. The Spark, Tunisia 2011

Tunisia was perhaps the most highly developed country in Africa at the outbreak of the Arab Spring. The World Bank reported in 1977 that that the country had experienced “rapid economic growth with increasingly equitable distribution of its benefits.”<sup>73</sup> As illustrated in Table 2, it enjoyed perhaps the highest standard of living in all of Africa, rivaled perhaps only by Libya.

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69. DEFENSE ADVANCED RESEARCH PROJECTS AGENCY (DARPA), DARPA FACT FILE: A COMPENDIUM OF DARPA PROGRAMS 5 (2002), available at <http://web.archive.org/web/20030407025711/http://www.darpa.mil/body/NewsItems/pdf/DARPAfactfile.pdf>.

70. *Id.*

71. Lee Tien, *Privacy, Technology and Data Mining*, 30 OHIO N.U. L. REV. 389, 396 (2004) (“TIA’s Wargaming the Asymmetric Environment (WAE) project, which was aimed at developing models of terrorist behavior, appeared to exemplify ‘true’ data mining: it assumed that different terrorist groups have distinct ‘styles’ or ‘signatures’ that can be identified in the transaction space . . .”).

72. See Roy S. Lee, *Panel on Peacekeeping: Legal and Political Issues*, 8 ILSA J. INT’L & COMP. L. 431, 442 (2002).

73. HUMAN RIGHTS, THE HELSINKI ACCORDS, AND THE UNITED STATES: ANNUAL HUMAN RIGHTS REPORTS SUBMITTED TO CONGRESS BY THE U.S. DEPARTMENT OF STATE 417 (Igor Kavass & Jacqueline P. Granier eds., 1982).

**Table 2 - Human Development in North Africa in 2008**  
(Unless Otherwise Noted)<sup>74</sup>

	Tunisia	Libya	Egypt	Morocco	Algeria	Sudan
Total life expectancy at birth (years)	74.3	72.3	72.3	72	71	57 <sup>p</sup>
Male life expectancy at birth (years)	72.4	70.2	69.9	71.6	70	58
Infant mortality rate (per 1,000 live births)	18.4 <sup>+</sup>	14	17	32.2 <sup>p</sup>	36	81 <sup>*</sup>
Under five mortality rate (per 1,000 live births)	22	19 <sup>+</sup>	21.8	37.9	41	112
Maternal mortality ratio (per 10,000 live births)	36	23	55	227	180 <sup>-</sup>	1107
Total expenditure on health (% of GDP)	6	3.5	6.4	5.3	4.4	3.6
Adult literacy rate 15+ years, (%)	78	89	71 <sup>*</sup>	56 <sup>+</sup>	75 <sup>p</sup>	50 <sup>-</sup>
Gross secondary school enrollment ratio - total (%)	75 <sup>+</sup>	110 <sup>*</sup>	92 <sup>*</sup>	44	95 <sup>+</sup>	30 <sup>o</sup>

## Key

' = 2001

• = 2002

- = 2003

<sup>p</sup> = 2000-2007

- = 2005

\* = 2006

o = 2007

^ = 2011

In 2010, however, Tunisia's living standards lagged considerably behind those of some of the countries whose satellite television channels were available in Tunisia, such as France, the United Arab Emirates (UAE), or Saudi Arabia.<sup>75</sup> Following neoconservative economic orthodoxy, Tunisia had privatized state-owned enterprises and gradually reduced subsidies for the necessities of life, without creating enough jobs or income to make up for the reduced subsidies.<sup>76</sup> To make matters worse, food prices hit a

74. WORLD HEALTH ORG., WORLD HEALTH STATISTICS 2010 45-52, 61-65 (2010), available at [http://www.who.int/whosis/whostat/EN\\_WHS10\\_Full.pdf](http://www.who.int/whosis/whostat/EN_WHS10_Full.pdf); *World Bank Data: Indicators*, WORLD BANK, <http://data.worldbank.org/indicator> (last visited Apr. 13, 2013) (select indicator by topic for data set); *Country Profile: Libya*, POLITY.ORG.ZA, <http://www.polity.org.za/article/libya-2009-11-09>.

75. See *World Bank Data*, *supra* tbl.2.

76. See Emad Mekay, *Tunisian Unrest Stirs Arab World*, INTER PRESS SERVICE (Dec. 31, 2010), <http://www.ipsnews.net/news.asp?idnews=54010>. For a description of neoconservative economic orthodoxy, and its disastrous impact on some other economies where it had been tried, see, for example, ALEJANDRO FOXLEY, *LATIN AMERICAN EXPERIMENTS IN NEOCONSERVATIVE ECONOMICS* 184-87 (1983). One of the observed impacts is that “essential food consumption per family for the poorer groups showed a reduction of 20% in real terms between 1969 and 1978” in Chile. *Id.* at 84. Another is a “marked” increase in the inequality of consumption, generating instability. See *id.* at 15, 19, 21, 84. See generally GLOBALIZATION, NEO-CONSERVATIVE POLICIES, AND DEMOCRATIC ALTERNATIVES. ESSAYS IN HONOUR OF JOHN LOXLEY (Haroon Akram-Lodhi et al., eds., 2005). Unemployment in Chile, for example, increased from 3% to more than 10%, with two economic depressions in less than a decade, and a GDP in 1983 close to where it had been in 1973, followed by strong growth after 1986. See *Econ. Comm'n for Latin Am. &*

record high, fueled by China's rising share of world consumption of foods and edible oils, and the use of biofuels by developed countries such as the United States.<sup>77</sup> These were warning signs of severe civil war in Rwanda and Yugoslavia in the 1990s.<sup>78</sup>

On December 17, 2010, a fruit vendor named Mohamed Bouazizi set himself on fire to protest government corruption after the police confiscated his produce because he was selling it without a permit, possibly igniting the Tunisian revolution and its parallels elsewhere.<sup>79</sup> Political commentator Hernando De Soto called Bouazizi a symbolic breadwinner struggling to achieve success in a shadow economy, confronting the corruption of local officials, and suffering the seizure of six crates of fruit and a public slap from a female police officer.<sup>80</sup> Perhaps one hundred more Tunisians imitated his example in the following six months.<sup>81</sup> Newspapers blamed economic malaise for the spreading self-immolation.<sup>82</sup> By the end of the month, "Arabs across the Middle East watched in awe as online video posts and sporadic coverage on Al-Jazeera TV station showed Tunisians, with a reputation of passivity, rise up in unprecedented street protests and sits-in against the police state of President Ben Ali."<sup>83</sup> Blogs and tweets provided real-time coverage of the unfolding protests.<sup>84</sup> The opposition alleged that the government used gunfire, mass arrests, raids, and torture to fight back.<sup>85</sup>

The protests turned violent. In one town, 2,000 protesters fought with police, "setting three police cars ablaze as well as the offices of the governing party and security services."<sup>86</sup> Tunisian officials argued that a "democratic state" could not allow "the use by certain extremists of prohib-

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the Caribbean, Table 1.1.1.1, *América Latina: Producto Interno Bruto* (Table 1.1.1.1), CEPAL (2010), available at <http://www.cepal.org/deype/cuaderno37/datos/1.1.1.1.xls>; Walden Bello & John Kelly, *The IMF and Chile: A Parting of Ways?*, MULTINAT'L MONITOR, (Apr. 1983), <http://multinationalmonitor.org/hyper/issues/1983/04/bello.html>.

77. Tom Gjelten, *The Impact of Rising Food Prices on Arab Unrest*, NPR (Feb. 18, 2011), <http://www.npr.org/2011/02/18/133852810/the-impact-of-rising-food-prices-on-arab-unrest?sc=17&f=1004>.

78. See Dane Rowlands & Troy Joseph, *The International Monetary Fund and Conflict Prevention*, in CONFLICT PREVENTION: PATH TO PEACE OR GRAND ILLUSION? 207, 209 (David Carmet & Albrecht Schnabel eds., 2003) (reviewing literature).

79. Nada Bakri, *Self-Immolation Is on the Rise in the Arab World*, N.Y. TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/world/africa/self-immolation-on-the-rise-in-the-arab-world.html>; Elaine Ganley & Bouazza Ben Bouazza, *Jobless Youths in Tunisia Riot Using Facebook*, BLOOMBERG BUSINESSWEEK (Jan. 11, 2011), <http://www.businessweek.com/ap/financialnews/D9KMBTFG0.htm>.

80. See Hernando De Soto, *The Real Mohamed Bouazizi*, FOREIGN POL'Y (Dec. 16, 2011), [http://www.foreignpolicy.com/articles/2011/12/16/the\\_real\\_mohamed\\_bouazizi](http://www.foreignpolicy.com/articles/2011/12/16/the_real_mohamed_bouazizi).

81. See Bakri, *supra* note 79.

82. See, e.g., *id.*

83. Mekay, *supra* note 76.

84. See *id.*

85. See *id.*

86. *Police Clash With Protesters in Tunisia*, FOXNEWS.COM (Dec. 25, 2010), <http://www.foxnews.com/world/2010/12/25/police-clash-protesters-tunisia/#ixzz1kGL3uKwC>.

ited weapons such as Molotov cocktails and fire bombs and the throwing of stones against people and public and private property."<sup>87</sup> The U.N. High Commissioner for Human Rights, Navi Pillay, called for prosecutions of police using excessive force, and "expressed concern over reports of widespread arrests, including of human rights defenders and bloggers advocating fundamental human rights principles such as the freedom of expression, as well as reports of torture and ill-treatment of detainees."<sup>88</sup> She argued that the Tunisian government should "draw up policies to ameliorate economic hardship and lift severe limitations on civil liberties, including the freedoms of assembly, the expression of opinion and the right to associate."<sup>89</sup>

By January 19, Ms. Pillay believed that one hundred persons had died in the Tunisian revolution.<sup>90</sup> As a result, however, President Ben Ali left office, with a transitional government taking over and announcing plans for democratic elections and the release of political prisoners by the end of the year.<sup>91</sup> Three people had died in cypcat riots in Algeria, and Libyan President Muammar Gaddafi condemned the "unjustified chaos" confronting Tunisia after Ben Ali's departure.<sup>92</sup> Protesters continued to battle police and stormed a police station in February after the deaths of four of their own.<sup>93</sup>

Moncef al-Marzouki, the leader of a secular Tunisian party,<sup>94</sup> became the interim president of Tunisia.<sup>95</sup> Yet the "Islamist" Ennahda Party won at the polls, received "most of the important Cabinet posts," and has been called "the most powerful group in the assembly" of Tunisia.<sup>96</sup> The term "Islamist" is a misnomer, however, for there are various forms of Islam that do not require political coercion, as the mass media's usage of the term suggests by linking it to fundamentalist political parties seeking to impose religious law.<sup>97</sup> A better term might be "jihadist," for jihadism is the belief

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87. Tarek Amara, *Tunisian Government Says 14 Killed in Clashes*, REUTERS (Jan. 9, 2011), <http://uk.reuters.com/article/2011/01/09/uk-tunisia-protests-idUKTRE7080A220110109>.

88. *Tunisia: UN Human Rights Chief Calls for Halt to Use of Excessive Force Against Protesters in Tunisia*, ALLAFRICA.COM (Jan. 12, 2011), <http://allafrica.com/stories/201101120927.html>.

89. *Id.*

90. Tommy Evans & Rima Maktabi, *Protesters March in Tunis Amid Arab League Fears*, KPAX.COM (Jan. 19, 2011, 11:14 AM), <http://www.kpax.com/news/protesters-march-in-tunis-amid-arab-league-fears/>.

91. Borzou Daragahi, *Tunisia's New Government to Investigate Ex-President's Financial Dealings*, L.A. TIMES (Jan. 20, 2011), <http://articles.latimes.com/2011/jan/20/world/la-fg-tunisia-protest-20110120>.

92. Evans and Maktabi, *supra* note 90.

93. *See Tunisia Demonstrators Storm Police Station in Retaliatory Attack 06.02.11*, YOUTUBE (Feb. 8, 2011), <http://www.youtube.com/watch?v=v9RfkAOjqIw>.

94. *See* Evans & Maktabi, *supra* note 90.

95. Osman El Sharnoubi, *Tunisia Opposition Fear Ennahda Power Grab*, AHAM ONLINE (Jan. 17, 2012), <http://english.ahram.org.eg/NewsContent/2/8/31906/World/Region/Tunisia-opposition-fear-Ennahda-power-grab.aspx>.

96. *Id.*

97. *See, e.g.,* CHARLES ALLEN, *GOD'S TERRORISTS: THE WAHHABI CULT AND THE HIDDEN ROOTS OF MODERN JIHAD* 57 (reprint paperback ed., 2007) (noting that jihadism, as devel-

that non-Islamic rulers, those who do not adhere to shari'a law, are illegitimate and that all Muslims everywhere should fight against such rulers.<sup>98</sup> This belief was radicalized further by Abdul Aziz bin Adbul-Rahman ibn Saud, who mobilized the most "highly motivated" sectors of the Arabian population, the Wahhabi fundamentalists and the *Ikhwan* or the "Brothers," to "declare jihad on their mutual enemy, the non-Wahhabis" of Arabia.<sup>99</sup> Ibn Saud became the religious leader of the "Brothers," claiming to be the representative of God on earth, and imposed upon them a strict discipline organized around the promise of Paradise and the hatred of Shi'a and other Muslims, even as he forged an opportunistic alliance with the British Empire.<sup>100</sup> The British oversaw the flight of the traditional ruler of much of Arabia and the coming to power of Ibn Saud in his place.<sup>101</sup>

As one professor at Tunisia's Manouba University stated, the danger for that country is "a new hegemony, a new authoritarian rule by one of the representative parties . . ." <sup>102</sup> As in Afghanistan and Iraq, the transition away from socialist autocracy in Tunisia has been characterized by a series of attacks on women perceived not to be practicing jihadist chastity in a proper manner.<sup>103</sup> And as in these countries, word is spreading that the now-dominant party is being funded by individuals or institutions in Saudi Arabia and the Persian Gulf.<sup>104</sup> The leaders of the party also analogize it to the Justice and Development Party (AKP) in Turkey,<sup>105</sup> which threatened to deport the entire Armenian Christian population of the country if other nations recognized that most of Turkey's Christians had been exterminated during and after World War I.<sup>106</sup> Tunisia under Ben Ali had

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oped by Muhammad ibn Abd al-Wahhab, marginalizes the Quran's calls for "charity, tolerance, forgiveness, and mercy," and advocates "violence against all who stood in Islam's way. Polytheists and pagans were to be given one opportunity to convert, and . . . [i]f they . . . resisted they were to be killed."); *id.* at 55-57 (arguing that jihadism involves the doctrine that departures from monkish restrictions on food, music, dancing, clothing, and forms of religious worship warrant killing or loss of property).

98. See NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 33 (2008).

99. ALLEN, *supra* note 97, at 240-42.

100. See *id.* at 242-47.

101. See *id.*, at 246, 252-53. "In return for the fabulous sum of five million pounds sterling, Ibn Saud promised to have no relations with any third party and not to intervene in the Persian Gulf." LAURENT MURAWIEC, *PRINCES OF DARKNESS: THE SAUDI ASSAULT ON THE WEST* 166 (2005). Britain made him a Knight Commander of the Indian Empire. See *id.* at 167. By way of comparison, Egypt budgeted only three million pounds per year to provide 1.2 million soldiers and guards for British auxiliary units. See *Egypt's Plea for Independence*, 304 *THE LIVING AGE* 336, 337 (1920).

102. *Tunisians Fear Sharia-law State May Be Looming*, RT.COM (Jan. 14, 2012), <http://rt.com/news/university-ennahda-niqab-tunisia-777/>.

103. Marianna Belenkaya, *What Price Women's Rights in Tunisia's New Democracy?*, RT.COM (Nov. 22, 2011, 10:46 AM), <http://rt.com/news/ennahda-party-country-jebali-905/>.

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

105. See *id.*

106. See Christopher Hitchens, *Shut Up About Armenians or We'll Hurt Them Again: Turkish Prime Minister Erdogan's Latest Sinister Threat*, SLATE (Apr. 5, 2010), [http://www.slate.com/articles/news\\_and\\_politics/fighting\\_words/2010/04/shut\\_up\\_about\\_armenians\\_or\\_well\\_hurt\\_them\\_again.html](http://www.slate.com/articles/news_and_politics/fighting_words/2010/04/shut_up_about_armenians_or_well_hurt_them_again.html) ("Just to be clear, then, about

less than a 5% difference between male and female educational levels, while Turkey under the AKP had more than a 10% difference.<sup>107</sup> Family law in Turkey is “grossly inequitable toward women,” as in Saudi Arabia, and worse than in Iraq or Iran.<sup>108</sup>

Meanwhile, the goal of the revolution, to provide jobs and the necessities of life to the poor and politically marginalized, has not been met, far from it. Unemployment has nearly doubled from 13% to 20%.<sup>109</sup>

#### IV. The Pharaoh, Egypt 2011

Egypt shared a decent level of human development with Tunisia, but lagged behind its peer countries on such metrics as median incomes and wages in particular. Table 3 illustrates these disparities.

**Table 3 - Economic Indicators in Key North African Nations in 2009 (Unless Otherwise Noted)<sup>110</sup>**

	Morocco	Egypt	Algeria	Libya	Tunisia	Sudan
Unemployment Rate, 2009	9.1	9.4	10.2	13 <sup>-</sup>	13.3	14.9
GDP Per Capita, 2009	2,900	2,500	4,000	9,100	4,200	1,300
GDP Per Capita, 2010	2,800	2,700	4,600	10,900	4,200	1,500

Key

<sup>-</sup> = 2005

the view of Turkey’s chief statesman: If democratic assemblies dare to mention the ethnic cleansing of Armenians in the 20th century, I will personally complete that cleansing in the 21st!”).

107. Valerie Hudson, *The Worst Places to Be a Woman*, FOREIGN POL. (Apr. 24, 2012), [http://www.foreignpolicy.com/articles/2012/04/24/the\\_worst\\_places\\_to\\_be\\_a\\_woman](http://www.foreignpolicy.com/articles/2012/04/24/the_worst_places_to_be_a_woman).

108. *Id.*

109. Bouazza ben Bouazza, *Tunisia Marks 1st Anniversary of Arab Spring*, ABC NEWS (Jan. 14, 2012), <http://abcnews.go.com/International/wireStory/tunisia-marks-1st-anniversary-arab-spring-15360274>.

110. Sources: Cent. Intelligence Agency, *WORLD FACTBOOK 2010* (2010), available at <https://www.cia.gov/library/publications/download/download-2010>; *World Economic Outlook Database*, INT’L MONETARY FUND, <http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/weoselgr.aspx> (last updated Aug. 2011) (select “All countries” and then “Sudan”); Rana Jawad, *Libya Grapples With Unemployment*, BBC (May 5, 2005), <http://news.bbc.co.uk/2/hi/africa/4515919.stm> (Unemployment) (GDP Per Capita, 2009); *GDP Per Capita*, WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.PCAP.CD> (last visited Apr. 13, 2013) (GDP Per Capita, 2010). The CIA is the source of the data for unemployment, which have been rounded to nearest tenth of a percent, but other non-CIA data was used to update figures for Libya and Sudan. The figures for Libya and Sudan come from the Libyan government and the International Monetary Fund, respectively. The figures from sources such as the IMF or countries’ own estimates do not always match the CIA’s World Factbook data. The CIA used a figure of 30%, which is unlikely because Libya had a stronger economy than Sudan, by far, according to the World Bank’s GDP Per Capita figure. The IMF is the source of the data for GDP per capita in 2009, which are expressed in constant U.S. dollars and have been rounded to nearest \$100. Except for Libya, the World Bank is the source of the data for GDP per capita in 2010, which are expressed in nominal terms and have been rounded to nearest \$100. Figures for Libya in 2010 are from IMF.

The Egyptian “Papyrus” revolution became known as a “Twitter revolution,” with little papyrus on display.<sup>111</sup> Despite the European financial crisis and the nuclear disaster in Japan, #egypt was the top hashtag on Twitter for 2011.<sup>112</sup> Egypt had a much more advanced social media culture than did Tunisia or Libya during their revolutions.<sup>113</sup> Egypt boasted the largest number of active Twitter users of any country experiencing an Arab Spring rebellion, with these users disproportionately based in Cairo, the site of the Tahrir Square protests and related violence.<sup>114</sup> When President Mubarak flipped the Internet kill switch, Google and Twitter helped Egyptians to continue sending tweets by means of voicemail.<sup>115</sup>

On January 17, 2011, an Egyptian man named Abdou Abdel Moneim immolated himself outside Egypt’s Parliament building.<sup>116</sup> Protesters proclaimed a “Day of Revolution” on January 25, 2011, with 90,000 Egyptians announcing their intentions to participate on Facebook.<sup>117</sup> Two days before that, Egypt’s Interior Minister, Habib el-Adly, “charged extremist group the Army of Islam,” a “militant group based in the Gaza Strip with links to al-Qa’ida,” with perpetrating an attack on a Coptic church that killed more than twenty people.<sup>118</sup> A spokesperson for Hamas denied that the Army of Islam was responsible.<sup>119</sup>

The Twitter hashtag #jan25 and the accounts @Ghonim and @SandMonkey became hubs for the exchange of information and virtual epicenters of the growing movement for Mubarak to “Leave!” The protesters gathered in Tahrir Square and attempted to storm the Egyptian Parliament on Jan. 25, the “Day of Revolution.”<sup>120</sup> Rock-throwing emerged as a rebel tactic, with one police officer dying on January 26 and others battling protesters until February 3.<sup>121</sup> Egypt reissued its prohibition on public gatherings and shut down the Internet for a time between January 28 and February 3.<sup>122</sup> Egypt had a long-standing policy of restricting access to political Web sites and arresting and sanctioning bloggers and Internet

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111. Peter Beaumont, *The Truth About Twitter, Facebook and the Uprisings in the Arab World*, GUARDIAN (Feb. 24, 2011), <http://www.guardian.co.uk/world/2011/feb/25/twitter-facebook-uprisings-arab-libya>.

112. Uri Friedman, *The Egyptian Revolution Dominated Twitter This Year*, FOREIGN POL. (Dec. 5, 2011), [http://blog.foreignpolicy.com/posts/2011/12/05/the\\_egyptian\\_revolution\\_dominated\\_twitter\\_this\\_year](http://blog.foreignpolicy.com/posts/2011/12/05/the_egyptian_revolution_dominated_twitter_this_year).

113. Beaumont, *supra* note 111.

114. See Friedman, *supra* note 112.

115. See *Egypt*, 65 MIDDLE E. J. 457, 468-69 (2011).

116. See *id.*

117. See *id.*

118. *Id.*

119. See *id.*

120. *Cairo Egypt Protesters Attempt to Storm Parliament 25.01.2011*, YOUTUBE (Jan. 25, 2011), <http://www.youtube.com/watch?v=nRjrBmHSVx0>.

