

AUTUMNAL RAGE: PLAYING WITH ISLAMIC FIRE†

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“You cannot respond to offensive speech with violence without begetting more violence.”¹

- Hillary Rodham Clinton

1. INTRODUCTION

American intervention in the “Muslim World”² during the past several years has by no means been non-controversial; rather,

† Arab Spring demonstrators have described their protests as Days of Rage. See *Middle East Protests: Inside The Arab Youth Quake*, Huffington Post (February 17, 2011).

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¹ Hillary Rodham Clinton, Sec’y of State, U.S. Dep’t of State, Remarks at Reception Marking Eid ul-Fitr (Sept. 13, 2012) (transcript available at <http://www.state.gov/secretary/rm/2012/09/197735.htm>).

² For an attempt to define this term, see *Is There A ‘Muslim World’?*, NPR (June 4, 2009, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=104927939> (questioning whether the Muslim World “exists as an

critics often charge that we alternatively violate international law or selectively use its protective cloak to advance our own interests.³ Viewed through this lens, American pronouncements might understandably be received as edicts encroaching upon local autonomy and reminiscent of colonial days. Still, the unfolding acts of violence against Americans and Western embassies in the “Muslim World” following the online posting of a U.S.-made “Mohammad video”⁴ were not foreseen.⁵ If they had been, we can

international community or just a piece of political rhetoric”). See also Ramzy Baroud, *The Myth of a ‘Muslim World,’* ASIA TIMES ONLINE (June 2, 2009), http://www.atimes.com/atimes/Middle_East/KF02Ak04.html (describing America’s “grave concern” with *moqawama* (or local resistance), including home-grown pro-democracy movements, as one reason for its continued and predictable failings in the Middle East).

³ Among the most cited examples, George W. Bush invaded Iraq in 2003 on the basis of undisclosed evidence indicating that weapons of mass destruction (“WMD”) existed and were to be used imminently against American interests. See Harry Van der Linden, *Would the United States Doctrine of Preventive War Be Justified as a United Nations Doctrine?*, in PHILOSOPHICAL PERSPECTIVE ON THE “WAR ON TERRORISM” 141 (Gail M. Presbey ed., 2007) (criticizing the George W. Bush doctrine of preventive war and the National Security Strategy’s (“NSS”) September 2002 argument justifying unilateral American military action even in the face of uncertainty as to the time and place of an enemy’s attack). See also, Matthew C. Waxman, *The Use of Force Against States That Might Have Weapons of Mass Destruction*, 31 MICH. J. INT’L L. 1, 6 (2009) (describing the limits of both collective United Nations action and the unilateral doctrine of anticipatory self-defense, and arguing in favor of an objective necessity approach as a limited exception to United Nations action especially useful in the face of perceived WMD threat scenarios). Separately, his father George H.W. Bush has been criticized for selectively seizing upon United Nations Security Council Resolution 660 to “liberate” the people of Kuwait from Iraqi occupation while also protecting American oil interests.

⁴ See ninjord, *Innocence of Muslims (The Muhammad Movie)* by Sam Bacile, YOUTUBE (Sept. 16, 2012), <http://www.youtube.com/watch?v=X6s8eFkt90Q&bpctr=1365390849>.

⁵ Four Americans were killed in response to the video, including the U.S. Ambassador Christopher Stevens, during an attack on the American consulate in Benghazi, Libya. Meanwhile, protesters in Cairo attacked the U.S. embassy there and demanded that the U.S. Ambassador be expelled. An American school in Tunisia was ransacked, and the State Department reportedly evacuated families and nonessential personnel from U.S. embassies in Tunis and Khartoum. See Andrew Roche, *Fury over Mohammad Video Simmers on in Muslim World*, REUTERS (Sept. 16, 2012, 4:51 AM), <http://www.reuters.com/article/2012/09/16/us-film-protests-idUSBRE88D00320120916>; Peter Baker & Mark Landler, *U.S. Is Preparing for a Long Siege of Arab Unrest*, N.Y. TIMES (Sept. 15, 2012), <http://www.nytimes.com/2012/09/16/world/middleeast/us-is-preparing-for->

assume, and hope, that the relevant embassies would have recalled or at least reduced their staffs, especially as violence in the region is not a new phenomenon.⁶ However, these unfortunate events present us with an opportunity to query whether these attacks were foreseeable, and to review the psychology behind our being caught off guard.