121. See *id.*; Jasiri X, *We All Shall Be Free!*, YOUTUBE (Feb. 3, 2011), <http://www.youtube.com/watch?v=mu7eQyasgw0>.

122. See *id.*; Tiffany Hsu, *Internet Restored in Egypt*, L.A. TIMES, Feb. 3, 2011, at B2; Jennifer Preston et al., *Movement Began with Outrage and a Facebook Page that Gave It an Outlet*, N.Y. TIMES, Feb. 6, 2011, at A10; James Cowie, *Egypt Leaves the Internet*, RENESYS BLOG (Jan. 27, 2011, 7:56 PM), <http://www.renexus.com/blog/2011/01/egypt-leaves-the-internet.shtml>; see also Jeremy Kirk, *With Wired Internet Locked, Egypt Looks to the*

users for opposition to the government or the established Muslim faith.<sup>123</sup> It had detained thousands of residents without trial for opposition political or religious activity.<sup>124</sup>

Although most Egyptians focused their energies on peaceful aspects of protests in Tahrir Square and other public places, other proponents of regime change in Egypt certainly adopted violent methods. They stormed and devastated the main police station, and set "a half dozen armored vehicles on fire" in the Suez region on January 27.<sup>125</sup> "Police opened fire on 1,000 Egyptian protesters trying to storm the Interior Ministry in Cairo on Saturday," January 29.<sup>126</sup> In February, in the Sinai region, revolutionaries attempted once again to storm a police station, leading to the death of one and the wounding of twenty.<sup>127</sup>

Thus, the facile narrative of peaceful protesters receiving merely rhetorical support from Western countries, forcing brutal dictators to step down by virtue of the "people's power," does not really hold up.<sup>128</sup> An examination of the actual course of the Arab Spring reveals that this narrative is overly simplistic and does not account for the facts. Violent means came to the fore in Tunisia, Egypt, Libya, Yemen, Syria, and other Arab Spring countries. The violence in Egypt and Tunisia went beyond rock throwing to the killing of police officers and the sacking and burning of police stations and Interior Ministry buildings.<sup>129</sup> In Libya and Syria, as discussed below, full-blown civil war broke out, based initially in eastern Libya near the Egyptian border, and in Syria near the Lebanese and Iraqi borders.<sup>130</sup> In Egypt, the violence continued after President Mubarak

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Sky, PC WORLD (Jan. 28, 2011), [http://www.pcworld.com/article/218064/with\\_wired\\_internet\\_locked\\_egypt\\_looks\\_to\\_the\\_sky.html](http://www.pcworld.com/article/218064/with_wired_internet_locked_egypt_looks_to_the_sky.html); *Internet Censorship*.

123. See U.S. DEP'T ST. 2009 HUMAN RIGHTS REPORT: EGYPT (2010), available at <http://state.gov/g/drl/rls/hrrpt/2009/nea/136067.htm>.

124. See *id.*

125. See Hannah Allam, *Protesters in Suez, Egypt Storm, Sack Main Police Station*, MCCLATCHY NEWSPAPERS (Jan. 28, 2011), <http://www.mcclatchydc.com/2011/01/28/108257/protesters-in-suez-egypt-storm.html>.

126. *Live Updates - Egypt Unrest*, TIMES INDIA (Jan. 30, 2011, 6:09 AM), [http://articles.timesofindia.indiatimes.com/2011-01-30/middle-east/28354153\\_1\\_egypt-unrest-egypt-s-brotherhood-orderly-transition/3](http://articles.timesofindia.indiatimes.com/2011-01-30/middle-east/28354153_1_egypt-unrest-egypt-s-brotherhood-orderly-transition/3).

127. See *Triumph As Mubarak Quits*, AL-JAZEERA (Feb. 11, 2011), <http://www.aljazeera.com/news/middleeast/2011/02/2011211164636605699.html>.

128. *Id.*

129. See, e.g., *Tunisia Unrest Spreads to Capital*, AL-JAZEERA (Jan. 11, 2011), <http://www.aljazeera.com/video/africa/2011/01/2011111214716877786.html> ("Police have fired into the air to disperse rioters ransacking buildings in a suburb of Tunisia's capital . . . [H]undreds of youths threw stones at police before smashing shops and setting fire to a bank."); Allam, *supra* note 125; Ernesto Londoño, *Ousted Police Officers Set Fire to Egypt's Interior Ministry*, WASH. POST (Feb. 23, 2011), [http://www.washingtonpost.com/world/ousted-police-officers-set-fire-to-egypts-interior-ministry/2011/02/23/ABLZcZQ\\_story.html](http://www.washingtonpost.com/world/ousted-police-officers-set-fire-to-egypts-interior-ministry/2011/02/23/ABLZcZQ_story.html) (noting that "demonstrators set roughly half a dozen vehicles parked outside the ministry on fire" and "lobbed molotov cocktails toward" the Interior Ministry); *Two Gunmen Shot Dead in Tunisia*, RTÉ NEWS (Jan. 17, 2011), <http://www.rte.ie/news/2011/0116/tunisia.html>.

130. See Jon Lee Anderson, *Sons of the Revolution*, NEW YORKER, May 9, 2011, at 42 (stating that Libyan rebellion emerged in Benghazi, near the Egyptian border, to which Westerners fled); Nibras Kazimi, *Handing Jihadis Cause*, NEWSWEEK INT'L, May 9, 2011;

stepped aside for a military regime to take over and conduct elections, with police stations attacked throughout the spring and summer of 2011, and the Israeli embassy in Cairo sacked in the fall, after a border skirmish killed five Egyptian soldiers.<sup>131</sup>

The violent character of the Arab Spring should not necessarily be a surprise. President Obama's Cairo speech portrayed revolutions "from South Africa to South Asia; from eastern Europe to Indonesia" as similar to the U.S. Civil Rights Movement in that they were all based upon "peaceful and determined insistence upon the ideals at the centre of America's founding."<sup>132</sup> Yet the reality of revolution in South Africa and South Asia was more violent than is widely thought. Recent scholarship on the road to South Asia's independence from the British Empire and the creation of the states of India, Pakistan, Bangladesh, Sri Lanka, Burma, and Afghanistan documents a bloody and quarrelsome process in which hundreds of thousands died.<sup>133</sup> Revolutionary violence in South Asia and South Africa was widespread and claimed thousands of lives, including frequent incidents in which revolutionaries burned regime loyalists alive (sometimes called "necklacing").<sup>134</sup> After independence, hundreds of thousands of persons in South Asia lost their lives to genocide, civil war, and structural violence such as denial of adequate health care.<sup>135</sup> They were joined by hundreds of thousands more who perished unnecessarily from HIV/AIDS due to corruption and neglect in South Africa.<sup>136</sup> Life expectancy in South

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Ben Knight, *Syrian Clamps Down on Rebel Cities*, AUSTL. BROADCASTING CORP. PREMIUM NEWS, Aug. 11, 2011; *Syrian Rebels Form National Council*, UPI, Aug. 24, 2011; Eric Watkins, *Sanctions, Saboteurs Take Toll on Syria's Oil Industry*, 109 OIL & GAS J., Nov. 14, 2011, at 25, 25; Paul Wood, *Revolution or Civil War?*, SPECTATOR, Dec. 3, 2011, at 17.

131. See Sami Aboudi & Mohamed Abdellah, *Egyptians Attack Israel Embassy, Ambassador Said to Flee*, ALERT NET (Sept. 10, 2011), <http://www.trust.org/alertnet/news/egyptians-attack-israel-ambassador-said-to-flee> ("Hundreds of Egyptians stormed the building housing Israel's mission in Cairo and threw embassy documents and its national flag from windows, while airport sources said on Saturday that Israel's envoy was set to fly out of the country."); *Egyptian Army Arrests 15 in Sinai Clashes*, MONSTERS & CRITICS (July 30, 2011), [http://www.monstersandcritics.com/news/middleeast/news/article\\_1654070.php/Egyptian-army-arrests-15-in-Sinai-clashes](http://www.monstersandcritics.com/news/middleeast/news/article_1654070.php/Egyptian-army-arrests-15-in-Sinai-clashes) ("Around 150 people, reported to be Islamists and carrying black flags reading 'There is no God but God,' tried to storm the police station . . . They were wearing black outfits and shouted slogans that called for 'turning Sinai into an Islamist emirate.'").

132. Full text: *Barack Obama's Cairo Speech*, *supra* note 8.

133. See, e.g., TRAVIS, *supra* note 9, at 347-48.

134. See Lionel Baixas, *Thematic Chronology of Mass Violence in Pakistan, 1947-2007*, ONLINE ENCYCLOPEDIA MASS VIOLENCE (June 24, 2008), available at [http://www.massviolence.org/fr/IMG/article\\_PDF/Thematic-Chronology-of-Mass-Violence-in-Pakistan-1947-2007.pdf](http://www.massviolence.org/fr/IMG/article_PDF/Thematic-Chronology-of-Mass-Violence-in-Pakistan-1947-2007.pdf); Paul R. Brass, *The Partition of India and Retributive Genocide in the Punjab, 1946-47: Means, Methods, and Purposes*, 5 J. GENOCIDE RES. 71, 90 (2003); SA TRUTH & RECONCILIATION COMM'N, FINDINGS AND RECOMMENDATIONS: HOLDING THE ANC ACCOUNTABLE (Mar. 2003) (S. Afr.), at 654-56, available at [http://www.info.gov.za/otherdocs/2003/trc/5\\_3.pdf](http://www.info.gov.za/otherdocs/2003/trc/5_3.pdf).

135. See, e.g., TRAVIS, *supra* note 9, at 376-88, 434.

136. See Clare Nullis, *AIDS Said Cuts S.Africa Teens' Life Span*, WASH. POST (Nov. 30, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/30/AR2006113000649.html>; *Don't Get Ill*, ECONOMIST, June 5, 2010, at 15; *South Africa and AIDS: Getting to Grips*, ECONOMIST (Dec. 2, 2010), <http://www.economist.com/node/>

Africa declined by ten years under democracy.<sup>137</sup>

Many of the examples of successful protest movements leading to the secure enjoyment of human rights and democracy fall apart on closer inspection. For example, Peter Ackerman and Jack DuVall look to Russia and Eastern Europe, India, Sri Lanka, and South Africa. Just about every one of them proves that nonviolent resistance alone is not very effective, and in many cases, conditions deteriorate after a transition to democracy without human rights or an independent judiciary. Starting with Sri Lanka, Ackerman and DuVall admit that nonviolent action had little effect, instead bringing about legal reforms characterized by even more discrimination against the Tamil minority.<sup>138</sup> They blame the Tamil Tigers for making the situation worse with an armed rebellion, but the government continued to deny the Tamils human rights and political freedoms after the Tamil Tigers were defeated in a massacre of tens of thousands of Tamils in 2009.<sup>139</sup> With regard to Russia and Eastern Europe, Ackerman and DuVall fail to mention that ten to twenty countries, including some of the largest on earth, attacked the Soviets in Afghanistan for over a decade, causing 13,000 to 30,000 battle deaths, contributing to 450,000 Soviet wounded and sick, and wasting so much money and manpower that the Soviet Union's GDP growth rate averaged 3.5% in the 1970s but 1.9% in the 1980s.<sup>140</sup> Much of Eastern Europe was liberated as a result of Soviet sclerosis or inability to retain the western colonies.<sup>141</sup> In the case of Yugoslavia, the dictatorship fell after a massive NATO bombing campaign that killed hundreds and left thousands hungry and cold.<sup>142</sup> Prior to a democratic transition, a massive international military campaign to support the rebels in Croatia, Bosnia, and Kosovo against the federal government, supported by dozens of countries including NATO and the Organization of the Islamic Conference, reduced Yugoslavia to the rump of Serbia and Montenegro.<sup>143</sup>

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17633289; Bruce Walker, *Public Health Maternity Horrors in South Africa*, NEW AM. (Aug. 9, 2011), <http://www.thenewamerican.com/world-news/africa/item/8340-public-health-maternity-horrors-in-south-africa>.

137. See *Improving South Africa's Health System*, SOUTHAFRICA.INFO (Feb. 12, 2010), <http://www.southafrica.info/about/government/stateofnation2010-health.htm>.

138. See PETER ACKERMAN & JACK DUVALL, *A FORCE MORE POWERFUL: A CENTURY OF NONVIOLENT CONFLICT* 461 (2000).

139. See HOWARD ADELMAN & ELAZAR BARKAN, *NO RETURN, NO REFUGE: RITES AND RIGHTS IN MINORITY REPATRIATION* 120 (2011); *Basic Rights Violated in Sri Lanka: Rights Group*, WEEKEND LEADER (Jan. 25, 2012), <http://www.thesundayleader.lk/2012/01/25/basic-rights-violated-in-sri-lanka-rights-group/>.

140. See CARMEL DAVIS, *POWER, THREAT, OR MILITARY CAPABILITIES: US BALANCING IN THE LATER COLD WAR, 1970-1982* 22-23 (2011); WILLIAM E. ODOM, *THE COLLAPSE OF THE SOVIET MILITARY* 249 (1998); *Afghanistan*, 13 *WORLD AFF. REP.* 75, 75 (1983).

141. See BRUCE A. ELLEMAN, *MODERN CHINESE WARFARE, 1795-1989* 296 (2001).

142. See RICHARD GARFIELD, UNITED NATIONS CHILDREN'S FUND [UNICEF], *ECONOMIC SANCTIONS, HEALTH, AND WELFARE IN THE FEDERAL REPUBLIC OF YUGOSLAVIA, 1990-2000* 46 (2001), available at [http://www.unicef.org/evaldatabase/files/FRY\\_01-013.pdf](http://www.unicef.org/evaldatabase/files/FRY_01-013.pdf); Alexandra Niksic, *Serbia Shivering Under Severe Power Cuts*, RELIEFWEB (Dec. 26, 2000), [reliefweb.int/node/73509](http://reliefweb.int/node/73509).

143. See TRAVIS, *supra* note 9, at 62-75, 82-85.

Other studies purport to show that “civic resistance” is more effective than violent revolution in producing democratic change; yet many of the 80% of states allegedly experiencing nonviolent democratic change were not actually free countries after the transition, such as Belarus, Cambodia, Iran, Russia, Tajikistan, Uzbekistan, and Zimbabwe.<sup>144</sup> All that such studies can show is that “civic resistance” was a “key factor” in 70% of transitions, many of which did not result in robust political freedom or fair democracies, notably in Colombia, El Salvador, India, Indonesia, Mexico, Niger, Sri Lanka, Nigeria, and Uganda.<sup>145</sup> Civic protest more often fails without international or domestic military conflict, notably in the Soviet Union under Stalin, China under Mao, Cambodia under Pol Pot, Uganda under Idi Amin, Pakistan and Bangladesh under Yahya Khan, Iraq under Saddam Hussein, Yugoslavia under Marshal Tito and Slobodan Milosevic, Afghanistan under the Taliban, and North Korea under the Kim family.

On January 31, Secretary of State Hillary Clinton called for an “orderly transition” to democracy in Egypt.<sup>146</sup> The next day, after barely two weeks of serious protest and conflict, President Obama asked Egyptian Hosni Mubarak to leave office, despite the risk that Mubarak and his family would face criminal trials.<sup>147</sup> President Mubarak transferred power to a military junta on February 11, in what some have described as “The Fall of the Pharaoh” or the “The Downfall of the Last Pharaoh in the Square.”<sup>148</sup>

Several scholars have argued that during the Arab Spring, the United States arrived at a complicated partnership with the Muslim Brotherhood and even Al-Qaeda veterans in Egypt, Libya, and elsewhere that contributed to the fall of secular regimes (by regional standards) with potentially catastrophic results. Testifying before a commission in the U.S. House of Representatives, Egyptian activist Cynthia Farahat accused the Obama administration of “supporting the Muslim Brotherhood” and said that this policy should stop, for the “founders of Hamas and Al-Qaeda are not mod-

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144. See ADRIAN KARATNYCKY & PETER ACKERMAN, FREEDOM HOUSE, HOW FREEDOM IS WON: FROM CIVIC RESISTANCE TO DURABLE DEMOCRACY (2005), available at <http://agnt.org/snv/resources/HowFreedomIsWon.pdf>; Erica Chenoweth & Maria J. Stephan, *Mobilization and Resistance: A Framework for Analysis*, in *RETHINKING VIOLENCE: STATES AND NON-STATE ACTORS IN CONFLICT* 249, 271 (Erica Chenoweth & Adria Lawrence eds., 2010) (“In a 2005 study of 67 regime transitions between 1973 and 2000, Adrian Karatnycky and Peter Ackerman find that among” forty cases of “nonviolent civic coalition[ ]” change, 80% “were classified as ‘free’ at the time of the study.”).

145. KARATNYCKY & ACKERMAN, *supra* note 144, at 6, 22-23.

146. *Live Updates - Egypt's Unrest*, *supra* note 126.

147. See Robert Dreyfuss, *Obama and Egypt's Revolution*, *NATION* (Feb. 14, 2011, 8:47 AM), <http://www.thenation.com/blog/158533/obama-and-egypts-revolution>. Mubarak is presently serving a life sentence after a trial focused on the deaths of anti-regime protesters. Trials may be forthcoming for members of the military who replaced Mubarak, on the basis that Egyptian security forces killed another hundred protesters and persons engaged in anti-government “clashes” after Mubarak’s ouster. *Egypt Panel Implicates Mubarak, Military in Deaths*, *YNETNEWS.COM* (Jan. 3, 2013), <http://www.ynetnews.com/articles/0,7340,L-4328018,00.html>.

148. See Dina Shehata, *The Fall of the Pharaoh: How Hosni Mubarak's Reign Came to an End*, 90 *FOREIGN AFF.* 26, 26 (2011); *The Downfall of the Last Pharaoh in the Square - Egypt*, *YOUTUBE* (Feb. 21, 2011), <http://www.youtube.com/watch?v=hxOIx-zbR5g>.

erate and [the United States] should not be engaged in talks with them."<sup>149</sup> On February 3, President Obama asked for President Mubarak to achieve a transition with "a broad representation of the Egyptian opposition."<sup>150</sup> President Obama argued that "Egyptians from all walks of life" had "demanded their universal rights" and displayed "the moral force of non-violence that has lit the world from Delhi to Warsaw, from Selma to South Africa . . . ."<sup>151</sup> Despite the rhetoric suggesting that Egypt's transition will bring about universal human rights, some commentators argued that it threatened to empower a political party with a record of supporting female genital mutilation.<sup>152</sup>

Egypt is a key prize in the war between Al-Qaeda and the United States. The Bush-era National Strategy for Combating Terrorism described a strategy to deny terrorists state sanctuary or the "control of any nation they would use as a base and launching pad for terror," and to promote "effective democracies as the long-term antidote to the ideology of terrorism . . . ."<sup>153</sup> Presidents Bush and Obama had the resource of the Egyptian military to draw upon to achieve this goal, as the United States armed the military<sup>154</sup> and relied upon it to act "responsibly as a caretaker to the state . . . to ensure a transition that is credible in the eyes of the Egyptian people."<sup>155</sup> The United States sent between dozens and hundreds of terror suspects to Egypt despite a "high risk of torture" by such methods as electric shock, beatings, and threats.<sup>156</sup>

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149. *Egyptian Activist to Obama: Stop Supporting the Muslim Brotherhood*, US ACTION NEWS (Dec. 8, 2011, 5:09 PM), <http://usactionnews.com/2011/12/egyptian-activist-to-obama-stop-supporting-the-muslim-brotherhood/>.

150. Dreyfuss, *supra* note 147.

151. *Full Transcript of Obama's Speech at UN General Assembly*, HAARETZ (Tel Aviv) (Sept. 21, 2011, 5:09 PM), <http://www.haaretz.com/news/diplomacy-defense/full-transcript-of-obama-s-speech-at-un-general-assembly-1.385820>.

152. See Mona Eltahawy, *Why Do They Hate Us?*, FOREIGN POL'Y (May/June 2012), [http://www.foreignpolicy.com/articles/2012/04/23/why\\_do\\_they\\_hate\\_us](http://www.foreignpolicy.com/articles/2012/04/23/why_do_they_hate_us) ("[M]ore than 90 percent of ever-married women in Egypt – including my mother and all but one of her six sisters – have had their genitals cut in the name of modesty . . . . [W]hen Egypt banned the practice in 2008, some Muslim Brotherhood legislators opposed the law.").

153. *Overview of America's National Strategy for Combating Terrorism*, *supra* note 31.

154. See AMNESTY INT'L, *ARMS TRANSFERS TO THE MIDDLE EAST AND NORTH AFRICA: LESSONS FOR AN EFFECTIVE ARMS TRADE TREATY*, 25-35 (2011), available at <http://www.amnesty.org/en/library/asset/ACT30/117/2011/en/049fdeee-66fe-4b13-a90e-6d7773d6a546/act301172011en.pdf>; USA *Arming Egyptian Security Forces for Brutal Crackdown*, AMNESTY INT'L (Dec. 7, 2011), <http://amnesty.ie/news/usa-arming-egyptian-security-forces-brutal-crackdown>; Kenneth Roth, Human Rights Watch, *Time to Abandon Autocrats and Embrace Rights: the International Response to the Arab Spring*, in *WORLD REPORT 2012* 1, 12 (2012) available at <http://www.hrw.org/world-report-2012>.

155. Dreyfuss, *supra* note 147.

156. *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Joint Hearing Before the Subcomm. on Int'l Org., Human Rights, & Oversight & the Subcomm. on Eur., of the H. Comm. on Foreign Affairs*, 110th Cong. 4 (2007) (statement of Amnesty International), available at <http://media.washingtonpost.com/wp-srv/politics/documents/transcript012911.pdf>; AMNESTY INT'L, *EGYPT - SYSTEMATIC ABUSES IN THE NAME OF SECURITY* 5 (2007), available at <http://www.amnesty.org/en/>

The leaders of Al-Qaeda also emphasized state-formation on their side. Ayman al-Zawahiri argued in 2005 that the aim was “a Muslim state . . . in the manner of the Prophet in the heart of the Islamic world,” especially in Egypt.<sup>157</sup> As one well-informed observer argued in 2011,

[A]l Qaeda’s true strategic dilemma lies in Egypt and Tunisia. In these countries, local tyrants have been ousted, but parliamentary elections will be held soon, and the United States remains influential.

The outcome in Egypt is particularly personal for Zawahiri, who began his fight to depose the Egyptian government as a teenager. Zawahiri also understands that Egypt, given its geostrategic importance and its status as the leading Arab nation, is the grand prize in the contest between al Qaeda and the United States. In his recent six-part message to the Egyptian people and in his eulogy for bin Laden, Zawahiri suggested that absent outside interference, the Egyptians and the Tunisians would establish Islamic states that would be hostile to Western interests. But the United States, he said, will likely work to ensure that friendly political forces, including secularists and moderate Islamists, win Egypt’s upcoming elections. And even if the Islamists succeed in establishing an Islamic state there, Zawahiri argued, the United States will retain enough leverage to keep it in line. To prevent such an outcome, Zawahiri called on Islamist activists in Egypt and Tunisia to start a popular (presumably nonviolent) campaign to implement sharia as the sole source of legislation and to pressure the transitional governments to end their cooperation with Washington.<sup>158</sup>

Zawahiri’s plan appears poised to come to fruition in 2012, as the economy tanks and fundamentalist religious parties seize the Egyptian parliament and prepare to declare war on Israel and coerce the Egyptian population to obey even more strict religious laws.<sup>159</sup> Israel’s navy intercepted tons of weapons on the way to terrorists in Gaza by way of Egypt in 2011 and 2012.<sup>160</sup> As in Iraq, kidnapping of non-Arabs and attacks on gas pipelines were on the rise, both developments that could deepen a foreign-exchange crisis.<sup>161</sup> In August 2011, terrorists in the Sinai Peninsula killed ten soldiers and civilians.<sup>162</sup> In a “humanitarian disaster,” Egyptians tor-

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library/asset/MDE12/001/2007/en/27dc4dc8-d3c5-11dd-8743-d305bea2b2c7/mde120012007en.pdf.

157. McCants, *supra* note 19, at 27.

158. See *id.* at 31.

159. See Oren Dorell & Sarah Lynch, *Christians Fear Losing Freedoms in Arab Spring Movement*, USA TODAY (Jan. 31, 2012), <http://www.usatoday.com/news/religion/story/2012-01-30/arab-spring-christians/52894182/1?csp=34news>; Samuel Segev, *Peace Treaty in Peril*, WINNIPEG FREE PRESS (Jan. 24, 2012), <http://www.winnipegfreepress.com/opinion/westview/peace-treaty-in-peril-137946183.html>.

160. See Yaakov Katz, *IDF Boards Ship Allegedly Smuggling Arms to Gaza*, JERUSALEM POST (Apr. 22, 2012), <http://www.jpost.com/Defense/Article.aspx?id=267103>.

161. See McCants, *supra* note 19, at 20 (describing foreign-exchange crisis); Bradley Hope, *Deep in the Sinai, a Looming Crisis Threatens Egypt-Israel Peace Treaty*, NAT’L (UAE) (Feb. 1, 2012), <http://www.thenational.ae/news/world/middle-east/deep-in-the-sinai-a-looming-crisis-threatens-egypt-israel-peace-treaty> (describing kidnappings and pipeline bombings).

162. See Shuki Sadeh, *A Fence, but not a Solution on the Israel-Egypt Border*, HAARETZ (Tel Aviv) (Nov. 25, 2011), <http://www.haaretz.com/weekend/week-s-end/a-fence-but-not-a-solution-on-the-israel-egypt-border-1.397627>.

tered African asylum-seekers passing through the Sinai to Israel.<sup>163</sup> Many of the Africans were themselves fleeing religious persecution in Eritrea.<sup>164</sup>

As in both Iran and Iraq, Egyptian women were losing their freedoms to dress as they chose and participate in public life.<sup>165</sup> The Arab world’s most popular comedian, Adel Imam, received a prison sentence for poking fun at jihadist characters in a film produced nearly two decades before the Egyptian revolution.<sup>166</sup> The economy, despite claims that the Arab Spring would promote jobs and increase wealth in the Middle East and North Africa,<sup>167</sup> faced “collapse” as investment, tourism, and trade dried up.<sup>168</sup>

## V. The “Cockroaches,” Libya 2011

Like Tunisia, Libya enjoyed relatively high levels of economic activity, health, education, infrastructure, and social welfare in 2010. It was in the upper third or half of the world’s countries in terms of certain public goods that socialist and mixed-economy governments are known to provide well. Table 4 provides a comparison of Libya and its neighbors according to U.N. statistics on public goods:

**Table 4 - Select Human Development Statistics for Libya and Its Neighbors<sup>169</sup>**

	Libya	Tunisia	Algeria	Egypt	Sudan	Niger	Chad
Life expectancy at birth (years)	74	74	72	70	58	51	49
Child mortality rate (per 1,000 live births)	19	21	32	21	108	26	209
Child malnutrition, underweight (percentage)	5%	N/A	4%	6%	41%	19%	37%
Per capita daily calorie intake (calories)	3,144	3,312	3,104	3,163	2,266	2,306	2,040
Proportion of undernourished in total population (percentage)	<5%	<5%	<5%	<5%	22%	20%	N/A

163. *Id.*

164. *See id.*

165. *See* Dina Sadek, *Women in Egypt Heed Warning From Iranian Women on Rights*, GLOBAL PRESS INST. (Jan. 26, 2012), <http://www.globalpressinstitute.org/africa/egypt/women-egypt-heed-warning-iranian-women-rights>.

166. *See* *Egyptian Actor Sentenced to Three Months in Jail for Defaming Islam*, AL-ARABIYA NEWS (Feb. 2, 2012), <http://english.alarabiya.net/articles/2012/02/02/192126.html>.

167. *See, e.g.*, Elliott Abrams, *A Forward Strategy of Freedom*, FOREIGN POLICY (Jan. 23, 2012), [www.foreignpolicy.com/articles/2012/01/23/a\\_forward\\_strategy\\_of\\_freedom](http://www.foreignpolicy.com/articles/2012/01/23/a_forward_strategy_of_freedom).

168. *See* David D. Kirkpatrick, *Struggling, Egypt Seeks Loan from I.M.F.*, N.Y. TIMES (Jan. 16, 2012), <http://www.nytimes.com/2012/01/17/world/middleeast/egypt-seeks-3-2-billion-loan-from-imf.html>.

169. *FAO Country Profiles*, U.N. FOOD & AGRIC. ORG., <http://www.fao.org/countryprofiles/default/en/> (select country from drop down list).

However, Libya was known to be an epicenter of mass migration and human rights violations, especially torture, long before the Arab Spring ignited a regional revolt.<sup>170</sup> For example, during the prison massacre at Abu Salim in 1996, an estimated 1,200 prisoners were slain.<sup>171</sup> Moreover, Gaddafi also trained troops and commanders led by known war criminals such as Charles Taylor, Foday Sankoh, Sadiq al Mahdi, and Omar Hassan al-Bashir, forces that later devastated villages in Sierra Leone, Liberia, and Darfur.<sup>172</sup>

Nevertheless, the Arab Spring presented a conflict between legal obligations to protect civilians and economic interests, however minor, in arms deals with Libya. In 2009, “European Union nations approved sales of \$470 million in weapons to [Libya’s] military . . . .”<sup>173</sup> The Obama administration approved \$17 million in military sales to Libya in 2009 and another \$60-million transaction that would sell “50 refurbished armored troop carriers to [the dictator’s] army . . . .”<sup>174</sup> One of the largest defense contractors, BAE Systems, Inc., lobbied for the deal under the leadership of its chairman of the board, retired General Anthony Zinni.<sup>175</sup> Under the Bush administration, the State Department’s Directorate of Defense Trade Controls approved \$46 million in “defense sales,” including “\$1 million in explosives and incendiary agents . . . .”<sup>176</sup> Previously, U.S. firms had sold M113 troop transports to Libya.<sup>177</sup>

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170. See U.S. DEP’T STATE, 2 COUNTRY REPORTS FOR HUMAN RIGHTS PRACTICES FOR 2007 1972 (2008); HUMAN RIGHTS WATCH, PUSHED BACK, PUSHED AROUND: ITALY’S FORCED RETURN OF BOAT MIGRANTS AND ASYLUM SEEKERS, LIBYA’S MISTREATMENT OF MIGRANTS AND ASYLUM SEEKERS, 4-5, 7, 14 (2009), available at [http://www.hrw.org/sites/default/files/reports/italy0909web\\_0.pdf](http://www.hrw.org/sites/default/files/reports/italy0909web_0.pdf); Press Release, Amnesty Int’l, Libya: Forcible Return/Torture and Ill-treatment (Sept. 4, 2007), <http://www.amnesty.org/en/library/asset/MDE19/014/2007/en/5e10c9b3-d36c-11dd-a329-2f46302a8cc6/mde190142007en.pdf>; Press Release, Amnesty Int’l, Libya: Forcible Return/Torture and Ill-treatment (Feb. 8, 2007), available at <http://www.amnesty.org/en/library/asset/MDE19/004/2007/en/56dddcdc-d3b3-11dd-a329-2f46302a8cc6/mde190042007en.pdf>; Press Release, Amnesty Int’l, Reaction to News of UK ‘No Torture’ Deal with Libya (Oct. 18, 2005), available at [http://www.amnesty.org.uk/news\\_details.asp?NewsID=16488](http://www.amnesty.org.uk/news_details.asp?NewsID=16488).

171. See *Libya: End Violent Crackdown in Tripoli*, HUM. RTS. WATCH (Mar. 14, 2011), <http://www.hrw.org/news/2011/03/13/libya-end-violent-crackdown-tripoli>.

172. J. MILLARD BURR & ROBERT O. COLLINS, DARFUR: THE LONG ROAD TO DISASTER 242-48 (2006); GÉRARD PRUNIER, DARFUR: A 21ST CENTURY GENOCIDE 51 (2008); Derek Brown, *Who Is Foday Sankoh?*, GUARDIAN (May 17, 2000), <http://www.guardian.co.uk/world/2000/may/17/sierraleone>; Mahmoud Habboush, *Sudan’s Bashir Offers to Help Form New Libyan Army*, ALERTNET (Jan. 7, 2012), <http://www.trust.org/alertnet/news/sudans-bashir-offers-to-help-form-new-libyan-army>; Aislinn Laing, *‘Blood Diamond’ Trial: The Case Against Charles Taylor*, TELEGRAPH (June 16, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/liberia/8578540/Blood-diamond-trial-the-case-against-Charles-Taylor.html>.

173. *Libya Army Transport Deal Frozen After US Approval*, FOXNEWS.COM (Mar. 7, 2011), <http://www.foxnews.com/us/2011/03/07/libya-army-transport-deal-frozen-approval/>.

174. *Id.*

175. *See id.*

176. *Id.*

177. *See id.*

Although these arms sales were measured in millions, the proceeds of potential oil and gas deals with Libya promised billions. Amerada Hess, ConocoPhillips, Marathon Oil, Occidental Petroleum, and Royal Dutch Shell made "massive new investments" in Libyan oil fields in the later years of the Bush administration.<sup>178</sup> In 2001, the task force on U.S. energy security convened by Vice President Dick Cheney targeted Libya along with Iran and Iraq as important future sources of oil imports for the United States, assuming sanctions against them could somehow be lifted.<sup>179</sup> The British and the Libyans reached an agreement in 2004 that called for Royal Dutch Shell to develop \$60 billion in natural gas reserves near the Mediterranean coast of Libya.<sup>180</sup> The declines of stock indexes and of overall economic activity in the late Bush administration contributed to plummeting oil prices, which reached below \$40 per barrel as President Obama took office.<sup>181</sup> American payments to former Al-Qaeda allies in Iraq to bribe them to stop fighting U.S. forces made investments in that country's oil fields more stable, boosting estimates of future oil supplies substantially, and arguably decreasing prices as a glut loomed.<sup>182</sup> The rebound in stock indexes and economic activity under President Obama led to soaring oil prices,<sup>183</sup> sending the price of Libyan crude oil above \$120 per barrel shortly after Libyan rebels seized certain oil-producing areas.<sup>184</sup>

In the wake of the 2004–2007 rapprochements between Libya and the NATO countries, Al-Qaeda complained that "Libya has turned into a new crusader base in the Islamic Maghreb, from which the bitter Christians can reach out and crush any jihadist renaissance that rises in the face of the

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178. See Christopher Helman, *Is Libya Going to Boot U.S. Oil Companies?*, FORBES (Jan. 22, 2009), [http://www.forbes.com/2009/01/22/libya-gaddafi-oil-biz-energy-cx\\_ch\\_0122libya.html](http://www.forbes.com/2009/01/22/libya-gaddafi-oil-biz-energy-cx_ch_0122libya.html).

179. See GEORGE ORWEL, *BLACK GOLD: THE NEW FRONTIER IN OIL FOR INVESTORS* 86 (2006) ("On April 19, 2001, reporters Peter Behr and Alan Sipress of the *Washington Post* wrote that Cheney's energy task force broached the possibility of lifting some economic sanctions against Iran, Libya, and Iraq as part of a plan to increase America's oil supply.").

180. See MARK ENSALACO, *MIDDLE EASTERN TERRORISM: FROM BLACK SEPTEMBER TO SEPTEMBER 11*, 185 (2008).

181. See David Goldman & Kenneth Musante, *Oil Recovers After Volatile Session*, CNNMONEY (Jan. 20, 2009), <http://money.cnn.com/2009/01/20/markets/oil/>.

182. Iraq's oil production rose from less than one million barrels per day after the U.S. invasion in 2003 to about 2.4 million barrels per day in November and December 2008 as attacks on U.S. troops and helicopters declined and some measures of fatalities with them. See Michael E. O'Hanlon & Ian Livingston, *Iraq Index: Tracking Variables of Reconstruction & Security in Post-Saddam Iraq*, BROOKINGS INST., June 30, 2011, at 6–7, 14, 20, <http://www.brookings.edu/iraqindex>.

183. The price of Brent crude oil (Europe spot price) began soaring a couple of months after President Obama took office in January 2009. See FED. TRADE COMM'N, BUREAU OF ECONOMICS, *GASOLINE PRICE CHANGES AND THE PETROLEUM INDUSTRY: AN UPDATE* 5 (2011), available at <http://www.ftc.gov/os/2011/09/110901gasolinepricereport.pdf>. The price of Brent crude oil nearly doubled between 2009 and 2011. See U.S. ENERGY INFO. ADMIN., 2011 BRIEF: BRENT CRUDE OIL AVERAGES OVER \$100 PER BARREL IN 2011 (2012), available at <http://www.eia.gov/todayinenergy/detail.cfm?id=4550>.

184. See CTR. FOR STRATEGIC & INT'L STUDIES, ENERGY AND NATIONAL SECURITY, Figure 1: Brent Crude Oil Prices 2011–2012, available at [www.energy.senate.gov/public/index.cfm/files/serve?File\\_id=af90af4a-7d5b-4415-bf1c-da99e151f2dd](http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=af90af4a-7d5b-4415-bf1c-da99e151f2dd).

regimes of collaboration and its masters.”<sup>185</sup> In January 2007, Al-Qaeda in the Islamic Maghreb (AQIM) was formed from an Algerian terrorist organization (“Algerian Salafist Group for Preaching and Combat”) on the model of Al-Qaeda in Iraq and began to establish ties with Tunisian and Libyan jihadists, including the Libyan Islamic Fighting Group.<sup>186</sup> During the Bush administration, many North Africans “joined Iraq’s insurgency; veterans are apparently returning to wage jihad at home or in Europe.”<sup>187</sup> In 2006, Al-Qaeda number two Ayman al-Zawahiri declared that AQIM would be a “thorn in the neck of the American and French Crusaders and their allies.”<sup>188</sup>

On February 16, 2011, the Libyan opposition entered a new phase when hundreds of protesters in Benghazi set fire to cars and threw petrol bombs.<sup>189</sup> The next day, a planned “Day of Rage” erupted in rebellion, with battles in Benghazi and al-Bayda killing about two dozen Libyans.<sup>190</sup> The Libyan government used text messages to threaten to shoot protesters and rebels, and arrested writers and protesters.<sup>191</sup> By February 19, more than eighty Libyans had died as the government fired on rebels and protesters.<sup>192</sup> The government blocked access to Facebook and Al-Jazeera, and denied electricity to selective areas.<sup>193</sup> Yet the opposition expanded to the capital of Tripoli, where police and soldiers shot dozens of anti-government activists.<sup>194</sup> By February 20, Human Rights Watch put the death toll at 173.<sup>195</sup>

Events in Libya followed a pattern more closely resembling Yugoslavia in 1991-1992 than the former Soviet Union in 1991-1992. Rather than mostly peaceful protests, a regional secession began, centered in the eastern city of Benghazi.<sup>196</sup> Britain, France, and the United States trained rebel units and provided logistical support in April and early May.<sup>197</sup> The Organization of the Islamic Conference (OIC), Sudan, and Turkey helped consolidate rebel gains against the socialist regime, including gains by rebels linked in significant part to international terrorist groups, until sys-

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185. LAURA MANSFIELD, *AL QAEDA 2007 YEARBOOK* 328 (2007).

186. See *Terror in the Maghreb: The Long Arm of Al-Qaeda*, *ECONOMIST* (Apr. 12, 2007), <http://www.economist.com/node/9009154>.

187. *Id.*

188. *Id.*; see also ALEXIS ARIEFF, CONG. RESEARCH SERV., RS21666, *POLITICAL TRANSITION IN TUNISIA* 19 (2011), available at <http://books.google.com/books?id=HduvWY8r8H0C&pg=PA19> (AQIM “actively” recruiting Tunisians).

189. See *Egypt*, *supra* note 115.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. See Dan Murphy, *Battles Erupt in Key Cities, Moving Libya Closer to Civil War*, *CHRISTIAN SCI. MONITOR* (Mar. 4, 2011), <http://www.csmonitor.com/World/Middle-East/2011/0304/Battles-erupt-in-key-cities-moving-Libya-closer-to-civil-war>.

197. See *3 Western Powers Send Military Advisors to Libya*, *L.A. TIMES* (Apr. 20, 2011), <http://web.archive.org/web/20110430101054/http://www.latimes.com/news/nationworld/world/la-fgw-libya-military-aid-20110421,0,3835596.story>.

tematic torture and massive alleged war crimes by the government against civilian cities, bordering on "genocide," prompted the United Nations to take action and NATO to begin bombing.<sup>198</sup> In July, Turkey and Qatar recognized the Libyan opposition, the Libyan Transitional National Council (LTNC), as the legitimate government, after France but before the United States, Britain, and other NATO countries.<sup>199</sup> Turkey provided an initial \$100 million in funding to the Libyan rebels,<sup>200</sup> and other OIC countries like Qatar and Kuwait kicked in anti-tank weapons and \$8–20 million in daily funding for the rebels.<sup>201</sup> Kuwait alone promised \$180 million for the LTNC.<sup>202</sup> The former European imperial powers in the region, France and Italy, recognized the LTNC in March and pledged over \$1 billion in aid to the LTNC, backed by billions more in frozen Libyan assets.<sup>203</sup> Qatar, the UAE, and the OIC recognized the LTNC as the sole legitimate representative of the Libyan people in March, June, and July, respectively.<sup>204</sup> The OIC had recognized other Muslim secessions from or rebellions against majority secular, Christian, or Jewish regimes, such as in Turkish-occupied northern Cyprus, the Kosovo region of Serbia/Yugoslavia, the Turkish-backed Hamas-governed Gaza Strip, and the U.N.-backed PLO-governed West Bank.<sup>205</sup>

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198. See TRAVIS, *supra* note 9, at 27–53 (2010).

199. See Kim Chipman & Zaid Sabah, *Turkey Recognizes Libyan Rebels, Gives \$300 Million*, AP Reports, BLOOMBERG (July 3, 2011), <http://www.bloomberg.com/news/2011-07-03/turkey-recognizes-libyan-rebels-gives-300-million-ap-reports.html>; *Libya Contact Group Recognizes Libya's Rebels*, HURRIYET DAILY NEWS (July 15, 2011), <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=world-leaders-open-talks-on-libya-2011-07-15>.

200. *Turkey Sets Up \$100 mln Fund to Help Libya Rebels*, REUTERS (June 9, 2011), <http://www.reuters.com/article/2011/06/09/libya-rebels-turkey-idAFLDE7581UC20110609>.

201. See Ian Black, *Libyan Rebels Receiving Anti-tank Weapons from Qatar*, GUARDIAN (Apr. 14, 2011), <http://www.guardian.co.uk/world/2011/apr/14/libya-rebels-weapons-qatar>. Qatar signed a deal to export oil from rebel-held territory in amounts estimated at 100,000 to 300,000 barrels per day at the price of \$100 per barrel that prevailed during the Arab Spring and until August 2011, netting about \$10–30 million a day. See *Libyan Rebels Sign Oil Export Deal with Qatar*, BBC NEWS (Mar. 27, 2011), <http://www.bbc.co.uk/news/business-12875810>; Rowena Mason, *Brent Crude Price Drops Below \$100*, TELEGRAPH (Aug. 10, 2011), <http://www.telegraph.co.uk/finance/oilprices/8692458/Brent-crude-price-drops-below-100.html>.

202. See Nissar Hoath, *Libya Rebels Win \$1.4b Aid*, KHALEEJ TIMES (UAE) (June 10, 2011), [http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/international/2011/June/international\\_June387.xml&section=international](http://www.khaleejtimes.com/DisplayArticle09.asp?xfile=data/international/2011/June/international_June387.xml&section=international).

203. See *id.*; see also *Italy Backs Libya Rebels, Dismisses Gaddafi Message*, REUTERS (Apr. 4, 2011), <http://uk.reuters.com/article/2011/04/04/us-bl-libya-italy-idUKTRE7331DO20110404>.

204. See Margaret Coker, *Qatar Recognizes Libyan Rebel Council*, WALL ST. J. (Mar. 28, 2011), <http://online.wsj.com/article/SB10001424052748704559904576228341860730126.html#>; *UAE Recognizes Libya's TNC*, EMIRATES 24–27 (June 13, 2011), [www.emirates247.com/news/world/uae-recognises-libya-s-tnc-2011-06-13-1.402387](http://www.emirates247.com/news/world/uae-recognises-libya-s-tnc-2011-06-13-1.402387); Siraj Wahab, *World Recognizes Libyan Opposition*, ARAB NEWS (July 15, 2011), <http://www.arabnews.com/node/384093>.

205. See Siraj Wahab, *OIC Islamic Cooperation Chief Calls For 'Decade of Action'*, EURASIA REVIEW (June 29, 2011), <http://www.eurasiareview.com/29062011-oic-islamic-cooperation-chief-calls-for-decade-of-action>.

A sense of real emergency and a humanitarian crisis then began to develop within the United Nations and the Libyan government. On February 21, Libya's deputy ambassador to the United Nations resigned and warned of "genocide" due to the extent of the killings, saying, "the regime of Qaddafi has already started the genocide against the Libyan people."<sup>206</sup> He urged the United Nations to create a "no fly zone" to block mercenaries from entering Libya.<sup>207</sup> The same day, three employees of the Libyan embassy in Stockholm resigned in protest, stating publicly that they "condemn[ed] the genocide that is taking place in Libya against civilians as a consequence of the legitimate demands for a life of dignity and without the despot Qaddafi's continued misrule and corruption."<sup>208</sup> The next day, Muammar Gaddafi declared that the government would kill its opponents "house by house," calling them "cockroaches" as groups of loyalists armed with machetes and firearms boarded trucks in apparent preparation for mass sweeps.<sup>209</sup> The activities of these units threatened civilians. According to witnesses:

Dozens of checkpoints operated by a combination of foreign mercenaries and plainclothes militiamen lined the road west of Tripoli for the first time, witnesses said, requiring not only the presentation of official papers but also displays of flag-waving, fist-pumping enthusiasm for Colonel Qaddafi . . . . "You are trying to convince them you are a loyalist," one resident said, "and the second they realize that you are not, you are done for."<sup>210</sup>

The U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, the U.N. Secretary General's Special Adviser on the Prevention of Genocide, and Human Rights Watch also condemned massive crimes in Libya and called for action to prevent further killings.<sup>211</sup> On February 23, Turkey confirmed that it was carrying out the largest evacuation in its his-

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206. Colin Moynihan, *Libya's U.N. Diplomats Break With Qaddafi*, N.Y. TIMES (Feb. 21, 2011), [http://www.nytimes.com/2011/02/22/world/africa/22nations.html?\\_r=0](http://www.nytimes.com/2011/02/22/world/africa/22nations.html?_r=0); see also *Libya's UN Mission Cuts Ties with Gaddafi, Warns Against Genocide*, MONSTERS & CRITICS (Feb. 21, 2011), [http://www.monstersandcritics.com/news/africa/news/article\\_1620958.php/Libya-s-UN-mission-cuts-ties-with-Gaddafi-warns-against-genocide](http://www.monstersandcritics.com/news/africa/news/article_1620958.php/Libya-s-UN-mission-cuts-ties-with-Gaddafi-warns-against-genocide).