This solemn occasion perhaps reflects a warped understanding of our hosts' cultural sensitivities, or even our limited genuine interest in what concerns them at all. We are led to question the ability and willingness of American policy-makers to consider, and thereby respect, local priorities. Insofar as Islam permeates the culture of many of these host nations and our foreign policy priorities reflect our willingness to accommodate this permeation, a question arises as to whether this foreign policy is so decidedly grounded in values antagonistic to Islam. To further emphasize the pressure of this situation, the present conundrum coincidentally presents "Mr. Obama's most serious foreign policy crisis of the election season."⁷

In order to strike a respectful balance among nations' competing interests, customary international law provides standards that all states must respect in order to maintain peace and stability. Additionally, all members of the United Nations must adhere to the tenets of its Charter including principles

a-long-siege-of-arab-unrest.html?pagewanted=all. Additionally, protesters climbed the walls of the German embassy in Khartoum and set it on fire. The U.S., U.K., and German embassies in Sudan were stormed and set ablaze. See *Embassy Attacks a Policy Wake-up Call for US Elite*, FOREIGN POL'Y J. (Sept. 15, 2012), <http://www.foreignpolicyjournal.com/2012/09/15/embassy-attacks-a-policy-wake-up-call-for-us-elite> (posting Video Interview by RT Moscow with Gareth Porter, Investigative Journalist, in Wash. D.C. (Sept. 15, 2012)). Protesters also broke into the U.S. embassy in Sanaa, Yemen with sounds of gunfire reported. *Blowback Time for US, Death & Disaster Only Outcome*, FOREIGN POL'Y J. (Sept. 15, 2012), <http://www.foreignpolicyjournal.com/2012/09/15/blowback-time-for-us-death-disaster-only-outcome> (posting Video Interview by RT Moscow with Neil Clark, Journalist and Broadcaster, in Oxford, U.K. (Sept. 15, 2012)).

⁶ Specifically, violence during the Arab Spring is not a surprise in spite of its peaceful connotations. Professor Hannibal Travis has even suggested that "[c]ivic protest more often fails without international or domestic military conflict." See Hannibal Travis, *Wargaming the 'Arab Spring': Predicting Likely Outcomes and Planning U.N. Responses*, (Fla. Int'l Univ. Legal Studies Research Paper No. 12-07) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2062578##. According to this perspective, we should be prepared for any and all conflagrations, particularly on September 11.

⁷ Baker & Landler, *supra* note 5.

relating to the use of force and the “sovereign equality of all its Members.”⁸ Moreover, the community of nations continues to have a duty to protect populations suffering from a humanitarian disaster.⁹ The issue presented before us is whether we have failed to live up to this responsibility in our dealings with the “Muslim World.”¹⁰ Specifically, has the Obama Administration acted in violation of international law just as its predecessors are commonly charged to have done? Armed with this knowledge, we might reconsider our regional security expectations.

2. ARAB SPRING: BACKGROUND AND PERCEPTIONS

The incendiary act of posting an American-made video with presumably American actors bastardizing the prophet Muhammad and the tenets of Islam fanned the Arab Spring’s flames of dissatisfaction with existing economic conditions. These flames were quite easily redirected toward a foreign interloper that has historically supported regional dictators.¹¹ As most citizens in the region grew up under autocratic regimes that exercised censorship over all media, they are simply unaccustomed to free speech. State sponsorship of the video by the U.S. government is therefore presumed.¹² The result of this is the current “Autumnal Rage”¹³

⁸ U.N. Charter art. 2(1).

⁹ See *infra* Section 3.2.

¹⁰ See *Is There A ‘Muslim World’?*, *supra* note 2; Baroud, *supra* note 2.

¹¹ See Baker & Landler, *supra* note 5 (“Mr. Obama’s defenders argue that the legacy of American support for Arab autocrats complicated the situation. . . . ‘[W]e had a good 40 years of U.S. policy backing regimes that the people in the street overthrew.’”) (quoting Martin S. Indyk, former ambassador to Israel under President Clinton).

¹² See Ed Husain, *Arab Spring Nations Don’t Yet Grasp Freedom of Dissent*, CNNOPINION (Sept. 14, 2012, 11:01 AM), <http://www.cnn.com/2012/09/14/opinion/husain-arab-spring-democracy/index.html> (indicating that many in the Muslim world were raised under dictatorial regimes, have inculcated the impression that a film cannot be produced without government approval, and thus attribute the “Mohammed video” to the U.S. government).