207. *Id.*

208. *Libyan Embassy Staff Resign in Stockholm*, LOCAL (Swed.) (Feb. 21, 2011), <http://www.thelocal.se/32178/20110221/>.

209. See Kareem Fahim & David D. Kirkpatrick, *Qaddafi's Grip on the Capital Tightens as Revolt Grows*, N.Y. TIMES (Feb. 22, 2011), <http://www.nytimes.com/2011/02/23/world/africa/23libya.html?pagewanted=all/>.

210. Kareem Fahim & David D. Kirkpatrick, *Qaddafi Massing Forces in Tripoli as Rebellion Spreads*, N.Y. TIMES (Feb. 23, 2011), <http://www.nytimes.com/2011/02/24/world/africa/24libya.html>.

211. *Fresh Violence Rages in Libya*, AL-JAZEERA (Feb. 22, 2011), <http://www.aljazeera.com/news/africa/2011/02/201122261251456133.html>; *Libya: "Stop the Massacre"-UN Experts*, RELIEFWEB (Feb. 22, 2011), <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EGUA-8EBURZ?OpenDocument>; Press Release, UN Sec'y-Gen. Special Advisor on the Prevention of Genocide, Francis Deng, and Spec. Adviser on the Responsibility to Protect, Edward Luck, on the Situation in Libya (Feb. 22, 2011), available at <http://www.un.org/en/preventgenocide/adviser/pdf/OSAPG,%20Special%20Advisers%20Statement%20on%20Libya,%2022%20February%202011.pdf>; *Libya: Commanders Should Face Justice for Killings*, HUM. RTS. WATCH (Feb. 22, 2011), <http://www.hrw.org/news/2011/02/22/libya-commanders-should-face-justice-killings>.

tory, transporting more than 5,000 nationals from the airport in Tripoli, with further evacuations planned for 25,000 Turks living in Libya.<sup>212</sup>

On February 25, Libyan soldiers reportedly opened fire on crowds of Libyans massing against the regime, killing up to 1,000.<sup>213</sup> On February 26, U.N. Secretary-General Ban Ki-moon cited estimates that more than 1,000 people had been killed in two weeks of protests in Libya.<sup>214</sup> That day, the U.N. Security Council issued a resolution condemning crimes against humanity in Libya, demanding an "immediate end to the violence," ordering U.N. members to prevent the sale of arms to Libya, noting that refugees were being forced to flee, stating that a medical supplies shortage had emerged, and expressing its "commitment to the sovereignty, independence, territorial integrity and national unity of" Libya.<sup>215</sup>

On February 27, a National Libyan Council was formed, headed by a Gaddafi-era official, former Justice Minister Mustafa Muhammad Abdel Jalil.<sup>216</sup> On March 12, the Arab League urged the Security Council to create a no-fly zone in Libya and stated that the League would help implement it.<sup>217</sup> On March 18, the Council authorized not only a no-fly zone but also "all necessary measures" to protect Libyan civilians, with five key U.N. members abstaining: Russia, China, Germany, India, and Brazil.<sup>218</sup> The Council authorized member states, "acting nationally or through regional organizations or arrangements . . . to protect civilians and civilian-populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory . . ." <sup>219</sup> The Council banned "all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians . . ." <sup>220</sup>

The Security Council also called upon Libya to "lift restrictions on all forms of media."<sup>221</sup> In Libya, in contrast to Egypt, the government had restricted Internet growth by banning private Internet service businesses.<sup>222</sup> The state-owned Internet company routed all wireline traffic to and from Libya.<sup>223</sup> To stop the opposition from organizing, on March 4, 2011, the government flipped the "kill switch."<sup>224</sup> This blocked people in

212. See Drew Hinshaw, *Mass Libya Evacuations as Qaddafi Digs In*, CHRISTIAN SCI. MONITOR (Feb. 23, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0223/Mass-Libya-evacuations-as-Qaddafi-digs-in>.

213. See *Egypt*, *supra* note 115, at 483.

214. See Suzan Fraser, *Turkey's PM Speaks Out Against Libya Sanctions*, U-T SAN DIEGO (Feb. 26, 2011), <http://www.utsandiego.com/news/2011/feb/26/turkeys-pm-speaks-out-against-libya-sanctions/>.

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

216. *Egypt*, *supra* note 115, at 483.

217. *Id.*

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

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

220. *Id.* ¶ 6.

221. S.C. Res 1970, *supra* note 215, ¶ 2(d).

222. See Cowie, *supra* note 122.

223. See *id.*

224. See *id.*

government-held territories, such as Tripoli, from receiving wireline Internet messages of support for the revolution from the outside world and frustrated efforts to send images of the revolution out of the country.<sup>225</sup>

In March, Human Rights Watch claimed that the Libyan government was “brutally suppressing all opposition in Tripoli, including peaceful protests, with lethal force, arbitrary arrests, and forced disappearances . . . .”<sup>226</sup> On March 10, a communiqué of the Peace and Security Council of the African Union (AU) announced the creation of an ad hoc AU High Level Committee on Libya.<sup>227</sup> On March 12, the Council of the League of Arab States sought a no-fly zone over Libya to create safe areas in places exposed to shelling and to protect the Libyan people and foreign nationals living in Libya.<sup>228</sup> Syria and Algeria, which suffered from the threat of terrorism, “argued that foreign intervention would destabilize the region.”<sup>229</sup> Prince Saud al-Faisal, the Saudi foreign minister who had overseen his country’s ties to the Taliban, who had covered up for Al-Qaeda’s atrocities in the past, and whose nation’s royal family had funded jihadism and Al-Qaeda worldwide,<sup>230</sup> was a noteworthy participant in this Arab League meeting.<sup>231</sup>

The rush to intervention was not without its critics. On March 10, 2011, Alan Kuperman, an associate professor at the Lyndon B. Johnson School of Public Affairs at the University of Texas, appeared on KTBC television in Austin, suggesting that there has been no massacres of civilians in Libya; that if there had, it was due to the rebellion because peaceful resistance movements do not incur massive retaliation against civilians; and that the only legitimate basis for a U.N. or U.S. intervention is a deliberate massacre. He said that if we “keep talking about intervening, we may escalate the civil war sufficiently to provoke just that sort of violence.”<sup>232</sup> The regime, in that case, “would fight to the very last civilian.”<sup>233</sup> He suggested that extremists were likely to take over the rebellion and that the United

225. See Dana Wollman, *Internet Traffic in Libya Goes Dark Amid Upheaval*, NBC NEWS (Mar. 4, 2011, 5:22 PM), [http://www.msnbc.msn.com/id/41911692/ns/technology\\_and\\_science-security/](http://www.msnbc.msn.com/id/41911692/ns/technology_and_science-security/).

226. *Libya: End Violent Crackdown in Tripoli*, *supra* note 171 (internal quotations omitted).

227. See S.C. Res. 1973, *supra* note 219.

228. Ethan Bronner & David E. Sanger, *Arab League Endorses No-Flight Zone Over Libya*, N.Y. TIMES (Mar. 13, 2011), <http://www.nytimes.com/2011/03/13/world/middleeast/13libya.html?pagewanted=all>.

229. *Id.*

230. See *Institutionalized Islam: Saudi Arabia’s Islamic Policies and The Threat They Pose: Hearing Before Subcomm. on Terrorism, S. Comm. on the Judiciary*, 108th Cong. 7 (2003); TRAVIS, *supra* note 9, at 496-98, 523-25. When Saudi Arabia suffered terrorist attacks that the West blamed on Al-Qaeda splinter groups in 2004, Prince Saud al-Faisal claimed that it was the “Zionists” and “Israel” who had attacked the country instead. *Saudi Arabia: Friend or Foe in the War on Terror?: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 75-80 (2005).

231. See Bronner & Sanger, *supra* note 228.

232. *Intervene in Libya? - Prof. Alan Kuperman on Fox TV*, YOUTUBE (Mar. 10, 2011), <http://www.youtube.com/watch?v=1Sn7aRr19tQ>.

233. *Id.*

Nations and the United States should not support the rebellion when peaceful change was possible, given that there was little violence during regime change during the revolutions in Tunisia and Egypt.<sup>234</sup>

There are a couple of potential problems with Professor Kuperman’s analysis. First, a deliberate massacre of the entire population is not the sole legitimate basis for the interventions that the U.N. Security Council authorizes, as described in Part VII.D. Second, many former officials of Gaddafi’s own regime called the massacres of Libyan people “genocide,” and the discovery of mass graves in caverns near the secret prisons corroborated their allegations that massacres had taken place. As the *Pretoria News* reported at about this time:

Dungeons, executions, bombings, kidnappings and death squads targeting civilians and journalists have left a country gripped by 42 years of fear shaken to its core.

In Benghazi, which up until a few weeks ago was a scene of brutal fighting, four secret bunker prisons in a security police compound have been discovered.

. . . .

The prisons housed hundreds of political activists, lawyers, teachers, journalists and civilians thought to be behind the planning of uprisings.

A maze of chambers nearly 30 metres underground, interlinked through now cemented-up tunnels, the dungeons consist of mass cells and solitary confinement cells no bigger than one square metre.

. . . .

Also inside were solitary confinement cells, which resembled cages.

Evidence of sealed tunnels could be seen.

Those who were rescued have reported that it is in these chambers that countless murdered activists are buried.<sup>235</sup>

In February, there had already been reports that Libyan aircrafts fired on protesters in the capital Tripoli.<sup>236</sup> This was before a full-fledged rebellion emerged in the capital in March. On March 28, President Obama remarked that if the NATO intervention had come later, “Benghazi . . . could [have] suffer[ed] a massacre that would have reverberated across the region and stained the conscience of the world.”<sup>237</sup> This echoed what an individual whom *The Independent* identified as a law professor wrote about ten days earlier: “The global community must act to stop Gaddafi and his

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234. See *id.*

235. Graeme Hosken, *Dungeons Found in Libya*, IOL NEWS (Mar. 17, 2011, 9:13 AM), <http://www.iol.co.za/news/africa/dungeons-found-in-libya-1.1042986?showComments=true>.

236. Moynihan, *supra* note 206.

237. President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

forces reaching Benghazi. If he gets here, he will kill everyone . . . .”<sup>238</sup> In April, Libya’s former oil minister accused Gaddafi of “ordering massacres in which as many as 20,000 had been killed by government troops.”<sup>239</sup> On March 17, Gaddafi gave his famous “no mercy” speech, which did, however, mention amnesty for rebels “who throw their weapons away.”<sup>240</sup> That day, the Security Council passed Resolution 1973 on Libya. It condemned Libya’s “gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions.”<sup>241</sup>

The Security Council resolution expressed “concern at the plight of refugees and foreign workers forced to flee the violence in the Libyan Arab Jamahiriya, welcoming the response of neighbouring States, in particular Tunisia and Egypt, to address the needs of those refugees and foreign workers, and calling on the international community to support those efforts.”<sup>242</sup> In the critical paragraph, it authorized “Member States . . . acting nationally or through regional organizations or arrangements . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi . . . .”<sup>243</sup> By “excluding a foreign occupation force of any form on any part of Libyan territory,” however, the resolution seemed to be tailored to authorize an intervention more similar to those in Haiti in 1993 or Kosovo in 1999 than to the one in Iraq in 2003.<sup>244</sup> The Council also stressed the “important role of the League of Arab States in matters relating to the maintenance of international peace and security in the region,” under Chapter VIII of the U.N. Charter.<sup>245</sup>

Two days later, President Obama reported to Congress that U.S. forces had begun military operations in support of U.N. Security Council Resolution 1973, “to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya.”<sup>246</sup> The flight of Libyans to neighboring countries threatened to destabilize the peace and security of the region, he argued.<sup>247</sup> The U.S. Africa Command

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238. Hana El-Gallal, *Hana El-Gallal: ‘He Will Kill Everyone. Do Something. Please . . . .’*, INDEP. (Mar. 17, 2011), <http://www.independent.co.uk/voices/commentators/hana-elgallal-he-will-kill-everyone-do-something-please-2244162.html>.

239. Michael Binyon, Deborah Haynes & Giles Whittell, *Libya Oil Minister Says Up to 20,000 Civilians Massacred*, AUSTRAL. (Apr. 7, 2011), <http://www.theaustralian.com.au/news/world/libya-oil-minister-says-up-to-20000-civilians-massacred/story-e6frg6so-1226035080080>.

240. Walden Bello, *The Crisis of Humanitarian Intervention*, FOREIGN POL’Y IN FOCUS (Aug. 9, 2011), [http://www.fpip.org/articles/the\\_crisis\\_of\\_humanitarian\\_intervention](http://www.fpip.org/articles/the_crisis_of_humanitarian_intervention) (internal quotations omitted).

241. S.C. Res. 1973, *supra* note 219, pmbl.

242. *Id.* (emphasis omitted).

243. *Id.* ¶ 4.

244. *Id.*

245. *Id.* ¶ 5.

246. Press Release, The White House, Office of the Press Sec’y, Letter from the President Regarding Commencement of Operations in Libya, (Mar. 21, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

247. *See id.*

led the bombing of air defense systems, “command and control structures,” forces, and airfields in Libya in order to establish a no-fly zone.<sup>248</sup> One goal was to stop Libyan government forces from taking the rebel cities of Benghazi, Ajdabiya, Misrata, and Zawiya. Another was to deliver “water, electricity, and gas supplies to all areas.”<sup>249</sup> President Obama wrote, “Qadhafi has forfeited his responsibility to protect his own citizens and created a serious need for immediate humanitarian assistance and protection . . . .”<sup>250</sup> On March 19, a communiqué of the OIC endorsed the NATO intervention, among other things, and called upon OIC member states to establish, subject to their discretion, contacts with the National Council that Jalil founded.<sup>251</sup>

The debate concerning whether the U.N.-sponsored intervention was premature continued. In early April, Professor Kuperman told the *Chicago Tribune* that “Gadhafi . . . did not massacre civilians in any of the other big cities he captured—Zawiya, Misrata, Ajdabiya—which together have a population equal to Benghazi. Yes, civilians were killed in a typical, ham-handed, Third World counterinsurgency. But civilians were not targeted for massacre.”<sup>252</sup> He distinguished the situation from that prevailing in “Rwanda, Darfur, Burundi, the Democratic Republic of Congo, Bosnia, or even Kosovo after NATO intervention.”<sup>253</sup> However, as Professor Kuperman himself pointed out, the largest massacres in these countries occurred between a year and several years after rebellion broke out, making them questionable comparisons to Libya, where intervention to halt massacres began approximately two months after protests began. On April 13, Kuperman wrote, “Misurata’s population is roughly 400,000. In nearly two months of war, only 257 people—including combatants—have died there. Of the 949 wounded, only 22—less than 3%—are women.”<sup>254</sup> This point again ignores that the monthly death toll was probably not very high in the early months of the Uganda-Rwanda and Yugoslavia-Kosovo conflicts of the 1990s. More importantly, in order to confirm the *absence* of murders or massacres, as Professor Kuperman does, one should first properly conduct the following: (1) extensive trials and appellate proceedings after forensic examinations of grave sites, such as those of Carla del Ponte for Kosovo and the Iraqi High Tribunal for the Kurdish and Shi’a rebellions

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248. *See id.*

249. *Id.*

250. *Id.*

251. Organization of the Islamic Conference, Mar. 19, 2011, *Final Communiqué Issued by the Emergency Open Ended Ministerial Meeting of the OIC Executive Committee on the Alarming Developments in Libyan Jamahiriya* (Mar. 19, 2011), available at <http://reliefweb.int/report/libya/final-communicu%C3%A9-issued-emergency-open-ended-ministerial-meeting-oic-executive>.

252. Steve Chapman, *Did Obama Avert a Bloodbath in Libya? Panicking Over a Dubious Threat*, CHI. TRIB. (Apr. 3, 2011), <http://www.chicagotribune.com/news/columnists/ct-oped-0403-chapman-20110403,0,4286197.column> (internal quotations omitted).

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

254. Alan J. Kuperman, *False Pretense for War in Libya?*, BOS. GLOBE (Apr. 14, 2011), [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2011/04/14/false\\_pretense\\_for\\_war\\_in\\_libya/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2011/04/14/false_pretense_for_war_in_libya/).

in Iraq; (2) extensive interviews with refugees and town leaders, such as those of Samuel Totten and the Darfur Atrocities Investigation Team, and of Human Rights Watch and Amnesty International prior to writing significant reports;<sup>255</sup> (3) an excess deaths study, such as those of the British medical journal *The Lancet* for Iraq in 2004 and 2006<sup>256</sup> and prior to that for Kosovo, Sudan, and the DRC; and (4) a review of satellite photos and published news reports, U.N. reports, and accounts by defectors, such as those conducted by the nongovernmental organizations the Enough Project and the Satellite Sentinel as well as various scholars in the Middle East Studies field. There is also a questionable assumption that deliberately targeting a city and knowingly killing civilians without deliberately targeting *the civilians* cannot be a war crime or crime against humanity. The International Criminal Tribunal for the Former Yugoslavia (ICTY) rejected this view in *Prosecutor v. Strugar*, which held that “to prove murder, it must be established that death resulted from an act or omission of the accused, committed with the intent either to kill *or, in the absence of such a specific intent, in the knowledge that death is a probable consequence of the act or omission.*”<sup>257</sup> In the *Galic* case, similarly, the ICTY convicted the accused of murder as a crime against humanity for leading “a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population.”<sup>258</sup>

Professor Kuperman’s analysis also omitted mention of certain evidence of massacres, as well as the situation on the ground in Misrata and Ajdabiya. On March 22, for example, a doctor in Misrata said that tanks fired on peaceful civilians and that “[t]he number of dead are too many for our hospital to handle . . . .”<sup>259</sup> In March, the government reportedly subjected Ajdabiya to “full throttle shelling reprisals.”<sup>260</sup> As one report stated: “A powerful regime force advancing from the west has been relentlessly bombarding Ajdabiya the past two days, raining rockets and artillery and tank shells on the city . . . .”<sup>261</sup>

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255. See GENOCIDE IN DARFUR: INVESTIGATING THE ATROCITIES IN THE SUDAN 223 (Samuel Totten & Eric Markusen eds., 2006).

256. See, e.g., Gilbert Burnham et al., *Mortality After the 2003 Invasion of Iraq: A Cross-Sectional Cluster Sample Survey*, LANCET (2006), available at <http://brusselstribunal.org/pdf/lancet111006.pdf>; Les Roberts et al., *Mortality Before and After the 2003 Invasion of Iraq: Cluster Sample Survey*, 364 LANCET 1857 (2004), available at [http://www.jhsph.edu/research/centers-and-institutes/center-for-refugee-and-disaster-response/publications\\_tools/iraq/sdarticle.pdf](http://www.jhsph.edu/research/centers-and-institutes/center-for-refugee-and-disaster-response/publications_tools/iraq/sdarticle.pdf).

257. *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment, ¶ 236 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) (emphasis added).

258. *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (internal quotations omitted).

259. Hadeel Al-Shalchi, *Snipers, Shells, Tanks Terrorize Key Libyan City*, TORONTO STAR (Mar. 22, 2011), [http://www.thestar.com/news/world/2011/03/22/snipers\\_shells\\_tanks\\_terrorize\\_key\\_libyan\\_city.html](http://www.thestar.com/news/world/2011/03/22/snipers_shells_tanks_terrorize_key_libyan_city.html).

260. Rosie DiManno, *Ajdabiya Solidly in Rebel Hands – Again*, TORONTO STAR (Mar. 26, 2011), <http://www.thestar.com/news/world/article/962345-ajdabiya-solidly-in-rebel-hands-again>.

261. *Rebels Battle to Hold City Under Gadhafi Siege*, USA TODAY (Mar. 16, 2011, 7:15 PM), [http://www.usatoday.com/news/world/2011-03-16-libya-rebels\\_N.htm](http://www.usatoday.com/news/world/2011-03-16-libya-rebels_N.htm).

On March 18, International Criminal Court (ICC) Prosecutor Luis Moreno-Ocampo announced that he had enough evidence to issue an arrest warrant for crimes against humanity in Libya by May.<sup>262</sup> On March 24, Moreno-Ocampo announced that he was "certain" that Libyan officials would be charged with crimes against humanity, because his office had evidence that "massive shooting of civilians" took place in Tripoli, Benghazi and other Libyan cities.<sup>263</sup> He noted that "[t]echnology is reducing the distance between people in Libya and people in the (rest of the) world," and that journalism portraying the plight of civilians in Libya had helped trigger an international response.<sup>264</sup> On April 15, a rare joint article from Barack Obama, David Cameron, and Nicolas Sarkozy called the siege of Misrata an attempt "to strangle its population into submission" and a way of "mercilessly targeting them," which, if accepted by the world, would be an "unconscionable betrayal."<sup>265</sup> The next day, "Human Rights Watch released photographs and testimony from its arms expert, which it said confirmed witness reports that" cluster bombs were dropped on Misrata, "indiscriminately throwing out dozens of high-explosive bomblets that cause widespread damage and injuries over a large area."<sup>266</sup> On May 6, Amnesty International reported that Libyan government snipers were shooting at civilians.<sup>267</sup>

On May 16, Moreno-Ocampo applied for an arrest warrant against three Libyans who allegedly bore the most culpability for crimes against humanity.<sup>268</sup> The evidence supporting a finding that crimes against humanity meeting a high enough level of gravity had taken place so as to trigger ICC jurisdiction, however, was redacted from the filing.<sup>269</sup> When

262. See Mike Corder, *Int'l Court Warns Gadhafi Not to Attack Civilians*, GUARDIAN (Mar. 18, 2011), <http://www.guardian.co.uk/world/feedarticle/9553061/print>; *Prosecutor on Libya 18 03 2011*, YOUTUBE (Mar. 18, 2011), <http://www.youtube.com/watch?v=ZfAsTXOozbY>.

263. Ben Hubbard, *International Court Expects Libyan Prosecution*, HUFFINGTON POST (Mar. 24, 2011, 10:26 AM), <http://www.huffingtonpost.com/huff-wires/20110324/international-court-libya/>.

264. *Id.*

265. David Cameron, Barack Obama & Nicolas Sarkozy, *The Bombing Continues Until Gaddafi Goes*, DAILY TELEGRAPH (Apr. 15, 2011, 8:15 AM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8452877/The-bombing-continues-until-Gaddafi-goes.html>.