¹³ See Andrew Lam, *From Arab Spring to Autumn Rage: The Dark Power of Social Media*, in *THE BLOG*, HUFFPOST WORLD (Sept. 14, 2012, 3:44 PM), http://www.huffingtonpost.com/andrew-lam/social-media-middle-east-protests_b_1881827.html (discussing the role played by social media in “stoking a combustible anger in the Middle East” resulting in the anti-American violence and protests of fall 2012). I respectfully adapt Lam’s term, “Autumn Rage.”

that we must bear, even in spite of official State Department disavowal and suggestions for restraint.¹⁴

2.1. *Origin and Symptoms*

The origins of the Arab Spring are debatable, but protests throughout the “Muslim World” were precipitated by varying reports of declining economic conditions, human rights abuses, and improved education that might have encouraged youth dissatisfaction with autocrats. That a wave of protests spread across these nations is not new; in fact, Tunisia, Egypt, and Libya all witnessed similar waves of protest following President Woodrow Wilson’s call to democracy almost a century ago in 1919. Then as now, the open question is why the passions of protest were aroused in the first place.¹⁵

Specific conditions were necessary for these revolutions against authority to actually succeed.¹⁶ Where they did, the supposed political freedoms realized by the Arab Spring have not yet translated into economic benefits for local populations, so that we are witnessing an accumulated venting of frustrations.¹⁷ One complicating factor has been that, as regional authoritarian governments were removed, extremist Islamic governments took their places.¹⁸ To make matters worse, these successor

¹⁴ See Clinton, *supra* note 1 (“[T]he United States rejects both the content and the message of that video. The United States deplores any intentional effort to denigrate the religious beliefs of others.”).

¹⁵ The precedent of the 1919 protests leads us to question the popular claim that the Arab Spring was facilitated by the advent of social media. See Lisa Anderson, *Demystifying the Arab Spring: Parsing the Differences Between Tunisia, Egypt, and Libya*, FOREIGN AFF., May/June 2011, at 2, 2 (noting that telegraphs and not social media were used to incite the 1919 protests).

¹⁶ Jack Goldstone identifies the following elements: 1) the government is viewed as so irremediably unjust or inept that it appears as a threat to the country’s future; 2) elites are alienated from the state and unwilling to defend it; 3) a broad cross-section of the population is mobilized; and 4) international powers fail to defend the government and prevent it from using full force to defend itself. See Jack A. Goldstone, *Understanding the Revolutions of 2011: Weakness and Resilience in Middle Eastern Autocracies*, FOREIGN AFF., May/June 2011, at 8, 16.

¹⁷ See Maha Hosain Aziz, *End of the Arab Spring?*, BLOOMBERGBUSINESSWEEK (Sept. 19, 2012), <http://www.businessweek.com/articles/2012-09-19/end-of-the-arab-spring> (arguing that the Arab Spring has not yet culminated in economic opportunities, and that food price inflation, which, among other factors, prompted the Arab Spring in 2011, is likely to prompt further protests).

¹⁸ See, e.g., Baker & Landler, *supra* note 5 (“[The Obama] administration has struggled to find a balance between supporting democracy and guarding national

governments have failed to grasp that true democracy is “not only about free elections but creating free societies.”¹⁹

Following the posting of the “Mohammad video” by an Egyptian Coptic Christian,²⁰ the lingering unrest brought on during the 2011 Arab Spring demonstrations was violently redirected against Western nations. Popular resentment of repressive regional governments—the principal object of the Arab Spring—has been successfully unleashed upon Western interests. Was this simply a natural occurrence?

To the contrary, Islamic extremist groups like al-Qaeda have found themselves increasingly vulnerable after the death of Osama bin Laden and in the wake of the Arab Spring’s call for democratic reforms. Out of desperation, these groups have seized on a campaign of misinformation to regenerate and to recruit money and manpower.²¹ Reportedly, they have attempted to exploit this situation by encouraging even more attacks on American embassies throughout the region.²² Regional governments have also stirred the pot by issuing bounties for the killing of the “anti-Muhammad” video’s producer.²³

interests in the region as authoritarian governments have been replaced by popular Islamist parties much less tied to Washington.”). In Libya, for example, Western and Arab support for the Libyan National Transitional Council (“LNTC”) enabled it to oust Qaddafi; the LNTC has since instituted Sharia Law as the basis for legislation, thereby proscribing any contravening measures. In Iraq, sectarian tensions continue with the Shi’ite Kurd population targeted by the Sunni government. After Egypt’s peaceful transition, Prime Minister Hisham Qandil’s cabinet was composed primarily of Muslim Brotherhood members.

¹⁹ Husain, *supra* note 12.

²⁰ The filmmaker, Nakoula Basseley Nakoula, apparently holds grudges against Islam. See Lam, *supra* note 13 (“[Nakoula] fanned the fire in the Middle East with incendiary video clips that in effect mocked and insulted the prophet Mohammed and turned the whole Arab Spring of 2011 into Autumn Rage of 2012 Against the USA.”).

²¹ Ali Soufan, an expert on the Middle East, argues that radical entities in Arab Spring countries have used the ‘anti-Muhammad video’ to strengthen their anti-American campaigns. See *Islamist Extremism After the Arab Spring*, COUNCIL ON FOREIGN RELATIONS (Sept. 14, 2012), <http://www.cfr.org/middle-east/islamist-extremism-after-arab-spring/p29053> (transcribing Interview by Jonathan Masters with Ali Soufan, CEO, The Soufan Group (Sept. 14, 2012)).

²² See Husain, *supra* note 12 (“The attacks on the American embassies in Libya, Egypt and Yemen are examples of the ongoing presence of intolerant, tyrannical actors in Arab societies.”).

²³ A Pakistani cabinet minister and a former Pakistani legislator issued bounties for \$100,000 and \$200,000 respectively. See Riaz Khan, ‘Innocence Of Muslims’ Protests: \$200,000 Bounty Offered In Pakistan For Anti-Islam Filmmaker’s Death, HUFFPOST WORLD (Oct. 1, 2012, 8:32 AM),

2.2. Role of "Islamic Fire"

From a Western perspective, Islam is ordinarily viewed as only a religion confined to its mosques, though it is often much more. Peter Hammond captures this view in asserting that "the primary aim of Islam is not spiritual, but political," and that Islam's goal is to establish a "worldwide Islamic state where *Sharia* law is enforced on all."²⁴ Moreover, one reader of Hammond's work extrapolates and claims that in much of the region, where the Islamic population is greater than eighty percent, we should "expect daily intimidation and violent jihad, some State-run ethnic cleansing, and even some genocide, as these nations drive out the infidels, and move toward 100% Muslim."²⁵ If we believe these predictions, then the anti-Mohammed video should be expected to incite violent retaliatory responses; the most immediate outlet for such violence was the Western presence on the ground in the form of embassies and diplomatic missions.

And yet we need to be careful in assuming that this "system of life" has taken hold consistently throughout the Arab Middle East. Whereas the new avowedly democratic regional governments will inevitably bring Islamist parties to the political fore, Western governments will need to be able to deal with this reality in spite of the new governments' anti-Israeli stance. There is hope, as the toppling of governments in Tunisia, Libya, and Egypt occurred without violent *jihad* and thus contrary to the calls for action espoused by al-Qaeda and other Islamist extremists.²⁶ However, the remaining political vacuum might also pose an opportunity for al-Qaeda to stretch its tentacles. The lesson is that the United States and other Western powers should engage with the successive governments to nudge them toward true democracy and constitutional nation building.

http://www.huffingtonpost.com/2012/10/01/innocence-of-muslims-filmmaker-bounty_n_1928565.html?view=print&comm_ref=false.

²⁴ PETER HAMMOND, *SLAVERY, TERRORISM AND ISLAM: THE HISTORICAL ROOTS AND CONTEMPORARY THREAT* 43 (2005).

²⁵ Bill Muehlenberg, *Dar al-Harb and Islamic Expansionism*, CULTUREWATCH, <http://www.billmuehlenberg.com/2013/02/04/dar-al-harb-and-islamic-expansionism/> (last visited Feb. 9, 2013).

²⁶ See Daniel Byman, *Terrorism After the Revolutions: How Secular Uprisings Could Help (or Hurt) Jihadists*, FOREIGN AFF., May/June 2011, at 48, 49 (pointing to the demands by protesters in Tunisia and Egypt for a free press, elections, and civil liberties as ideas that al-Qaeda believes are "as abhorrent as secular dictatorship").