266. Harriet Sherwood, *NATO Must Send in Troops to Save Misrata, Say Rebels*, GUARDIAN (Apr. 16, 2011, 1:12 PM), <http://www.guardian.co.uk/world/2011/apr/16/libya-muammar-gaddafi/print>.

267. Simon Denyer, *Amnesty International Accuses Libya of War Crimes*, WASH. POST (May 6, 2011, 4:00 AM), <http://www.sfgate.com/news/article/Amnesty-International-accuses-Libya-of-war-crimes-2372560.php>.

268. Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-4, Pre-Trial Chamber I Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi (May 16, 2011), available at [www.icc-cpi.int/iccdocs/doc/doc1073503.pdf](http://www.icc-cpi.int/iccdocs/doc/doc1073503.pdf).

269. See *id.* at 17. The application alleged that "GADDAFI, as indirect perpetrator, and SAIF AL-ISLAM and AL-SENSUSSI, as indirect co-perpetrators, committed crimes against humanity in the form of murder across Libya in, inter alia, Tripoli, Benghazi, and Misrata, through the Libyan State apparatus and Security Forces in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute." *Id.* at 16.

the ICC issued its warrant of arrest, much more evidence was forthcoming, including:

1. the government arrested demonstrators, lawyers, and journalists in Benghazi and Tripoli between February 15 and 17, 2011, and tortured them thereafter, including by electrocution and whipping;<sup>270</sup>
2. Saif al-Islam Gaddafi “order[ed] the imprisonment and elimination of political dissidents,” using resources that Muammar Gaddafi supplied;<sup>271</sup>
3. the government incited violence against dissidents by using charged language such as “sanitize,” “filth,” and “stray dogs” in televised speeches and text messages, a practice which the ICC found to be objectionable;<sup>272</sup>
4. the government passed laws criminalizing propaganda against the regime to set the stage for the violent suppression of dissent;<sup>273</sup>
5. the government blocked emails, the Internet, independent newspapers and broadcast media, and international satellite television channels such as Al-Jazeera to prevent the population from learning about the ongoing suffering;<sup>274</sup> and
6. in a cover-up campaign, the government removed dead bodies from the streets and hospitals, and occasionally burned them.<sup>275</sup>

Between June and October, NATO’s Operation Unified Protector bombed Libyan government forces, especially in the vicinity of Benghazi, and then followed rebel units as they moved west as “air support for anti-Gaddafi forces.”<sup>276</sup> Some NATO bombs killed civilians, although the government and rebels were not always wearing uniforms, including Col. Gaddafi and Saif al-Islam Gaddafi themselves.<sup>277</sup> Meanwhile, the United States, Britain, France, Italy, Qatar, Kuwait, and the UAE trained and armed the rebels, with Qatar sending hundreds of troops pursuant to a U.S. demand for Arab participation in the U.N. mission.<sup>278</sup> As an adviser to President Obama explained in early 2012:

What the President decided is this. Is that we were willing to back a military action if we could get a coalition together because we weren’t going to do it

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270. Situation in the Libyan Arab Jamahiriya, Case No. ICC-01/11-12, Pre-Trial Chamber I Decision on the Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi, ¶ 46 (June 17, 2011).

271. *See id.* ¶ 80.

272. *See id.* ¶¶ 20, 26(ii).

273. *See id.* ¶ 19.

274. *See id.* ¶ 77.

275. *See id.* ¶ 93.

276. HUMAN RIGHTS WATCH, WORLD REPORT 2012: LIBYA 2 (2012), available at [http://www.hrw.org/sites/default/files/related\\_material/libya\\_2012.pdf](http://www.hrw.org/sites/default/files/related_material/libya_2012.pdf).

277. *See id.*

278. *See id.*

unilaterally. We wouldn’t put U.S. boots on the ground in another Muslim country.

We wanted to get Arab participation not just rhetorical participation but concrete participation and we did with the (INAUDIBLE) from the UAE and the Jordanians and we have had a good legal basis. And we tried to put together a coalition . . . .

[President Obama made] a decision to go forward and take out all the air defense systems in Libya and to make it appropriate then for a “no fly zone” to be put in place and for operations to begin to protect civilians. And that’s what we did.<sup>279</sup>

In October, as the rebels closed in on Col. Gaddafi’s hometown of Sirte, LNTC forces captured him and his son Muatassim and probably executed them while in custody, although crossfire was also blamed.<sup>280</sup> In Sirte, “53 bodies of apparent Gaddafi supporters” turned up in a rebel camp, some apparently executed with their hands tied behind their backs.<sup>281</sup> By 2012, estimates of the death toll in Libya ranged up to 50,000, as regime loyalists and diverse militias waged ethnic and political violence.<sup>282</sup>

Jihadism emerged fairly early on in the Libyan civil war as a major factor. As Jon Lee Anderson reported from Libya in May of 2011:

One common myth held that Qaddafi himself was an Israeli agent, part of a conspiracy backed by the West. Graffiti around the Benghazi courthouse read “Qaddafi = Yahud.” I was told repeatedly that an Israeli woman had claimed on television that she was a cousin of Qaddafi; the footage had been rebroadcast on one of the Arabic satellite news channels, and “everyone” had seen it.

A brigade of former jihadi fighters—tough-looking, full-bearded older men—had come to the front from the eastern city of Derna. Their leader, Abdel Hakim al-Hasidi, had fought alongside Osama bin Laden’s Al Qaeda volunteers in Afghanistan, and some of his fighters were jihadi veterans of the war in Iraq. Another top commander, Abu Sufian bin Qumu, is a former Guantanamo detainee who also fought in Afghanistan.<sup>283</sup>

By 2012, the head of the LNTC Military Council for Tripoli was a prominent Al-Qaeda veteran.<sup>284</sup>

Libya would represent a huge victory for Al-Qaeda if it were able to displace the other political, tribal, and religious leaders jockeying for power in the post-Gaddafi era. As the Special Representative of the U.N. Secre-

279. *The Charlie Rose Show* (PBS television broadcast Jan. 26, 2012).

280. See HUMAN RIGHTS WATCH, *supra* note 276, at 5.

281. *Id.*

282. See Karin Laub, *Libya: Estimated 30,000 Died in War; 4,000 Still Missing*, HUFFINGTON POST (Sept. 8, 2011, 3:49 AM), [http://www.huffingtonpost.com/2011/09/08/libya-war-died\\_n\\_953456.html](http://www.huffingtonpost.com/2011/09/08/libya-war-died_n_953456.html); Chris Toensing, Op-Ed., *Libya’s Lessons: Body Counts Would Be Embarrassing*, OTHER WORDS (Mar. 5, 2012), [http://www.otherwords.org/articles/libyas\\_lessons](http://www.otherwords.org/articles/libyas_lessons); see also Kim Sengupta, *Rebel Leaders Put Libya Death Toll at 50,000*, INDEPENDENT (Aug. 31, 2011), <http://www.independent.co.uk/news/world/africa/rebel-leaders-put-libya-death-toll-at-50000-2346590.html>.

283. Anderson, *supra* note 130.

284. See Dorell & Lynch, *supra* note 159.

tary-General for Libya noted in October 2011, Libya contains an “extraordinary quantity of weaponry and munitions” that now menace not only Libya’s residents but the entire region, because the flow of weapons and former soldiers “across borders is naturally a major anxiety for Libya’s neighbours and beyond.”<sup>285</sup> Libya’s arsenals included chemical weapons, nuclear materials, “other nonconventional weapons,” “all sorts of mines,” and “the largest known stockpile of shoulder-fired anti-aircraft missiles” outside of the main arms-exporting countries.<sup>286</sup> Neighboring countries reported a flood of armaments. In the absence of a central government, Libya was fast becoming “a haven for violent militant Islam, weapons smuggling and the drugs trade right on Europe’s doorstep.”<sup>287</sup>

Thousands of lives may be at risk in Nigeria, Niger, and Chad as Al-Qaeda’s North African wing and the Nigerian Taliban, Boko Haram, gain access to huge stockpiles of Libyan machine guns, grenades, and vehicle-mounted cannons.<sup>288</sup> Boko Haram is capable of large-scale attacks on Christians and secularists, having slain more than 500 in Nigeria in 2011, 250 in January 2012, and dozens more in April of 2012.<sup>289</sup> In Mali, Taureg rebels and allied jihadists conquered territory as large as France, perpetrating mass rapes and plundering civilian property, which caused 284,000 people to flee the area.<sup>290</sup>

In January of 2012, President Omar Hassan al-Bashir of Sudan visited Libya to congratulate the rebels on overthrowing the socialist regime and offered to build a national army based on the rebellion’s various components.<sup>291</sup> He blamed Libya for providing arms to Sudanese rebels who nearly overthrew his regime in 2008.<sup>292</sup> He called the Libyan revolution “the best gift to Sudan in its modern history.”<sup>293</sup> Speaking at a press conference with al-Bashir,<sup>294</sup> Mustafa Abdel Jalil, the head of the LTNC, said that Libya would make major investments in Sudan with the \$65-billion

285. U.N. SCOR, 66th Sess., 6693d mtg. at 4, U.N. Doc. S/PV.6639 (Oct. 26, 2011).  
286. *Id.*

287. Hadeel Al Shalchi, *Cradle of Libya Revolt Seeks Autonomy from New Rulers*, REUTERS (Apr. 16, 2012, 9:33 AM), <http://www.reuters.com/article/2012/04/16/libya-autonomy-idUSL6E8F4BT020120416>.

288. Louis Charbonneau, *Arms From Libya Could Reach Boko Haram, al Qaeda: U.N.*, REUTERS (Jan. 26, 2012, 5:16 PM), <http://www.reuters.com/article/2012/01/26/us-libya-un-arms-idUSTRE80P1QS20120126>.

289. *See id.*; Drew Hinshaw, *North Mali Gripped by Rape and Theft, Group Says*, WALL ST. J. (Apr. 30, 2012), [http://online.wsj.com/article/SB10001424052702304868004577375852099193584.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052702304868004577375852099193584.html?mod=googlenews_wsj).

290. Hinshaw, *supra* note 289.

291. Mahmoud Habboush, *Sudan’s Bashir Offers to Help Form New Libyan Army*, REUTERS (Jan. 8, 2012), <http://www.reuters.com/article/2012/01/07/us-libya-sudan-idUSTRE8060KL20120107>.

292. *Sudan: Bashir Criticises Kadhafi in Libya Trip*, ALLAFRICA.COM (Jan. 7, 2012), <http://allafrica.com/stories/201201080036.html>.

293. *Bashir Hails Gaddafi Fall As ‘Best Gift’ to Sudan*, ALARAB (Aug. 1, 2012), <http://www.alarab.co.uk/english/display.asp?fname=%5C2012%5C01%5C01-08%5Czsubz%5C910.htm>.

294. *See id.*

Libyan Investment Authority.<sup>295</sup>

## VI. The Sideshow: Sudan

Many commentators have questioned whether the intervention in Libya presented a double standard with other countries, such as Syria or Yemen, where as many, if not more, protesters were killed.<sup>296</sup> But the most glaring double standard applies to one Arab League member compared with the others: Sudan. The leaders of Egypt, Libya, and Syria were quickly asked or forced to step down after killing too many Arabs, often because other Arab countries opposed their leaders;<sup>297</sup> however, the leader of Sudan, Omar Hassan al-Bashir, has not been asked to step down<sup>298</sup> and enjoys a thriving trade with the West,<sup>299</sup> despite far more victims among non-Arab populations there. This is because Arab nations, including Saudi Arabia, support him.<sup>300</sup> President Obama called on President Mubarak to step down immediately and signed an order arming the Libyan rebels and recognizing them, but did not do the same for Sudan.

The case for regime change was much stronger in Sudan than for virtually any country in the world. There is perhaps no other country where more than two million persons have been killed by two decades of a regime's policies<sup>301</sup> and where the U.S. Congress and the President could agree that the regime had committed genocide, not once but twice: first in

295. *Libya NTC Says to Review Investments Worldwide*, REUTERS (Jan. 7, 2012), <http://www.reuters.com/article/2012/01/07/libya-investment-idUSL6E8C70DA20120107>.

296. See, e.g., Amos N. Guiora, *Intervention in Libya, Yes; Intervention in Syria, No: Deciphering the Obama Administration*, 44 CASE W. RES. J. INT'L L. 251 (2011).

297. See, e.g., *U.S. Policy on Syria: Hearing Before the Subcomm. on Near Eastern and South and Central Asian Affairs of the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Jeffrey D. Feltman, Assistant Sec'y, Bureau of Near E. Aff.), available at <http://www.state.gov/p/nea/rls/rm/176948.htm>; William Wan & William Booth, *United States Recognizes Libyan Rebels As Legitimate Government*, WASH. POST (July 15, 2011), [http://www.washingtonpost.com/world/middle-east/western-arab-leaders-meet-in-turkey-on-libyas-future/2011/07/15/gIQAZLbjFI\\_story.html](http://www.washingtonpost.com/world/middle-east/western-arab-leaders-meet-in-turkey-on-libyas-future/2011/07/15/gIQAZLbjFI_story.html); *Friends of Syria Conference Recognizes Syrian National Council as Legitimate Representatives of Syrians*, XINHUA NET (Feb. 25, 2012), [http://news.xinhuanet.com/english/world/2012-02/25/c\\_131430461.htm](http://news.xinhuanet.com/english/world/2012-02/25/c_131430461.htm).

298. In 2009, President Obama's envoy to Sudan explained U.S. policy as "engagement with all parties" in Sudan, "negotiations and discussions and dialogue with the Khartoum Government," and to "work with the Government of Sudan." U.S. Dep't of State, *Special Envoy Gration Briefs on Recent Trip to Sudan* (June 17, 2009) (statement of U.S. Special Envoy to Sudan J. Scott Gration), available at <http://london.usembassy.gov/africa012.html>; see also, e.g., Mahmoud A. Suleiman, *US's Gration Rewards the Genocidal NCP*, SUDAN TRIB. (Aug. 5, 2009), [http://www.sudantribune.com/spip.php?page=imprimable&id\\_article=32040](http://www.sudantribune.com/spip.php?page=imprimable&id_article=32040).

299. U.S. trade in goods with Sudan soared to \$143 million in 2008, despite a financial crisis and recession in the United States. See U.S. CENSUS BUREAU FOREIGN TRADE, 2008: TRADE IN GOODS WITH SUDAN (2009), available at <http://www.census.gov/foreign-trade/balance/c7320.html>. After declining a bit in 2009, it rose by nearly 50% in 2010. See U.S. CENSUS BUREAU FOREIGN TRADE, 2010: TRADE IN GOODS WITH SUDAN (2011), available at <http://www.census.gov/foreign-trade/balance/c7320.html>.

300. See *Sudan, Saudi Summit to Strengthen Political, Economic Ties*, SUDAN VISION (Mar. 10, 2012), <http://news.sudanvisiondaily.com/details.html?rsnpid=207725>.

301. See TRAVIS, *supra* note 9, at 448-54, 463, 470.

Southern Sudan and then in Darfur.<sup>302</sup> Moreover, the Sudanese rebels were a lot closer to taking the capital of Khartoum in 2008 than the Libyan rebels were to occupying Tripoli in 2011, when President Obama and the European and Arab powers began backing the Libyan revolt.<sup>303</sup> If genocide and crimes against humanity are to be taken seriously as justifications for U.S. military and diplomatic actions, the duty to prevent and punish these crimes must be fulfilled for non-Arab peoples as well. Even as President Obama heralded his own protection of civilians in Libya at the 2012 State of the Union address, violence in largely non-Arab southern Sudan had driven tens of thousands of civilians from their homes who faced starvation and disease as refugees or internally displaced persons.<sup>304</sup> In 2011, half a million people were at risk of starvation in southern Sudan (just north of South Sudan), and threats by Sudan against South Sudan and the blockade of South Sudan put 4.7 million lives at risk.<sup>305</sup>

As shown in Tables 1-4, it is not as if, despite its many crimes, the al-Bashir regime has achieved high levels of economic and human development for the majority of its residents. Nor has the regime's continuance in power stabilized its neighbors, for Sudan has invaded Chad and backed the incredibly brutal and merciless Lord's Resistance Army in Uganda.<sup>306</sup> Sudan also persecutes the opposition, the alleged basis of the ICC's crimes against humanity charges.<sup>307</sup>

302. Sudan Peace Act of 2002, Pub. L. No. 107-245, § 2(10), 116 Stat. 1504, 1505 (2002).

303. *Compare Sudanese Rebels 'Reach Khartoum'*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/7394033.stm> (last updated May 10, 2008), with *Gunfire, Explosions Heard in Tripoli*, CNN (Mar. 20, 2011), <http://edition.cnn.com/2011/WORLD/africa/03/19/libya.civil.war/index.html>.

304. See Hannibal Travis & Samuel Totten, *Action Needed Now to Avert Famine in Nuba Mountains*, S. SUDAN NEWS AGENCY (Jan. 27, 2012), <http://www.southsudannewsagency.com/opinion/columnists/action-needed-now-to-avert-famine-in-nuba-mountains>.

305. *Half a Million People Risk Starvation in Sudan*, VOICE AM. NEWS, <http://www.voanews.com/content/half-a-million-people-risk-starvation-in-sudans-southern-kordofan-and-blue-nile-states-149239585/370059.html> (last updated Apr. 26, 2012); U.N. Mission in S. Sudan, *Hunger Could Threaten Over Four Million in South Sudan* (Feb. 8, 2012), <http://webcache.googleusercontent.com/search?q=cache:VJs15qXyr3gJ:unmiss.unmissions.org/Default.aspx%3Ftavid%3D3481%26ct%3DDetails%26mid%3D6047%26ItemID%3D52935%26language%3Den-US+sudan+%22four+million%22+hunger+2012&cd=1&hl=en&ct=clnk&gl=us>.

306. See TRAVIS, *supra* note 9, at 462-63; see also JIMMY CARTER, *BEYOND THE WHITE HOUSE: WAGING PEACE, FIGHTING DISEASE, BUILDING HOPE* 55 (2007); PETER EICHSTAEDT, *FIRST KILL YOUR FAMILY: CHILD SOLDIERS OF UGANDA AND THE LORD'S RESISTANCE ARMY* xix, 9 (2009); ERROL P. MENDES, *PEACE AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: A COURT OF LAST RESORT* 65 (2010). The State Department blamed the Lord's Resistance Army for large-scale massacres and the displacement of 400,000 of al-Bashir's enemies in the Central African Republic, the Democratic Republic of the Congo, and South Sudan. See Jonnie Carson, Assistant Sec'y, Bureau of African Aff., Remarks to United States Institute of Peace: U.S. Efforts to Counter the Lord's Resistance Army (Dec. 17, 2011), available at <http://www.state.gov/p/af/rls/rm/2011/178501.htm>.

307. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES SUDAN, available at <http://www.state.gov/documents/organization/160477.pdf>.

## VII. Wargaming the Arab Spring and Planning U.N. Responses

### A. The Duty to Prevent and Punish Genocide

#### 1. *Predicting Whether There is a Risk of Genocide in Arab-Spring Countries*

The Arab Spring combines several risk factors for genocide in one giant political earthquake. As the Cohen-Albright Genocide Prevention Task Force found in 2008, the risk factors associated with increased risk of genocide or mass atrocities since 1945 include the following:

- History of genocide or mass atrocities;
- Armed conflict;
- State-led discrimination;
- Exclusionary ideology;
- Ethnically polarized elite;
- Nonviolent protest;
- Leadership instability;
- Autocratic regime;
- High infant mortality; and
- Low trade openness, or non-member of General Agreement on Tariffs and Trade or World Trade Organization<sup>308</sup>

States’ internal repression of the Arab Spring threatened to bring about cases of auto-genocide, or the killings of a significant part of a national group by that nation’s de jure leadership in order to forestall regime change. There were precedents for regarding this sort of political killing, or “politicide,” as a prohibited form of genocide, despite the Soviet Union’s insistence in 1948 that “political groups” not be included in the protection of the U.N. Convention for the Prevention and Punishment of the Crime of Genocide.<sup>309</sup>

The particular warning signs of genocide have surfaced in some Arab Spring countries. These warning signs include: civil war, which regimes use to scapegoat local populations and justify massacres; formation of

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308. MADELEINE K. ALBRIGHT & WILLIAM S. COHEN, GENOCIDE PREVENTION TASK FORCE, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS 24-25 (2008), available at <http://www.usmmm.org/genocide/taskforce/pdf/report.pdf> (citing Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 AM. POL. SCI. REV. 57 (2003)).

309. See, e.g., Daniel Feierstein, *National Security Doctrine in Latin America: The Genocide Question*, in THE OXFORD HANDBOOK OF GENOCIDE STUDIES 500 (Donald Bloxham & A. Dirk Moses eds., 2010); JOHN B. QUIGLEY, THE GENOCIDE CONVENTION: AN INTERNATIONAL LAW ANALYSIS 17, 28, 31, 39-41, 164 (2006); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 153-65 (2d ed., 2009); Econ. & Soc. Council, Comm’n on Human Rights, Subcomm’n on Prevention of Discrimination & Prot. of Minorities, 38th Sess., *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1985/16 (July 2, 1985) (by B. Whitaker).

clandestine death squads and terrorist cells, which operate in secret and conceal their doings; demonization of groups and institutionalized inequality between groups; upcoming elections and intensification of the competition among groups for political and economic power, including land; undue concentration of political power; censorship of the media and absence of freedom of religion or speech; associations of ethnic and religious groups with political opinions or movements; celebration of past genocides or abuses against an ethnic or religious group; torture, abduction, rape, and denial of food or water; and redirection of humanitarian aid.<sup>310</sup>

Crimes against humanity have occurred in new Arab Spring regimes that arguably owe their existence to other countries. Concerning murder as the crime against humanity, in October 2011, the Egyptian army and allied Muslim militias attacked and killed twenty-seven Coptic Christians in central Cairo.<sup>311</sup> The Copts were actually protesting a failure to investigate or punish the perpetrators of a church massacre, which some believe helped spark the Egyptian revolution.<sup>312</sup> The ICC condemned smaller-scale killings of groups of protesters in Libya as crimes against humanity, as noted above, without taking action on the massacres in Egypt. Concerning persecution as a crime against humanity, an Egyptian student was arrested and two days of anti-Christian rioting occurred after a dispute over a Facebook posting in December 2011.<sup>313</sup> Other Copts have been killed for failing to pay protection money to armed militias.<sup>314</sup> The ICC, as described above, attached some importance to the targeting of individuals based on the content of Facebook postings and to the censorship of such media by a regime insistent on implementing Islamic law. As relevant to both Egypt and Libya, Al-Qaeda emerged in North Africa at the intersection between Arab Nationalism (as a form of anti-imperialist opposition to the 1991 war between Iraq and the U.N.-backed NATO democracies and Arab monarchies) and jihadism (coupling pan-Islamism with opposition to modernity, socialism, feminism, and religious toleration).<sup>315</sup> Mass exter-

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310. See U.N. Secretary-General, *Report of the Secretary-General on the Implementation of the Five Point Action Plan and the Activities of the Special Adviser on the Prevention of Genocide*, Annex, U.N. Doc. E/CN.4/2006/84 (Mar. 9, 2006); Helen Fein, *The Three P's of Genocide Prevention: With Application to a Genocide Foretold—Rwanda*, in PROTECTION AGAINST GENOCIDE: MISSION IMPOSSIBLE? 41, 52–53 (Neal Riemer ed., 2000).

311. See Dorell & Lynch, *supra* note 159; *Egypt Islamists Vow to Protect Churches on Orthodox Christmas*, MONSTERS & CRITICS (Dec. 30, 2011, 2:19 PM), [http://news.monstersandcritics.com/middleeast/news/article\\_1683306.php/Egypt-Islamists-vow-to-protect-churches-on-Orthodox-Christmas](http://news.monstersandcritics.com/middleeast/news/article_1683306.php/Egypt-Islamists-vow-to-protect-churches-on-Orthodox-Christmas).

312. See Leila Fadel, *In Mina's Death, Some See Spark for a Second Revolution*, WASH. POST. (Oct. 17, 2011), [http://articles.washingtonpost.com/2011-10-17/world/35280713\\_1\\_military-rule-egyptians-heba-morayef](http://articles.washingtonpost.com/2011-10-17/world/35280713_1_military-rule-egyptians-heba-morayef).

313. See Maggie Michael, *Egypt Arrests Christian Over Anti-Prophet Posting*, YAHOO! NEWS (Dec. 31, 2011), <http://news.yahoo.com/egypt-arrests-christian-over-anti-prophet-posting-142033787.html>.

314. Mary Abdelmassih, *Two Copts Killed in Egypt for Refusing to Pay Extortion Money*, ASSYRIAN INT'L NEWS AGENCY (Jan. 26, 2012, 11:36 PM), <http://www.aina.org/news/20120126173659.htm>.

315. See *Al-Qaeda International: Hearing Before the Subcomm. on Int'l Operations and Terrorism*, S. Comm. on Foreign Relations, 107th Cong. (2001) (statement of J. T. Caruso,

mination of non-Arabs and Shi'a Muslims is a hallmark of Al-Qaeda and its past or present state sponsors, such as Afghanistan, Pakistan, and Sudan.<sup>316</sup> As noted above, an Al-Qaeda veteran became the military leader of Tripoli after the death of Gaddafi, and reprisals against former regime figures in Iraq prompted Arab Nationalists and jihadists to cooperate.<sup>317</sup> The Arab Spring could therefore promote two exclusionary ideologies: jihadism and Arab Nationalism.

The situation of non-Arabs in Libya continued to deteriorate during the NATO intervention, constituting mass racial lynching, and perhaps a successful genocide, by the rebel forces. As the LNTC won the battle for Western Libya in August, "local militias arbitrarily arrested hundreds, if not thousands, more sub-Saharan migrant workers and dark-skinned Libyans from the south, accusing them of being mercenaries. In some cases, the militias subjected these detainees to physical abuse and forced labor in detention."<sup>318</sup> Thousands of non-Arab Africans struggled to survive "in makeshift camps with very poor living conditions and security."<sup>319</sup> This followed the pattern in the east, where reports of dark-skinned people being hunted down and killed first began to surface. Witnesses described the systematic persecution and massacres of non-Arab workers and migrants. As NPR's correspondent reported from Benghazi in February:

Among those desperate to flee the troubles in Libya are thousands of African migrants from all over the continent.

As NPR's Ofeibe Quist-Arcton reports, they say they've become targets for Libyans who are enraged that African mercenaries are fighting on behalf of the regime.

OFEIBEA QUIST-ARCTON: . . . Samuel, who's from Ghana, told the BBC he's frightened. Samuel is in Benghazi, Libya's second city, which is in the hands of anti-Gadhafi supporters. But it's these Libyans the Ghanaian and other Africans fear.

Mr. SAMUEL: Holy God, holy God, holy God. For five weeks now I'm indoors. Everybody's panic, we need help. We need help. Please, we need help. They do not like the blacks, so, please, we need your help.

QUIST-ARCTON: The hostility Samuel describes stems directly from reports that Moammar Gadhafi has mercenary recruits in his security forces from Africa who are indiscriminately killing protesters. Saad Jabbar, deputy director of the North Africa Center at Cambridge University, is monitoring developments in Libya and confirms Africans have become targets.

Professor SAAD JABBAR (Deputy Director, North Africa Center at Cambridge University): I tell you, these people, because of their scheme, they will

Acting Assistant Dir., Counter Terrorism Division, FBI), available at <http://web.archive.org/web/20070110035127/http://www.fbi.gov/congress/congress01/caruso121801.htm>; CHRIS HEFFELFINGER, TRENDS IN EGYPTIAN SALAFI ACTIVISM 8-11 (2007).

316. See TRAVIS, *supra* note 9, at 440-78, 489-96, 519, 523-29, 532-44.

317. See Dorell & Lynch, *supra* note 159; *The Next Insurgency: Baathists and Salafis Pool Resources to Fight Iraqi Government*, GULF STATES NEWSLETTER, Sept. 17, 2010, <http://www.washingtoninstitute.org/uploads/Documents/opeds/4cb5e0af99213.pdf>.

318. HUMAN RIGHTS WATCH, *supra* note 276, at 4.

319. *Id.*

be slaughtered in Libya. There is so much anger there against those mercenaries, which suddenly sprung up. I think it is urgent to do something about it now, otherwise, a genocide against anyone who has black skin and who doesn't speak perfect Arabic.

QUIST-ARCTON: This Turkish oil worker, who's managed to escape from Libya, told the BBC he'd witnessed violence against his African colleagues.

Unidentified Man: (Through translator) We left behind our friends from Chad. We left behind their bodies. We had 70 or 80 people from Chad working for our company. They cut them dead with pruning shears and axes, attacking them, saying you're providing troops for Gadhafi. The Sudanese, the Chadians were massacred. We saw it ourselves.<sup>320</sup>

At one school serving as a shelter for African refugees, evidence emerged of anti-black extermination:

Many of the West African workers got caught in the cross fire; some were mugged or attacked while making their escape from nearby towns, as opposition protesters accused them of working for the regime. Rashid Mohamed and about 40 Ghanaian colleagues hid . . . for eight days, rationing bread as fighting raged around them, with their sleeping quarters—along with their passports and belongings—burned. “They said that Gaddafi brought the black people to fight,” he says. “So the Libyans, when they see the blacks, they will kill them.”

. . . .

Residents accuse them of being mercenaries for Gaddafi. “And if they go out, some people might kill them.”<sup>321</sup>

Non-Arab Africans told reporters that “the Libyans who oppose Colonel Qaddafi lash out at the African migrants because they look like the dark-skinned mercenaries many here say the Libyan leader has recruited to crush the uprising,” and that if the rebels “see black people they beat them,” one being beaten so badly in Zawiyah that he could no longer walk.<sup>322</sup> Others were trapped, fearing abuse.<sup>323</sup> In one camp, non-Arabs reported that rebels “chased us with guns and knives” and tortured Africans with electrical cables, leaving their backs striped with wounds from being whipped.<sup>324</sup> During the summer of 2011, anti-government forces conquered Tawergha and then looted it, “leaving a ghost town behind.”<sup>325</sup>

320. *All Things Considered: In Libya, African Migrants Say They Face Hostility*, Nat'l Pub. Radio (Feb. 25, 2011), available at <http://www.npr.org/2011/02/25/134065767/-African-Migrants-Say-They-Face-Hostility-From-Libyans>.

321. Abigail Hauslohner, *Lost in Libya's Turmoil: Workers From the Third World*, TIME MAG. (Feb. 27, 2011), <http://www.time.com/time/world/article/0,8599,2055709,00.html>.

322. David D. Kirkpatrick & Scott Sayare, *Libyan War Traps Poor Immigrants at Tripoli's Edge*, N.Y. TIMES (Mar. 7, 2011), <http://www.nytimes.com/2011/03/08/world/middleeast/08refugees.html?pagewanted=all&r=0>.

323. See *id.*

324. Brian Rohan, *Displaced Black Libyans Tell of Beatings, Expulsion at Gunpoint*, REUTERS (Oct. 17, 2011, 3:25 PM), <http://www.reuters.com/article/2011/10/17/us-libya-displaced-idUSTRE79G2CY20111017>.

325. *Id.*

As one witness reported, the rebels “came to kill black people . . .”<sup>326</sup> Reuters reported that the rebel reprisals formed “one of the bloodiest episodes in Libya’s civil war.”<sup>327</sup> A columnist for *Modern Ghana* wrote movingly of the plight of these non-Arabs in Libya and of the failure of the international community to take action on the issue: “We are demanding a special meeting of United Nation[s] to discuss the elimination of Africans by lynching in Libya. If it was any other group, the world will be crying genocide.”<sup>328</sup>

Upon learning of U.S. proposals that non-Arab Africans flee for the borders with Tunisia or Egypt to receive U.S. aid, Gregory Stanton of Genocide Watch was reminded of the Clinton administration’s plan to persuade the Tutsis in Rwanda to depart for safe havens outside Rwanda in order to receive U.S. assistance.<sup>329</sup> Minority Rights Group documented that “reports of organized racist attacks on so-called ‘Black’ Libyans and foreign workers, particularly in rebel-held areas,” contributing to the flight of 500,000 from the country, indicated a risk factor for mass killing.<sup>330</sup> Although Somalia, Sudan, Afghanistan, and Iraq continued to be at the highest risk of genocide, the Arab Spring had greatly increased the risk for groups in Libya and Yemen and also increased the risk in Kosovo and Uganda.<sup>331</sup>

The “attacks on Coptic Christians in Cairo” raised “the specter of Iraq, where Christians fled persecution in the chaos following the U.S.-led invasion . . .”<sup>332</sup> Christian Solidarity International announced a new campaign relating to church bombings, mass displacements, and other evidence of religious genocide in the Middle East and Africa.<sup>333</sup> Laws prohibiting criticism of the established religion are very common in funda-

326. *Id.*

327. *Id.*

328. Farouk Martins Aresa, *World and Press Watch as Africans Are Lynched in Libya*, MODERN GHANA (Mar. 2, 2011), <http://www.modernghana.com/news/318508/1/world-and-press-watch-as-africans-are-lynched-in-l.html>. The author elaborated:

The whole world is watching, the whole world is watching, the whole world is watching as innocent Africans are being lynched in Libya. The time to act is right now since nobody acted yesterday or day before . . . There are men, women and children dying in the hands of Libyan mobs simply because they look Africans [sic] and must therefore be mercenaries because they cannot place their hands on Gadhafi. . . . There is no mention of it at the United Nations by African leaders and countries getting first hand reports are silent.

*Id.*

329. E-mail from Gregory Stanton, President, Genocide Watch, to author (Feb. 28, 2011) (on file with author).

330. MARK LATTIMER, PEOPLES UNDER THREAT 2011 3–4 (2011), available at [http://www.genocidewatch.org/images/At\\_Risk\\_11\\_Minority\\_Rights\\_Group\\_Risk\\_Briefing.pdf](http://www.genocidewatch.org/images/At_Risk_11_Minority_Rights_Group_Risk_Briefing.pdf).

331. See *id.* at 2, 5.

332. *Syria’s Religious Minorities Wary of Uprising*, VOICE AM. NEWS, <http://www.voanews.com/english/news/middle-east/Syrias-Religious-Minorities-Wary-of-Uprising-137497628.html> (last updated Jan. 16, 2012, 7:00 PM).

333. See *Genocide Alert: Urge President Barack Obama to Defend Middle East Christians!*, CHRISTIAN SOLIDARITY INT’L (2012), <http://campaigns.csi-usa.org/index.php?id=1Obama>.

mentalist countries, as they were in various European empires and modern nation-states before that. Some countries, such as Egypt, Jordan, Kuwait, Libya, Saudi Arabia, and Yemen, have gone so far as prohibiting religious worship that conflicts with Islamic law.<sup>334</sup>

## 2. *Planning U.N. Responses to Attempts or Conspiracies to Commit Genocide*

Although the threat of post-Arab Spring genocides arises from both regimes and opposition political and religious movements, U.N. responses have, for the most part, focused only on one or two regimes. The inadequacy and partiality of these responses may be in line with Saudi and other Gulf Arab states' long-term agenda to promote Wahhabi and neo-Wahhabi modes of governance,<sup>335</sup> but the acquiescence of the United Nations in this strategy will spell disaster for the secular and Christian communities of the region.

Impunity for genocide and other international crimes is a signature characteristic of the post-1948 international order. In 1948, the Nuremberg tribunal for German war criminals was disbanded.<sup>336</sup> In the ensuing six decades, international crimes have multiplied. Although Raphael Lemkin lobbied in the 1940s for an international criminal court to prevent and punish genocide, no such court was established until the 2000s. Furthermore, the court that was established in 2002 contained an absurdly broad "complementarity" loophole that has considerably slowed the process of cases to judgment, and states have not cooperated with the court in any event.<sup>337</sup> Most individual nations have not vigorously prosecuted the

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334. See U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM 2002 523-31, 557-66, 569-71, 579-85, 596-99 (2002).

335. "Neo-Wahhabism" is defined as the jihadist ideology of "Osama bin Laden, Ayman al-Zawahiri, and Abu Musab al-Zarqawi," an ideology that is dedicated to annihilating non-Muslims as a spiritual collectivity, including Shi'a Arabs. HAMID DABASHI, ISLAMIC LIBERATION THEOLOGY: RESISTING THE EMPIRE 18 (2008); see Daniel Mabrey, *Demystifying Hawala: Understanding Terrorist Financing Networks*, 19 CRIME & JUST. INT'L 23, 23 (2003).

336. 1 JULES DESCHENES, COMMISSION OF INQUIRY [OF CANADA] ON WAR CRIMINALS 27 (1986).

337. See Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. L. 49, 107 (2009) (suggesting that under the ICC's "complementarity" loophole, "it is possible for states to prosecute criminals on reduced domestic charges and apply minimal criminal sanctions, or even grant pardons. For example, prosecuting a case where all of the elements for genocide were met as a simple case of multiple murders, even with minimum sentencing, would be considered final under the Rome Statute."); Benjamin B. Ferencz, *Ending Impunity for the Crime of Aggression*, 41 CASE W. RES. J. INT'L L. 281, 287, 290 (2009) (arguing that the failure of the Rome Statute of the ICC to "punish aggression is a repudiation of Nuremberg and a step backward in the development of international criminal law," that "[p]rohibiting the ICC from exercising its jurisdiction is an indefinite guarantee of continuing immunity for future aggressors," and that the "result is self-defeating and counter-productive" to the goals of the ICC); William A. Schabas, *"Complementarity in Practice": Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5, 24 (2008) (criticizing ICC's complementarity analysis as "simplistic" as it treats some non-lethal crimes as worse than homicide or even

perpetrators of genocide and war crimes in their midst.<sup>338</sup> Notably, the United States grants broad immunity to heads of state and other officials committing war crimes abroad, while not hesitating to arrest, search, and imprison members of minority black, Native American, and Latino populations, often for petty, nonviolent crimes such as drug possession.<sup>339</sup>

There are exceptions to the pattern of post-1948 impunity relating to countries such as Yugoslavia, Rwanda, Cambodia, Sierra Leone, Ethiopia, Iraq, Sudan, and Lebanon.<sup>340</sup> Typically, however, the exceptions simply prove the rule. For example, U.N. interventions in Iraq and Yugoslavia during the early 1990s aimed at minimizing civilian harm, but state fragility and internal conflict in those countries claimed hundreds of thousands of lives, with few torturers or perpetrators of religious cleansing held accountable by the U.N. or anyone else.

Commentators directed severe criticism at President Obama's policies of seeking peace with favored nations in the Middle East and Africa at the high price of impunity for notorious and heinous crimes. Much of this criticism relates to Sudan, for, as Bret Stephens of the Wall Street Journal argues, as a political candidate President Obama urged the kind of "tough" U.N. sanctions on Sudan that he has reserved for Libya, Syria, and Iran, but once in office his administration offered Sudan a tempting "menu of incentives and disincentives" that Omar al-Bashir could munch on at his leisure "till he dies comfortably in his bed."<sup>341</sup> As the Voice of America reported, some African Americans lost hope in President Obama as the

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massacres, leading to just the sort of "apathy or a desire to protect perpetrators" that ICC is intended to "fight").

338. Natalie Pierce, *Picking Up the Pieces: Truth and Justice in Sierra Leone*, 6 N.Z. J. PUB. & INT'L L. 117, 117-18 (2008) (noting that there was "nearly half a century of relative inactivity in international criminal law after the International Military Tribunals in Nuremberg and Tokyo following World War II").

339. See David Scheffer, *Closing the Impunity Gap in U.S. Law*, 8 N.W. U. J. INT'L HUM. RTS. 30, \*6, \*9, \*40 (2009); Mark A. Summers, *Immunity or Impunity? The Potential Effect of Prosecutions of State Officials for Core International Crimes in States Like the United States That Are Not Parties to the Statute of the International Criminal Court*, 31 BROOK. J. INT'L L. 463, 470 n.41 (2006). On U.S. incarceration policy as trending towards a racist "new Jim Crow" model, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); MARC MAUER & RYAN S. KING, *SENTENCING PROJECT, UNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 1-2* (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf); Joseph Winter, *Prison and Native Spirituality*, in 1 AMERICAN INDIAN RELIGIOUS TRADITIONS: AN ENCYCLOPEDIA 774, 777 (Suzanne J. Crawford & Dennis F. Kelley eds., 2005); James Forman, *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 22-23 (2012); *More Blacks, Latinos in Jail Than College Dorms*, MSNBC, (Sept. 27, 2007, 10:52 AM), [http://www.msnbc.msn.com/id/21001543/ns/us\\_news-life/more-blacks-latino-jail-college-dorms/](http://www.msnbc.msn.com/id/21001543/ns/us_news-life/more-blacks-latino-jail-college-dorms/); Ruth Steinberger, *Indian Children Incarceration Rate 40% Higher Than Whites*, LAKOTA J., July 26-Aug. 2, 2002, available at [http://www.dlncoalition.org/dln\\_issues/indian\\_children\\_incarceration\\_rate\\_higher.htm](http://www.dlncoalition.org/dln_issues/indian_children_incarceration_rate_higher.htm).

340. See generally DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (2012).

341. Bret Stephens, *Does Obama Believe in Human Rights?*, WALL ST. J. (Oct. 21, 2009), <http://webcache.googleusercontent.com/search?q=cache:KHFdQ-xdOFYJ:online.wsj.com/article/SB40001424052748704500604574481341183751038.html>.

death toll in the Democratic Republic of Congo surpassed five million, possibly reached seven million, and prompted the United Nations to issue a report on genocidal massacres there.<sup>342</sup> In 2012, the Obama administration's decision to admit Yemen's president to the United States for medical treatment prompted debate about whether the benefits of the plan for ensuring a peaceful transition in Yemen outweighed the costs of harboring a leader who allegedly killed hundreds of rebels and protesters and provoked resentment of a type perhaps not seen since the U.S. admission of the Shah of Iran in 1979.<sup>343</sup>

In Sudan, of course, despite U.S. and U.N. knowledge of an anti-"infidel" genocide since 2004,<sup>344</sup> little has been done to remove President al-Bashir from power, and he continues to tour the region with impunity.<sup>345</sup> Although an arrest warrant has been issued, NATO members continue to trade with al-Bashir and to offer him "incentives."<sup>346</sup> Indeed, Goldman Sachs arranged the initial public offering of a key investor in Sudan.<sup>347</sup>

There are officials in the United States tasked with preventing genocide. On February 24, 2011, Genocide Watch sent a letter to U.S. Ambassador to the U.N. Susan Rice, U.S. Ambassador to Libya Gene Cretz, State Department Policy Planning Officer Catherine Powell, and U.S. Special Ambassador for War Crimes Issues Stephen Rapp, asking the United States to back a U.N. Security Council resolution referring the situation in Libya

342. See Nico Colombant, *Africa Policy Watchers Lose Hope in President Obama*, VOICE AM., <http://t.co/DDQM5KxB> (last updated Jan. 27, 2012, 7:00 PM) ("Congolese Americans at [a] recent protest said they had campaigned vigorously for Obama in 2008 and even rallied for his health care legislation, but that now they felt disillusioned with the way the U.S. government was dealing with Africa and Africans."); Michelle Faul, *A Second Rwanda Genocide Is Revealed in Congo*, MSNBC (Oct. 10, 2010, 12:25 PM), <http://t.co/SeGGMui> (noting that the many "mass graves" in the Democratic Republic of Congo prompted "a controversial U.N. report published on Oct. 1, which accuses invading Rwandan troops of killing tens of thousands of Hutus in 1996 and 1997"); Jennifer Fierberg, *The Nightmare in the Congo*, SALEM-NEWS.COM (Jan. 24, 2012), <http://www.salem-news.com/articles/january242012/congo-violence-jf.php> ("Since 1996 the Congo has been invaded by Rwanda and Uganda for their minerals[,] . . . six million Congolese civilians have been massacred with the full knowledge of the US, UK, Britain and other western backers which are allowing rebel groups from neighboring countries to kill with impunity."); Ann Garrison, *Congo: What's Rwanda Got to Do with It?*, S.F. BAY VIEW (Dec. 27, 2011), <http://bit.ly/woVLAO> ("Congo's North and South Kivu provinces[,] [are] intense conflict regions on the country's borders with Uganda, Rwanda and Burundi."); *Top 25 Censored Stories for 2005-06*, PROJECT CENSORED (Sept. 9, 2006), <http://lists.econ.utah.edu/pipermail/margins-to-centre/2006-September/000966.html> (listing "High-Tech Genocide in Congo" as "[t]he world's most neglected emergency").

343. See Tom A. Peter, *Yemen's President Saleh Departs for US, Apparently Ending His Rule*, CHRISTIAN SCI. MONITOR (Jan. 23, 2012), <http://www.csmonitor.com/World/terrorism-security/2012/0123/Yemen-s-President-Saleh-departs-for-US-apparently-ending-his-rule>.

344. See TRAVIS, *supra* note 9, at 458-68, 472-73, 555-61.

345. See U.K. FOREIGN & COMMONWEALTH OFFICE, ANNUAL REPORT ON HUMAN RIGHTS 2009 65 (2010); *Sudan's Bashir Offers Help to Libya During Criticised Visit*, BBC (Jan. 7, 2012), <http://www.bbc.co.uk/news/world-africa-16454493>.