2.3. American Perceptions

Historically, American strategic priorities have placed the defense of the American mainland at the top; the betterment of the American economic system, second; the containment through military alliances of America's main adversary, the Soviet Union, third; and, at the bottom, the encouragement of underdeveloped countries to grow in the image of the United States through the transplanting of American values abroad.²⁷

These American priorities play a key role in forming our foreign policies, and thereby shape attitudes abroad. The suggestion is that the United States has pursued its own economic interests—as in category two, above—at the same time that it has chosen to ignore the values cherished by local populations. In abetting and enabling regional struggles during the Arab Spring, did the United States perpetuate a public image as an oilfield-hungry empire, or as a benefactor that facilitates democracy? Or is this image irrelevant, in light of regional sensitivities to anti-Islam media messages?

By contrast, it would be awkward and unrealistic to expect American and Muslim World priorities to always align; the policies of any two nations rarely overlap. Whereas politicians often vie over defending American citizens' interests, the same cannot be said about defending the interests of foreign populations, simply because our politicians are not directly accountable to them. Rather, a classical realist worldview suggests that all states can be expected to advance their own interests first and foremost, rather than any universal moral imperative.²⁸ This paradigm ensures that the interests of foreign populations will tend to be secondary in American policy-making.

Moreover, within a democracy like the United States, different players have varying priorities. For example, President Obama

²⁷ See Manoj Joshi, *South Asia and American Strategic Policy*, in *NEW PERSPECTIVES ON AMERICA AND SOUTH ASIA* 29, 30–31 (Robert M. Crunden et al. eds., 1984) (cataloguing American strategic priorities in global politics).

²⁸ Specifically, classical realism considered moral theorizing around international responsibilities as futile. See Allen Buchanan & David Golove, *Philosophy of International Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 868, 872 (Jules Coleman & Scott Shapiro eds., 2002) (arguing, *inter alia*, that the realist perspective may imply alternatively (i) that moral norms do not exist in international law; (ii) that no actor behaves or will behave morally in international relations; or (iii) that moral conduct in international relations is irrational and thus rare).

might value America's current relations with the Muslim World differently than Governor Romney does. In an election year like 2012, we could have expected the political opposition to have a strong influence; we could even have queried whether the anti-Muhammad video, along with its timing during election season, was a strategic ploy by the political opposition to besmirch the President's record in the Middle East. In any case, we could have predicted Romney's questioning the Obama Administration's actions and inactions that allowed the September 11, 2012 attack on American interests in Benghazi.²⁹

The anti-Islam video's appearance in the Muslim World presumably purports to suggest that it best reflects Western perceptions of Islam, specifically those of the Obama Administration. Then-Secretary of State Hillary Clinton attempted to pacify concerns over the video's authorship. However, Secretary Clinton's criticism of the Muslim World's response to the video can also be interpreted as actually including a veiled threat: "You cannot respond to offensive speech with violence without begetting more violence."³⁰ Perhaps she was speaking figuratively, but in the context of delivering comments at an event to mark a Muslim holy day, her words might also be interpreted as suggesting reprisals. In any case, ambiguous words do not necessarily evince a clear indication of a nation's foreign policy intentions; by contrast, consistency with international law can be more telling.

²⁹ Reports indicate that the United States might have underestimated the security situation in Benghazi. Ambassador Christopher Stevens' diary, retrieved by CNN, displays his growing concerns. After a roadside bombing on June 6, 2012, Representative Peter King of New York, Chairman of the House Committee on Homeland Security, recalls nothing about requests "for more security or that they thought they needed more because it was more of a risk, or that there was talk or a debate about it." See Eric Schmitt et al., *U.S. May Have Put Mistaken Faith in Libya Site's Security*, N.Y. TIMES, Sept. 30, 2012, <http://www.nytimes.com/2012/10/01/world/africa/mistaken-sense-of-security-cited-before-envoy-to-libya-died.html>. However, it is really the host country's duty to alert the embassy about security threats, and the decision of how to respond belongs to the Ambassador; of course, if Ambassador Stevens requested reinforcements that the State Department denied, the criticism might be valid.

³⁰ Clinton, *supra* note 1.