346. TRAVIS, *supra* note 9, at 561; see also Stephens, *supra* note 341.

347. See *As Goldman Exec, Obama Nominee Played Key Role in Sudan-Linked IPO*, PUB. ACCOUNTABILITY INITIATIVE (July 21, 2009), <http://www.scribd.com/doc/17549361/As-Goldman-exec-Obama-nominee-played-key-role-in-Sudanlinked-IPO>.

to the ICC.<sup>348</sup> This presented a complex legal question. Genocide Watch urged that Resolution 1593 be "adapted and applied to Libya." U.N. Security Council Resolution 1593 of March 31, 2005 attempted to make citizens of states that had not signed and ratified the Rome Statute of the ICC immune from the ICC's jurisdiction relating to "operations in Sudan established or authorized by the Council or the African Union."<sup>349</sup> The resolution, controversially, claimed to be "recognizing that States not party to the Rome Statute have no obligation under the Statute,"<sup>350</sup> while simultaneously referring the situation in Sudan to the ICC, resulting in an arrest warrant against Sudan's sitting head of state, Omar al-Bashir, for crimes against humanity and genocide.<sup>351</sup>

On the other hand, Dov Jacobs of Leiden University argued that the Security Council referral violated international law because "the power given to the Security Council, by a treaty other than the UN Charter to effectively make [the Rome Statute of the ICC] binding on a non-State party is contrary to international law."<sup>352</sup> Due to such problems, he favored eliminating genocide as an international crime.<sup>353</sup> The problem with these arguments is that they disregard the obligation under customary international law to prevent and punish genocide, which is binding on all states regardless of their refusal to become parties to the Genocide Convention or the Rome Statute, as reflected in the Sudan ICC referral and other rulings.

The U.N. also has special officers tasked with preventing genocide. The Secretary-General's Special Advisers on the Prevention of Genocide and the RTP, in this capacity, "have reminded the national authorities in Libya, as well as in other countries facing large-scale popular protests, that the heads of State and Government at the 2005 World Summit pledged to protect populations by preventing genocide, war crimes, ethnic cleansing, and crimes against humanity, as well as their incitement."<sup>354</sup>

The ICC, however, has the most authority to deal with genocide out of any actor short of the Security Council, as it may issue arrest warrants, subject to the Pre-Trial Chamber of the ICC's review. On March 2, 2011, the ICC Prosecutor, Luis Moreno-Ocampo, declared that because Security Council Resolution 1970 (2011) conveyed jurisdiction to the ICC over the situation in Libya since February 15, 2011, he would open an investigation

348. Letter from Genocide Watch to Susan Rice, U.S. Ambassador to Libya (Feb. 24, 2011).

349. S.C. Res. 1593, ¶ 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

350. Dov Jacobs, *Libya and the ICC: On the Legality of Any Security Council Referral to the ICC*, SPREADING THE JAM BLOG (Feb. 28, 2011), <http://dovjacobs.blogspot.com/2011/02/un-security-council-resolution-on-libya.html>.

351. See S.C. Res. 1593, *supra* note 349, ¶ 6.

352. Jacobs, *supra* note 350.

353. Dov Jacobs, *Bashir and Genocide in Sudan: Second Time Lucky for the OTP*, SPREADING THE JAM BLOG (July 13, 2010), <http://dovjacobs.blogspot.com/2010/07/bashir-and-genocide-in-sudan-second.html>.

354. Ban Ki-moon, U.N. Secretary-General, Remarks to Security Council Meeting on Peace and Security in Africa, (Feb. 25, 2011), available at [http://www.un.org/apps/news/infocus/speeches/statments\\_full.asp?statID=1095](http://www.un.org/apps/news/infocus/speeches/statments_full.asp?statID=1095).

to assess whether “there is a reasonable basis to believe that a crime within the jurisdiction of the [ICC] has been or is being committed.”<sup>355</sup> It would be up to the ICC judges to decide whether to issue arrest warrants based on the evidence.<sup>356</sup> Perhaps due to inadequate funding, undue meddling by political actors, or excessively onerous standards of proof, whether self-imposed by the Prosecutor or imposed from above by the Pre-Trial Chamber, there have been inexcusably long delays between the opening of an ICC investigation and having a final warrant of arrest issued. The delays, in the Libya case, meant that the main target of the investigation, Muammar Gaddafi, was dead before the ICC could hold a hearing or examine any witnesses in court. The delays in the Darfur case were as follows: investigation opened June 2005, application for warrant of arrest filed July 2008, first warrant of arrest issued against the President of Sudan in March 2009, and second warrant of arrest issued July 2010.<sup>357</sup> It even took five months from the Appeals Chamber’s decision on the first warrant for the Pre-Trial Chamber I to issue a genocide warrant.<sup>358</sup> Some of these crimes date back to 2003, meaning it could well be fifteen years between the commission of the crime and trial/sentencing, during which time many of the victims of the crime and their surviving relatives live or die under the sovereign power of the alleged perpetrator. There is clearly a case for streamlining the court’s procedures, for doing away with formalities and technicalities, and for the ICC working harder and setting stricter briefing and investigatory schedules. Otherwise, the ICC threatens to become nearly useless compared to the ICTR, which convicted the Rwandan politician Jean-Paul Akayesu within about four to five years from a genocidal massacre,<sup>359</sup> and the ICTY, which convicted a Srebrenica massacre defendant within six years of the event.<sup>360</sup> On that schedule, the Darfur case should have been over in late 2008, but it had yet to begin even in 2012.<sup>361</sup> Likewise, following the slow pace of international justice, Gaddafi would not have faced trial until perhaps 2019.

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355. ICC: *Prosecutor to Open an Investigation in Libya*, HUM. RTS. WATCH (Mar. 3, 2011), <http://www.hrw.org/news/2011/03/03/icc-prosecutor-open-investigation-libya>.

356. See *id.*

357. See *ICC Prosecutor Opens Darfur Investigation: Full Cooperation is Needed*, HUM. RTS. FIRST (June 7, 2005), [http://www.iccnw.org/documents/ICC\\_InvestigationsDarfur7Jun2005.pdf](http://www.iccnw.org/documents/ICC_InvestigationsDarfur7Jun2005.pdf); *Situation in Darfur, Sudan*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx) (last visited Dec. 27, 2012); *Timeline: The International Criminal Court and Sudan*, REUTERS (Oct. 19, 2009), [www.reuters.com/article/2009/10/19/us-sudan-darfur-events-timeline-sb-idUSTRE5911RI20091019](http://www.reuters.com/article/2009/10/19/us-sudan-darfur-events-timeline-sb-idUSTRE5911RI20091019).

358. Saira Mohamed, *The ICC Appeals Chamber Decision on the Warrant of Arrest in Prosecutor v. Bashir*, 14 AM. SOC. INT’L L., Feb. 17, 2010, available at <http://www.asil.org/insights100217.cfm>.

359. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4, Sentence (Oct. 2, 1998).

360. See *Prosecutor v. Krstic*, Case No. IT-98-33-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

361. See *Situation in the Darfur, Sudan*, Case No. ICC-02/05-03/09-412, Defence Application for Leave to Appeal the “Decision on the Defense Request for a Temporary Stay of Proceedings,” ¶ 23 (Nov. 5, 2012).

Those honored with the solemn responsibility to protect humanity from genocide should live up to the gravity of the task before them. Bureaucratization, nit-picking, and gilding the lily do a disservice to the potential victims of genocide who call upon the international community to save them. The international community's virtual silence in the face of warning signs of genocide is tantamount to consent. It must urgently reform international institutions that have repeatedly failed to prevent or punish cases of genocide in the past, including the ICC, the International Court of Justice, and the U.N. Security Council. Scholars and journalists may contribute to this process by recognizing and condemning attempted genocides and conspiracies to commit genocide; studying and distributing evidence of the warning signs and preparatory stages to genocide as they emerge, while there is still time to prevent them; and building a culture of intolerance to genocide. When countries experience armed conflict, militias are formed, minorities lack political power, effective protection of human rights falls by the wayside, minorities are blamed for consorting with enemies of the majority, religious freedom is at risk, and torture, murder, and abduction reach epidemic proportions, genocide is close at hand.

#### B. The Duty to Prevent and Punish Other War Crimes

The merit of looking to war crimes other than genocide as sources of obligations on the part of states, and principles overriding their sovereignty, is that other war crimes may be easier to prove than genocide. Long delays sometimes result from legalistic arguments about whether certain killings or tortures meet the definition of genocide, while such killings or tortures may be relatively easy to characterize as war crimes. Unfortunately, U.N. member states typically do not honor the duty to prevent and punish other war crimes. Such crimes remain distressingly common and are even publicly defended in places such as the U.S. Congress.

There are precedents, however, for holding foreign governments responsible for supporting and arming rebel movements, or even duly constituted governments, when the rebels or regimes kill civilians. The Fourth Geneva Convention of 1949 creates an obligation on the part of most U.N. member states to try and punish those who, "regardless of their nationality," torture, treat cruelly, unlawfully deport, willfully cause great suffering to, or willfully kill or maim civilians or surrendering soldiers.<sup>362</sup> The ICTY has declared that a state may control forces acting on its behalf even if such forces "had autonomous choices of means and tactics although participating in a common strategy along with the 'controlling State.'"<sup>363</sup> The Special Court for Sierra Leone convicted the former President of Liberia, Charles Ghankay Taylor, for having "assisted," "encouraged" or "act[ed] in concert with" the Revolutionary United Front of Sierra Leone, which murdered, raped, and acted cruelly towards an unknown number of civilians in

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362. Convention Relative to the Protection of Civilian Persons in Time of War arts. 2-3, 146, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

363. Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, ¶ 47 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

Sierra Leone.<sup>364</sup> In the South African apartheid case in the Second Circuit, the Second Circuit held that plaintiffs could sue corporations who aided and abetted a violation of the law of nations, with two judges agreeing that “the individual responsibility of a defendant who aids and abets a violation of international law” is a universal rule.<sup>365</sup> In *Bosnia and Herzegovina v. Serbia and Montenegro*, Judge Al-Khasawneh of the International Court of Justice emphasized that international tribunals must not insist that those supporting war crimes control the “specific operations,” for that would “give[ ] States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefor.”<sup>366</sup> Remarking on this case and on the 2001 Articles on Responsibility of States for Internationally Wrongful Acts, Amnesty International argued that if another state supplies or permits the sale of arms that a military or police force used in the past to fire on and threaten protesters, this may “knowingly aid or assist another state to commit an internationally wrongful act such as the perpetration of crimes against humanity or human rights violations by a police force, [in which case] the transferring state will also be responsible under international law.”<sup>367</sup> Therefore, it seems likely that under established principles of state responsibility for the conduct of rebels in other states, providing arms or encouragement to rebel groups even without controlling them may constitute a breach of international law, and countries such as Qatar have an obligation to punish lynchings and mass-casualty bombings that rebels or former rebels who seize control of a region carry out.

The obligation not to facilitate rebel groups that persecute Christians, Jews, secularists, or non-Arabs also applies to those inside the United States contemplating actions that could lead to deaths in Africa or Asia.<sup>368</sup> The War Crimes Act makes grave violations of the Geneva Conventions a U.S. crime, and conspiracies or aiding and abetting may be actionable under general principles of U.S. law.<sup>369</sup> In a related vein, the *van Anraat* case in the Netherlands illustrates the potential criminal responsibility of arms dealers under such a law for selling weapons to states or other groups motivated by exclusionary ideologies resulting in massacres of ethnic

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364. *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Judgment, ¶ 13 (May 18, 2007).

365. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 270 (2d Cir. 2007).

366. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. 256 (2007) (Dissenting Opinion of Vice-President Al-Khasawneh).

367. AMNESTY INT'L, ARMS TRANSFERS TO THE MIDDLE EAST AND NORTH AFRICA: LESSONS FOR AN EFFECTIVE ARMS TRADE TREATY 6 (2011), available at <http://www.amnesty.org/en/library/asset/ACT30/117/2011/en/049fdeec-66fe-4b13-a90e-6d7773d6a546/act301172011en.pdf> (citing Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, arts. 16, 41(2), U.N. Doc. A/RES/56/83 (Dec. 12, 2001)).

368. See MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL 32438, U.N. CONVENTION AGAINST TORTURE (CAT): OVERVIEW AND APPLICATION TO INTERROGATION TECHNIQUES 10 (Jan. 25, 2008), available at [fpc.state.gov/documents/organization/101750.pdf](http://fpc.state.gov/documents/organization/101750.pdf).

369. See *id.*; see also CHARLES DOYLE, CONG. RESEARCH SERV., R 41223, FEDERAL CONSPIRACY LAW: A BRIEF OVERVIEW 13 (Apr. 30, 2010), available at <http://www.fas.org/sgp/crs/misc/R41223.pdf>.

minorities, in that case Kurds under Arab Nationalism.<sup>370</sup> Perhaps cognizant of that case, the NATO countries have been suppressing evidence of mass torture and persecution in Iraq, even as they step up military cooperation with and arms sales to Iraq's military.<sup>371</sup>

David Scheffer, who was centrally involved with the creation of international criminal tribunals for Sierra Leone and other countries as the U.S. Ambassador at Large for War Crimes Issues, has argued that new treaties are needed to hold states accountable for crimes against humanity and war crimes, which may evade the reach of the ICC, due to its focus on individuals, and of the International Court of Justice, due to technical jurisdictional limitations.<sup>372</sup> Any proposed crimes against humanity treaty should create an obligation on the part of ratifying states similar to, or preferably even more clear than, their obligation under Article I of the Genocide Convention to prevent and punish such crimes. This obligation implies a responsibility not to facilitate the rise to power of political movements that will persecute religious minorities or ethnic groups, establish a dominant religion as the official faith by coercion, or restrict the inherent human rights to change one's religion, circulate religious ideas, worship and assemble as one desires at any given point in time, or enjoy full equality without legal or social discrimination with respect to other ethnicities, religions or sects.<sup>373</sup>

### C. The Duty Not to Return Refugees to Civil War or Ethno-Political Violence

Prior to the Arab Spring, Egypt, Tunisia, and Libya were not among the most prolific sources of refugee flight in Africa: that status was reserved for Sudan, Somalia, the Democratic Republic of Congo, and Angola, each of which drove away more than ten times as many refugees as the upper tier of North African countries.<sup>374</sup> Syria and Yemen, despite quite serious political conditions, also could not come close to Iran or Iraq in terms of refugee flight.<sup>375</sup> Indeed, Syria and Yemen hosted huge numbers of refugees from

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370. See, e.g., Michael J. Kelly, *Prosecuting Corporations for Genocide Under International Law*, 6 HARVARD L. & POL'Y REV. 339 (2012); Harmen van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 6 J. INT'L CRIM. JUST. 557 (2008).

371. CHRISTOPHER H. PYLE, *GETTING AWAY WITH TORTURE: SECRET GOVERNMENT, WAR CRIMES, AND THE RULE OF LAW* (2009); Jeffrey Kaye, *Iraqi Torture Scandal Touches Highest Levels of NATO*, TRUTHOUT (Jan. 6, 2012), <http://www.truth-out.org/iraqi-torture-scandal-touches-highest-levels-nato/1325794053#.TwfcygZNXx8.twitter>.

372. See David Scheffer, *The World Court's Fractured Ruling on Genocide*, 2 GENOCIDE STUD. & PREVENTION 123, 132 (2007).

373. As I have argued elsewhere, religious or political compulsion, when violent and systematic, should be considered as constituting a crime against humanity, namely persecution. See Hannibal Travis, *YouTube from Afghanistan to Zimbabwe: Tyrannize Locally, Censor Globally*, in TRANSNATIONAL CULTURE IN THE INTERNET AGE 76, 105-06 (Adam Candeub & Sean A. Pager eds., 2012).

374. See Simon Rogers, *Refugee Statistics Mapped*, GUARDIAN (June 20, 2011), <http://www.guardian.co.uk/news/datablog/interactive/2011/jun/20/refugee-statistics-mapped>.

375. See *id.*

elsewhere, notably from Iraq and Somalia.<sup>376</sup> By the end of 2011, however, more than 1,500 people from Africa and Asia had died at sea en route to Europe, and it would be difficult to deny that many, if not most of them, were fleeing political persecution and violence.<sup>377</sup> Italy anticipated up to 300,000 refugees from Libya on its shores if the regime fell in February 2011.<sup>378</sup> In fact, the U.N. High Commissioner for Refugees reported that since February 2011, 660,000 Libyans have fled the country, and 200,000 were internally displaced.<sup>379</sup> Approximately 90,000 Libyan refugees and 200,000 Libyan residents born in third countries fled to Tunisia, with most of them returning home after the violence ended.<sup>380</sup> Tunisia was not prepared to offer asylum to those fearing to return home, because the government lacked the judicial capacity to honor its responsibilities under the 1951 Refugee Convention and the 1967 Refugee Protocol.<sup>381</sup> Further, Amnesty International condemned the international community, especially the European Union, for failing to fulfill their shared responsibilities under international law to protect Libyan refugees, concluding that “sub-Saharan Africans in Libya remain at high risk of abuse and arbitrary arrest by anti-Gaddafi forces.”<sup>382</sup> Egypt and Tunisia, overwhelmed by the Libyans they did allow in, confined others in desert camps, without either dignity or freedom, contrary to the oft-heralded aims of the Arab Spring.<sup>383</sup>

International law provides a framework for the orderly resolution of the claims of asylum-seekers from Arab Spring countries and their neighbors that they should not be forcibly deported back “home.” Article 3 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that, “[n]o State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>384</sup> In deciding whether such grounds exist, a state party should consider whether the state to which the person would be sent is experiencing “a consistent pattern of gross, flagrant or mass violations of

376. See *id.*; *Global Trends Report 2010*, UNHCR (2011), [https://docs.google.com/spreadsheets/cc?key=0AonYZs4MzLZbdElSazg4bE04MWIFVURmQW10TDVneHc&hl=en\\_US#gid=2](https://docs.google.com/spreadsheets/cc?key=0AonYZs4MzLZbdElSazg4bE04MWIFVURmQW10TDVneHc&hl=en_US#gid=2).

377. See *UN Says Record Number of Migrants Die in Mediterranean in 2011*, RADIO FREE EUR. (Jan. 31, 2012), [http://www.rferl.org/content/un\\_says\\_record\\_number\\_migrants\\_die\\_mediterranean\\_2011\\_int\\_aware/24469347.html](http://www.rferl.org/content/un_says_record_number_migrants_die_mediterranean_2011_int_aware/24469347.html).

378. See Nick Squires, *Libya: Italy Fears 300,000 Refugees*, TELEGRAPH (Feb. 23, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8343963/Libya-Italy-fears-300000-refugees.html>.

379. See *2012 UNHCR Country Operations Profile - Libya*, UNHCR, <http://www.unhcr.org/pages/49e485f36.html> (last visited Oct. 28, 2012).

380. UNHCR, *GLOBAL APPEAL 2012-13, TUNISIA 138* (2011), available at <http://www.unhcr.org/4ec2310016.html>.

381. See *id.* at 143.

382. *Libya: Totally Inadequate Response by EU States to Refugees Stuck in Limbo*, AMNESTY INT'L (Sept. 19, 2011), <https://www.amnesty.org/en/news-and-updates/report/libya-totally-inadequate-response-eu-states-refugees-stuck-limbo-2011-09-19>.

383. See *id.*

384. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3(1), Dec. 10, 1984, 1465 U.N.T.S. 85.

human rights."<sup>385</sup> Similarly, the 1951 Convention Relating to the Status of Refugees denies states the right to return refugees to climates of persecution, urging states to give refuge to such unlucky souls without regard to ethnic or national favoritism and to excuse refugees' failure to pursue legal immigration procedures due to the threat of persecution or death.<sup>386</sup> Although the 1951 Convention was restricted to events occurring in Europe or Turkey,<sup>387</sup> the Protocol Relating to the Status of Refugees of 1967<sup>388</sup> extended refugee protection to those suffering persecution in other lands.<sup>389</sup> As stated in the Convention, refugees should not be punished as a result of "illegal entry or presence" if they "present themselves without delay to the authorities and show good cause for their illegal entry or presence."<sup>390</sup>

#### D. The Duty to Respect the Political Independence and Territorial Integrity of Other States

The U.N. Charter purports to regulate the international relations of U.N. member states. Article 2, paragraph 4 of the Charter attempts to restrict the threat or use of force against the "territorial integrity" or "political independence" of a member state or other force exercised "in any other manner inconsistent with the Purposes of the United Nations."<sup>391</sup> Force consistent with the purposes of the United Nations includes force pursuant to Articles 39 and 42 of the U.N. Charter, pursuant to which the Security Council may authorize member states to act militarily against "any threat to the peace, breach of the peace, or act of aggression."<sup>392</sup> The Security Council, therefore, is responsible for maintaining international peace and security.<sup>393</sup> Although many U.N. member states have the opportunity to sit on the Security Council, five nations are permanent members and the non-permanent members must vie for a spot at biannual intervals, with no chance for consecutive terms.<sup>394</sup> The five permanent member states are the United States, the United Kingdom of Great Britain and Northern Ire-

385. *Id.* art. 3(2).

386. See Convention Relating to the Status of Refugees arts. 1(A)(2), 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention]; Erika Feller, *The Evolution of the International Refugee Protection Regime*, 5 WASH. U. J.L. & POL'Y 129, 131-32 (2001).

387. See SYLVIE DA LOMBA, *THE RIGHT TO SEEK REFUGEE STATUS IN THE EUROPEAN UNION* 3 (2004).

388. Protocol Relating to the Status of Refugees, arts. 1, 33-34, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 268 [hereinafter 1967 Refugee Protocol].

389. See DA LOMBA, *supra* note 387, at 3.

390. 1951 Refugee Convention, *supra* note 386, art. 31(1).

391. See U.N. Charter, art. 2(4).

392. See *id.* art. 39 ("[The Security Council] shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."), art. 42 (Security Council may authorize action "to maintain or restore international peace and security," including a "blockade, and other operations by air, sea, or land forces of Members of the United Nations.").

393. See *id.*, art. 24.

394. See Rules of Procedure of the General Assembly, Rules 142-44, U.N. Doc. A/520/Rev.15 (Dec. 31, 1984); U.N. Charter, art. 23.

land, France, Russia, and China.<sup>395</sup> Although Security Council resolutions pass by a threshold set at a positive vote of nine members, the permanent member states have veto power to block proposed resolutions of the Security Council without justification,<sup>396</sup> and they often use this power to protect their own and their allies' interests.<sup>397</sup>

In cases such as Libya, the debate concerning the potential infringement of Libya's territorial integrity and political independence relates primarily to whether the Security Council should have authorized force at all in order to protect civilians and whether, once it did, it exceeded its mandate by seeking regime change. In other cases, the Article 2 issues are murkier and more multi-faceted.

Without a Security Council resolution, some scholars have argued that a right or even a responsibility of humanitarian intervention devolves upon regional organizations and those powerful enough to intervene militarily. The factors underlying the doctrine of humanitarian intervention as a matter of past state practice supported by diplomats and legal scholars—and the RTP as endorsed by the Security Council and Secretary-General since at least 2006—illustrates some differences between Libya and other cases where intervention has not been forthcoming.<sup>398</sup> The customary international law factors governing the right of humanitarian intervention<sup>399</sup> include the following:

1. The human rights violations must be immediate. This was satisfied in not only Libya but also in many other countries.
2. The force must be proportionate to the danger. This was the most questionable criterion in Libya, as the force used may have gone beyond protecting particular civilians, opening a humanitarian corridor, delivering food and water to areas of conflict, or facilitating the flow of refugees to Europe and elsewhere in Africa. Attacking government troop formations and leaders related to but arguably transcended these purposes. Other Security Council resolutions directed at protecting civilians were not followed by immediate efforts to achieve regime change by bombardment and arming rebels. One might argue, on the other hand, that steps short of regime

395. *Current Members*, UN, <http://www.un.org/en/sc/members/> (last visited Mar. 15, 2013).

396. Thomas Bruha, *Security Council*, in 2 UNITED NATIONS: LAW, POLICIES AND PRACTICE 1147, 1152 (Rüdiger Wolfrum ed., 1995).

397. *Id.* at 1156–57.

398. S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); Press Release, Importance of Preventing Conflict Through Development, Democracy Stressed, as Security Council Unanimously Adopts Resolution 1674, U.N. Press Release SC/8710 ¶ 16 (Apr. 28, 2006), <http://www.un.org/News/Press/docs/2006/sc8710.doc.htm>.

399. These factors are drawn from Lillich and Gallant. See Judy A. Gallant, *Humanitarian Intervention and Security Council Resolution 688: A Reappraisal in Light of a Changing World Order*, 7 AM. U. INT'L L. REV. 881, 890 n.49 (1992); Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives*, in LAW AND CIVIL WAR IN THE MODERN WORLD 229, 248 (John N. Moore ed., 1974); Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 218 (1969); Richard B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 IOWA L. REV. 325, 347–51 (1968).

change during U.N.-authorized interventions fell short in Sudan in the 1980s, and Iraq and Somalia in the 1990s, as massive violations of human rights and international humanitarian law continued to occur after particular civilians were protected and aid was delivered to war-torn areas.

3. The force must be limited to ongoing or imminent large-scale deprivations of the most fundamental human rights (i.e., the government must kill, threaten to kill, or act so recklessly as to result in the death of a substantial number of its own people). This was debatable in Libya, but it seems that the imminent dangers of human rights violations in various locations, including Tripoli, could have justified some of the force used. The former Libyan ambassador has said that without the NATO intervention that occurred, more than 100,000 may have died in Benghazi. Up to 20,000 were killed in a similar battle in 1982 in Syria. More than 100,000 were killed, and tenth of Iraq's population fled analogous fighting in 1991, and 1,000 refugees died daily by some estimates.<sup>400</sup>

4. The intervener must be relatively disinterested, but other motives may be present if not overriding. Other motives might be overpowering in the case of Iraq or Saudi Arabia due to their market power in world energy markets, but were less compelling in Libya, which was a much smaller market share. Bahrain and other small kingdoms and emirates occupy a middle category. The United States' and Europe's arms sales to Bahrain and other Gulf states may be large, but are not enormous in the overall scheme of the exporting nations' respective economies. Yemen is much poorer than Libya. One might argue that Libya is well-situated for pro-democratic intervention in that it is rich enough for the rule of law and liberal institutions potentially to succeed, unlike Yemen. Iraq and Saudi Arabia are so rich in oil and gas reserves that no intervention there could be disinterested and energy concerns would likely predominate.

5. All peaceful means must be exhausted or futile before intervening with force. Peaceful means have been pursued Egypt, Bahrain, Yemen, and other cases, but may have been believed to be futile in Libya. Western governments had been calling on Libya to stop censoring and torturing members of the political opposition for decades without result. The same could be said of other African and Middle Eastern states, however.<sup>401</sup>

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400. HUMAN RIGHTS WATCH, *ENDLESS TORMENT: THE 1991 UPRISING IN IRAQ AND ITS AFTERMATH* (1992), available at <http://www.hrw.org/legacy/reports/1992/Iraq926.htm>; 1982: *Syria's President Hafez al-Assad Crushes Rebellion in Hama*, GUARDIAN ARCHIVE BLOG (Aug. 1, 2011), <http://www.guardian.co.uk/theguardian/from-the-archive-blog/2011/aug/01/hama-syria-massacre-1982-archive>; *Chemical Ali Sentenced to Death for a Second Time*, TELEGRAPH (Dec. 2, 2008, 1:24 PM), <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/3542055/Chemical-Ali-sentenced-to-death-for-a-second-time.html>; *Libyan Envoy Aujali: Gadhafi Has 'No Place to Go'*, PBS (Mar. 22, 2011), [http://www.pbs.org/newshour/bb/world/jan-june11/libya2\\_03-22.html](http://www.pbs.org/newshour/bb/world/jan-june11/libya2_03-22.html).

401. See U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, U.N. Doc. No. CCPR/C/LBY/CO/4 (Nov. 15, 2007); U.S. DEPT STATE, *COUNTRY REPORT ON HUMAN RIGHTS PRACTICES 2002-LIBYA* (2003), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/refworld?page=country&docid=>

The RTP principles include the following:

1. "Serious harm occurring to human beings, or imminently likely to occur," such as "large scale loss of life, actual or apprehended," as "the product either of deliberate state action, or state neglect . . . ." <sup>402</sup> The Security Council and NATO had abundant cause to believe that large-scale loss of life was "apprehended" in Libya, and perhaps in some other cases as well. They could cite former Libyan officials, including the former interior minister and U.N. delegation, for this proposition.
2. "The primary purpose of the intervention, whatever other motives intervening states may have, must be to halt or avert human suffering. Right intention is better assured with multilateral operations, clearly supported by regional opinion and the victims concerned." <sup>403</sup> A multilateral operation would be less likely to be endorsed by the United Nations or Arab League in cases of Bahrain, Kuwait, Saudi Arabia, or Yemen, which are similar to other Arab states in their violations of human rights (except for Saudi Arabia, which is committed to total religious genocide on a continuous basis but is very powerful within the United Nations, the Arab League, the G20, the United States, etc.). Colombia and Sri Lanka are also countries that might meet RTP principle #1 but not #2 because their neighbors support the violence going on there (as with Plan Colombia and Asian nations' aid to Sri Lanka).
3. "Military intervention can only be justified when every non-military option for the prevention or peaceful resolution of the crisis has been explored, with reasonable grounds for believing lesser measures would not have succeeded." <sup>404</sup> As noted above, U.S. Secretary of State Hillary Clinton had called for a peaceful solution in Bahrain and Yemen and condemned Saudi violence in Bahrain. <sup>405</sup> In other places, such as Colombia or Sri Lanka, there are claims of a "peace process" despite tens of thousands of deaths in civil war. <sup>406</sup>
4. "The scale, duration and intensity of the planned military intervention should be the minimum necessary to secure the defined human protection

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402. INT'L COMM. ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XII (2001).

403. *Id.*

404. *Id.*

405. See *Clinton Calls Intervention in Bahrain 'Alarming'*, CNN (Mar. 16, 2011), [http://www.cnn.com/2011/WORLD/meast/05/21/yemen.political.deal/index.html](http://articles.cnn.com/2011-03-16/us/us.bahrain_1_bahraini-state-hillary-clinton-jay-carney; Mohammed Jamjoom & Hakim Almasmari, Yemeni Opposition Signs Deal Leading to President's Departure</a>, CNN (May 21, 2011), <a href=).

406. Carmen Lomellin, *Supporting the Peace Process in Colombia*, U.S. DEP'T STATE BLOG (July 29, 2010), [blogs.state.gov/index.php/site/entry/colombia\\_peace\\_process](http://blogs.state.gov/index.php/site/entry/colombia_peace_process); Press Statement, U.S. Dep't of State, Sri Lanka: Peace Process (Mar. 14, 2002), <http://2001-2009.state.gov/r/pa/prs/ps/2002/8774.htm>; Press Statement, U.S. Dep't of State, The Peace Process in Sri Lanka (Nov. 19, 2004), <http://2001-2009.state.gov/r/pa/prs/ps/2004/38513.htm>.

objective.”<sup>407</sup> It seems that in Libya, as described above, the primary critique of the intervention is that it did not last long enough and was not conducted intensely enough against the rebel factions to secure the objective of protecting Libyan civilians, including Libyans originating in other African countries or having darker skin tones.

5. “There must be a reasonable chance of success in halting or averting the suffering which has justified the intervention, with the consequences of action not likely to be worse than the consequences of inaction.”<sup>408</sup> There may not be a reasonable prospect of reducing the level of suffering prevailing in Syria, Yemen, or other countries, given the danger of Al-Qaeda taking over. The democratic opposition may be weaker, and it may lack needed support from the army or the country’s security agencies or diplomats to re-establish order and government services in some of the countries other than Libya.

6. “There is no better or more appropriate body than the United Nations Security Council to authorize military intervention for human protection purposes . . . Security Council authorization should in all cases be sought prior to any military intervention action being carried out.”<sup>409</sup> The Security Council authorized intervention in Libya, but did not authorize one in Syria or Yemen in 2011.<sup>410</sup>

7. “If the Security Council rejects a proposal or fails to deal with it in a reasonable time,” there are two alternative options: first, “consideration of the matter by the General Assembly in Emergency Special Session under the ‘Uniting for Peace’ procedure;” and second, “action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization from the Security Council.”<sup>411</sup>

The Arab League may lack the resources to intervene effectively in Syria or Yemen, given that its aircrafts may present less of a dramatic disparity with these nations than NATO’s aircrafts present. In addition, there is another regional organization that might effectively oppose Arab League interventions in other Arab Spring countries: the Shanghai Cooperation Organisation (SCO) may eventually have more countries participating in it than the Arab League and far vaster populations and resources.<sup>412</sup> Notably, in 2005 the SCO called upon the United States to set a firm deadline

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407. INT’L COMM. ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 402, at XII.

408. *Id.*

409. *Id.*

410. See 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).

411. *Id.* at XIII

412. SHIRLEY A. KAN, CONG. RESEARCH SERV., RL 33001, U.S.-CHINA COUNTERTERRORISM COOPERATION: ISSUES FOR U.S. POLICY 30 (2010), available at <http://www.fas.org/spp/crs/terror/RL33001.pdf> (noting that Iran, India, and Pakistan participated as observers in the SCO between 2005 and 2009, along with core members China, Russia, and Central Asian states).

for withdrawal of its forces from Central Asia.<sup>413</sup> As noted above, China, India, and Russia have opposed forceful humanitarian intervention in Syria, let alone other states.<sup>414</sup>

8. “The Security Council should take into account in all its deliberations that, if it fails to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means to meet the gravity and urgency of that situation – and that the stature and credibility of the United Nations may suffer thereby.”<sup>415</sup> This is a wild card clause in RTP doctrine, suggesting a role for unilateral action against “conscience-shocking situations,”<sup>416</sup> which are ubiquitous in the world of nation-states dominated by ethnic groups.

9. “Clear objectives; clear and unambiguous mandate at all times; and resources to match.”<sup>417</sup> It is questionable whether clear objectives and adequate resources existed for the Libyan intervention; it is still less clear that sufficient resources would exist to “protect”<sup>418</sup> Syria or Yemen, when protection of the civilian population post-intervention is included in the mandate of the intervention. NATO countries’ resources are stretched thin in Afghanistan, Iraq, Pakistan, and Somalia. The Arab League has rarely engaged in large-scale wars collectively.

10. “Common military approach among involved partners; unity of command; clear and unequivocal communications and chain of command.”<sup>419</sup> This proved to be problematic, but not entirely absent, in the Libya intervention for which NATO provided a decision-making superstructure.<sup>420</sup>

11. “Acceptance of limitations, incrementalism and gradualism in the application of force, the objective being protection of a population, not defeat of a state.”<sup>421</sup> This principle seemed to have been violated in Libya, with defeat of a state being not only aimed at, but also achieved in stunning fashion.

12. “Rules of engagement which fit the operational concept; are precise; reflect the principle of proportionality; and involve total adherence to international humanitarian law.”<sup>422</sup> It is difficult to say whether this principle was satisfied in Libya, for information about civilian casualties is ambiguous.<sup>423</sup> Some have forcefully argued that disproportionate weapons were

413. See *id.*; see also ROBERT SUTTER, HISTORICAL DICTIONARY OF CHINESE FOREIGN POLICY xxxiii (Jon Woronoff ed., 2011).

414. See HUMAN RIGHTS WATCH, WORLD REPORT 2012: SYRIA (2012) available at <http://www.hrw.org/world-report-2012/world-report-2012-syria>.

415. INT’L COMM. ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 402, at XIII.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. See JIM ZANOTTI, CONG. RESEARCH SERV., R41761, TURKEY-U.S. DEFENSE COOPERATION: PROSPECTS AND CHALLENGES 8–9 (2011), available at <http://www.fas.org/sgp/crs/mideast/R41761.pdf>.

421. INT’L COMM. ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 402, at XIII.

422. *Id.*

423. See HUMAN RIGHTS WATCH, *supra* note 276.

used in Libya. They might also be used in Syria or Yemen, as they were used widely in Iraq.<sup>424</sup>

13. “Acceptance that force protection cannot become the principal objective.”<sup>425</sup> This is difficult to assess without better information about rules of engagement and operational tactics. It is always an issue, however, when better-equipped forces, especially air forces, take on relatively poorly equipped third-world armies, as in Iraq, Libya, or Yugoslavia.

14. “Maximum possible coordination with humanitarian organizations.”<sup>426</sup> In Libya, this does not seem to have occurred; although some aid was provided, it was far short of “maximum” possible aid.<sup>427</sup> It is even more doubtful that such aid would have occurred in Syria or Yemen, given the logistical problems in those countries.

As argued above, although the Security Council’s decision-making remains highly politicized and arbitrary, to the detriment of human freedom and the advancement of human rights, there is another U.N. body that might promote respect for the territorial integrity and independence of states, while taking note of the RTP as an emerging doctrine of customary international law. The U.N. Security Council is only one of six principal organs that the U.N. Charter created.<sup>428</sup> Although the U.N. General Assembly (General Assembly) elects a majority of members to the Security Council, it is the permanent member states that possess the greatest power. According to Article 7 of the U.N. Charter, they may act through the General Assembly, the International Court of Justice, the Economic and Social Council, and the Secretariat. The International Court of Justice is a key Charter institution whose expertise in and mission to promote international law might have influenced the course of the Arab Spring.<sup>429</sup> The loopholes in its jurisdiction, which is based on consent and the slow and old-fashioned nature of its procedures, in addition, prevent the Court from being brought into play in the cases of Libya or Syria, or even in the much more long-standing disputes such as Iraq and the Persian Gulf, Afghanistan and Pakistan, or Somalia and Ethiopia.

One area in which the International Court of Justice might clarify the law is by articulating the distinction between rebels whom a state aids without controlling, and whose crimes for which the state is not responsible because they might have been committed anyway,<sup>430</sup> and rebels who

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424. See, e.g., CLUSTER MUNITION MONITOR, CLUSTER MUNITION MONITOR 2011 (2011), available at [http://www.the-monitor.org/cmm/2011/pdf/Cluster\\_Munition\\_Monitor\\_2011.pdf](http://www.the-monitor.org/cmm/2011/pdf/Cluster_Munition_Monitor_2011.pdf).

425. INT’L COMM. ON INTERVENTION & STATE SOVEREIGNTY, *supra* note 402, at XIII.

426. *Id.*

427. See *UN to Send Aid to Eastern Libya Amid Reports of Hardship and Attacks on Civilians*, UNITED NATIONS NEWS CENTRE (Mar. 22, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37851&Cr=libya&Cr1=>.

428. U.N. Charter art. 7, para. 1.

429. See *id.*, art. 38.

430. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

occupy the entire country as a result of another state's material or political aid, whose crimes the aiding state should be held responsible for as the sovereign power that has seized control of the nation.<sup>431</sup> This would require an in-depth analysis, beyond the scope of this Article, of the principles of state attribution, state responsibility, and the legal status of external support to armed rebels assuming some level of control (such as when rebels are given funds, as Qatar gave funds to Libyan rebels and Saudi Arabia may have given funds to Syrian rebels, or when rebels have known bases in a foreign country (like Turkey)).<sup>432</sup>

#### E. The Duty to Promote Other Human Rights

Although perhaps not a "duty," the promotion of human rights is a key objective of the United Nations. In his Cairo speech, President Obama stated:

Among some Muslims, there is a disturbing tendency to measure one's own faith by the rejection of another's. The richness of religious diversity must be upheld - whether it is for Maronites in Lebanon or the Copts in Egypt. And fault lines must be closed among Muslims as well, as the divisions between Sunni and Shia have led to tragic violence, particularly in Iraq.

Freedom of religion is central to the ability of peoples to live together. We must always examine the ways in which we protect it.<sup>433</sup>

Regarding democracy in the Middle East, he addressed activists, saying that "you must maintain your power through consent, not coercion; you must respect the rights of minorities, and participate with a spirit of tolerance and compromise . . . . Without these ingredients, elections alone do not make true democracy."<sup>434</sup>

As Secretary of State Hillary Clinton declared in 2010:

Religious freedom is under threat from authoritarian regimes that abuse their own citizens. It is under threat from violent extremist groups that exploit and inflame sectarian tensions. It is under threat from the quiet but persistent harm caused by intolerance and mistrust which can leave minority religious groups vulnerable and marginalized.

During the past year, al-Qaida issued calls for further violence against religious minorities in the Middle East. Sufi, Shia, and Ahmadiyya holy sites in Pakistan have been attacked. So was a Syriac Catholic church in Baghdad just a few weeks ago.<sup>435</sup>

Nearly one year later, Secretary Clinton noted:

431. Cf. G.A. Res. 3314 (XXIX), U.N. GAOR 29th Sess., Supp. No. 31, U.N. Doc. A/9731 (Vols. I & II), at 142-44 (Dec. 14, 1974), available at [http://untreaty.un.org/cod/avl/pdf/ha/da/da\\_ph\\_e.pdf](http://untreaty.un.org/cod/avl/pdf/ha/da/da_ph_e.pdf).

432. Cf. *id.*

433. *Full Text: Barack Obama's Cairo Speech*, *supra* note 8.

434. *Id.*

435. Hillary Rodham Clinton, U.S. Sec'y of State, Address at the Release of the 2010 International Religious Freedom Report (Nov. 17, 2010), available at <http://www.state.gov/secretary/rm/2010/11/151081.htm>.

[In 2011,] we heard reports that gunmen masquerading as security officers waylaid a bus of Shia pilgrims traveling throughout western Iraq. The women were abandoned by the side of the road, but the 22 men were shot, and their bodies left in the middle of the desert. This sort of hateful, senseless violence has no aim other than to undermine the fabric of peaceful society.

In the Middle East and North Africa, the transitions to democracy have inspired the world, but they have also exposed ethnic and religious minorities to new dangers. People have been killed by their own neighbors because of their ethnicity or their faith. In other places, we've seen governments stand by while sectarian violence, inflamed by religious animosities, tears communities apart.

Now, the people of the region have taken exciting first steps toward democracy—but if they hope to consolidate their gains, they cannot trade one form of repression for another.<sup>436</sup>

Secretary Clinton expanded upon these remarks in another speech in late 2011:

[T]his year, the international community in the Human Rights Council made an important commitment. And it was really historic, because before then, we had seen the international community pit against one another freedom of religion and freedom of expression. And there were those in the international community who vigorously and passionately defended one but not the other. And our goal in the work that so many nations represented here have been doing, with the adoption of Resolution 1618 and then again last month in the General Assembly's Third Committee, was to say we all can do better. And this resolution marks a step forward in creating a safe global environment for practicing and expressing one's beliefs. In it, we pledge to protect the freedom of religion for all while also protecting freedom of expression. And we enshrined our commitment to tolerance and inclusivity by agreeing to certain concrete steps to combat violence and discrimination based on religion or belief.<sup>437</sup>

Resolution 1618 may be historic, but it is far from having the robustness required to face the threats of marginalization, vulnerability, discrimination, intimidation, and violence of which Secretary Clinton spoke. Rather, it is well-known in the United States and Europe that hate groups and religious extremists require the deterrent effect of criminal law in order to dull the edge of their violence and that even with such laws the killing and marginalization may continue for decades, as the ongoing crimes of neo-Confederate groups in the United States and neo-Nazi groups in the United States and Europe demonstrate.

It is possible, indeed likely, that after a full transition away from military and emergency rule, quasi-democratic elections in Arab Spring countries, after the flight of many middle-class secularists and religious

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436. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at the Release of the 13th Annual Report on International Religious Freedom (Sept. 13, 2011), available at <http://www.state.gov/secretary/rm/2011/09/172254.htm>.

437. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks at the Istanbul Process for Combating Intolerance and Discrimination Based on Religion or Belief (Dec. 14, 2011), available at <http://www.state.gov/secretary/rm/2011/12/178866.htm>.

minorities, will be swept by the best-funded and best-organized radical theocratic groups, much as in Iraq and the Gaza Strip in 2005. Even if such groups cannot immediately claim victory, they will attempt to intimidate and cause secularists and religious minorities to flee, again as in Iraq and Gaza, leading to a slow and steady march to power in increasingly fearful, divided, and impoverished societies. At that point, again as in Iraq and Gaza, it may be too late for other nations to promote human rights.

It will be a sorry testament to the democratizing power of social media and the insistence on freedom and dignity of many protesters if the Arab Spring countries of Egypt, Libya, and Syria come to resemble the surviving, Arab-majority, authoritarian, quasi-theocratic states of Iraq, Kuwait, Saudi Arabia, and Sudan. If so, refugees may sigh in far-off lands for the secular culture and oil wealth they used to enjoy.<sup>438</sup>

## Conclusion

There are many models for post-authoritarian transitions; some of them are not very inspiring. For every happy ending like those in Central Europe, Japan, or South Korea, there may be a story like that of Russia, Iraq, Pakistan, Somalia, South Africa, Colombia, or Mexico: featuring civil war, rampant crime, massive corruption, and/or plummeting health standards. The laws of many countries have fallen short when it comes to holding domestic perpetrators of political and religious violence accountable in court. Hagiography and whitewash are too often handed down in schools and by the media. The principal corrective to such propaganda is the even-handed and objective interpretation and application of international criminal law and human rights treaties to political and military leaders. Time will tell if the rise of social media, and President Obama's commitment to freedom and the cause of peace, will persuade the United Nations to guide the world towards compliance with its own solemn treaties.

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438. In Iraq, half of the population survived on less than one dollar per day in 2007, as the median household income fell to \$144 per month, unemployment approached 60%, food subsidies were slashed, and one in four children suffered from chronic hunger. See U.N. Assistance Mission for Iraq, Human Rights Report, Jan. 1-Mar. 31, 2007, ¶ 62 (2007); U.N. DEV. PROGRAMME, IRAQ LIVING CONDITIONS SURVEY 2004, VOLUME I: TABULATION REPORT (2005), available at [cosit.gov.iq/english/pdf/english\\_tabulation.pdf](http://cosit.gov.iq/english/pdf/english_tabulation.pdf); ECONOMIST INTELLIGENCE UNIT, *supra* note 26, at 24, 33; NGO Coordinating Comm. in Iraq & Oxfam Int'l, *Rising to the Humanitarian Challenge in Iraq* 3-4, 6, 9, 12, 17-19, 33 (Briefing Paper, July 18, 2007); *Iraq: Fix the Public Distribution System to Meet Needs of the Displaced*, REFUGEES INT'L (Apr. 10, 2007), <http://www.refugeesinternational.org/content/article/detail/9971/>; see also Robert Looney, *Can Iraq Overcome the Oil Curse?*, 7 WORLD ECON. 21, 37 (2006).