3. RESPONSIBILITIES UNDER INTERNATIONAL LAW

3.1. *The Use of Force*

Traditional thinking on the right of a nation to use unilateral force against another nation is embodied in the United Nations Charter, which only permits such acts in situations where an armed attack has occurred.³¹ In the aftermath of September 11, 2001, many have called for the expansion of these circumstances on the basis that the nature of security threats have changed, and threats might now emerge where they would not have in the past. Thus, the argument goes, the rules governing the use of force should adapt in step with the times. Specifically, the doctrine of preventive war has garnered support where a non-imminent threat is in danger of being carried out, and where well-articulated evidence substantially corroborates the suspicion.³² By contrast, the classic anticipatory self-defense argument requires the threat posed to be imminent.

Traditionalists counter that the Security Council's decision-making process more adequately addresses the "new terrorism" threats as it melds cooperation with a broader range of circumstances in which force may be authorized.³³ By way of

³¹ The U.N. Charter provides: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2(4). As a narrow carve-out to this general prohibition, the Charter provides further: "Nothing . . . shall impair the *inherent* right of individual or collective self-defense if an *armed attack* occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51 (emphases added).

³² See generally Robert J. Delahunty & John Yoo, *The "Bush Doctrine": Can Preventive War Be Justified?*, 32 HARV. J.L. & PUB. POL'Y 843, 863-65 (2009) (arguing that the United Nations rules of force will have to be supplanted, and providing the following criteria for an intervener to initiate a preventive war: 1) the prospective intervener must announce to the world its intentions and give the target nation an opportunity to peaceably provide redress; 2) it must have a justifiable purpose of protecting an innocent civilian population; 3) it should act as part of a coalition of forces; 4) it should have attempted acts other than the use of force to dispel the force; and 5) the use of force employed should be proportionate to the threat posed).

³³ Article 39 requires the Security Council to "determine the existence of any threat to the peace, breach of the peace, or act of aggression and . . . make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. Charter art. 39. Article 41, in turn, empowers the Security Council to take measures short of using force, including the disruption of economic and

example, Professor Allen Weiner asserts that, although the unanimity of the Security Council's five permanent members has in the past been considered a roadblock to authorizing the use of force due to their conflicting alliances and stances among themselves, the nature of the new security threats do not predictably demonstrate such differences.³⁴ Insofar as acts of terror threaten the efficient channels of capitalism, the hegemony enjoyed by the leaders of the world economies will more naturally tend to unite them as a function of their own self-interests.³⁵ This sensitivity to a united call to action is especially acute in the Middle East, where international dependence on oil imports from the region compels world attention. This interest arises from concerns about a consistent supply of energy commodities that can affect national security and feed the engines of capitalism.

In response, expansionists³⁶ point to the state of customary international law prior to the adoption of the United Nations Charter as permissive of self-defense "in anticipation of an

diplomatic relations. U.N. Charter art. 41. Moreover, if the Security Council suspects that Article 41 measures would be, or have proven to be, inadequate, then Article 42 enables it to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." U.N. Charter art. 42.

³⁴ Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 STAN. L. REV. 415 (2006). Weiner argues that when dealing with the increased proliferation of WMD and acts of terrorism, the Security Council's existing mechanism will likely be more reliable and effective than contemporary demands for expansion of the unilateral self-defense doctrine beyond actual armed attacks. He also points out that this possibility will not always yield unanimous outcomes, as the split opinions in the case of Iraq demonstrate.

³⁵ See *id.* at 455.

³⁶ See, e.g., Alexander Benard & Paul J. Leaf, *Modern Threats and the United Nations Security Council: No Time for Complacency (A Response to Professor Allen Weiner)*, 62 STAN. L. REV. 1395 (2010). Benard and Leaf critique Weiner's contention as idealistic by offering examples of discord among the permanent members in the cases of Iran, North Korea, and the missile defense programs in Eastern Europe and East Asia. *Id.* at 1415-34. They suggest that reforms to the international law on the use of force are the way forward, in part due to the continued reluctance of Russia and China to abandon their Cold War-era mentality of "spheres of influence." *Id.* at 1433. Due to the modern armed terrorist's ability to strike without warning or concern of a retaliatory strike as there is often no territory under such non-state actors' control, Benard and Leaf cite Article 51 reforms as the legal basis for unilateral action to account for the probability of an attack measured by an enemy's capability and intention, as well as the magnitude of the harm. *Id.* at 1435.

imminent armed attack.”³⁷ The guiding criteria are ostensibly based on the proportionality of the response relative to the threat posed and the necessity of the response under the circumstances.³⁸ Moreover, it has been argued that the term “inherent” in Article 51 of the Charter³⁹ is not meant to limit the customary right to anticipatory self-defense; that is, an actual armed attack is not the only circumstance contemplated by the Charter to allow exercising the right to self-defense.⁴⁰

3.2. *The Responsibility to Protect*

In addition to a nation’s responsibility to defend its citizens, the community of nations and Great Powers arguably have a responsibility to protect⁴¹ populations suffering from humanitarian disasters.⁴² Among the drivers of such collective initiatives, the

³⁷ Michael J. Kelly, *Pulling at the Threads of Westphalia: “Involuntary Sovereignty Waiver” – Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT’L L. & FOREIGN AFF. 361, 421 (describing the historic origins of self-defense and its recognition as a justifiable use of force by Catholic and Ancient Greek philosophers).

³⁸ For a description of the 1847 *Caroline* case involving Americans on a ship full of armaments intended for Canadians in their independence struggle against the British, see *id.* at 421–22 (citing ANTHONY D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 33–35 (2d. ed. 1995) (quoting Daniel Webster)). The British soldiers found the ship and attacked its unarmed Americans, killing two and capturing two, and sent the ship over Niagara Falls. Specifically, the standard of “necessity” accepted by both the American and British sides was that there should be “an ‘instant, overwhelming’ necessity” that leaves “no choice of means, and no moments for deliberation.”

³⁹ See Benard & Leaf, *supra* note 36, at 1398 (citing U.N. Charter art. 51) (emphasizing that an important feature of Article 51 is its creation of a unilateral right permitting the “inherent right” to self-defense without prior U.N. approval).

⁴⁰ See Kelly, *supra* note 37, at 421 (2005) (noting that there are circumstances when a state is not required to wait until it has experienced an actual armed attack to act in self-defense).

⁴¹ See Amit K. Chhabra, *Superpower Responsibility for State Recognition: Charting a Course for Nagorno-Karabakh*, 31 B.U. INT’L L. J. 125 (2013) (arguing for a system favoring state recognition of former Soviet states and the responsibility of the Great Powers to lead unilaterally in this regard, especially in cases of humanitarian disaster giving rise to the responsibility to protect).

⁴² One of the first calls for such a duty appeared in the 2005 World Summit Outcome:

Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. . . .

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter,

United Nations has taken a front row seat. Several guiding principles underlie the United Nations' mandate in this regard. First, its stated *raison d'être*:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.⁴³

For this reason, regional disputes that appear domestic in nature garner the United Nations' support for intervention when deemed threats to "international peace and security." Such authorization comes in the form of an Article 48 Security Council resolution.⁴⁴ Examples of authorized interventions include: where a state commits or fails to prevent genocide or crimes against humanity in its territory; where countries find it necessary to take action to protect their nationals against other states that harbor international terrorists; and where states pursue weapons of mass destruction ("WMD").⁴⁵ Historically, the supposed maintenance of international peace and security was deemed necessary in the case

to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.

2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138-39, U.N. Doc. A/60/1, (Oct. 24, 2005).

⁴³ U.N. Charter art. 1(1).

⁴⁴ See *id.* at art. 48(1) (establishing the powers of the United Nations Security Council).

⁴⁵ See Milena Sterio, *On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule*, 19 MINN. J. INT'L L., 137, 155 (2010) (enumerating several bases for authorized intervention previously described by Richard Haas).

of Albanian Muslims persecuted in Kosovo⁴⁶ as well as on behalf of Kurds allegedly persecuted in Northern Iraq.⁴⁷ Moreover, a refugee problem was identified as giving rise to this responsibility in the aftermath of the 2008 Haiti earthquake.⁴⁸

Additionally, the basic human rights provisions provide responsibilities of both the United Nations as well as its member states.

[T]he United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development;. . . and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.⁴⁹

This obligation also belongs to each individual state: "All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."⁵⁰

3.3. *Intervention Limitations*

This obligation to act is not without limitation, however. In so acting, Members shall consider: that "[t]he Organization is based on the principle of the sovereign equality of all its Members;"⁵¹ that they "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state;"⁵² that "the United Nations [shall not] intervene in matters which are essentially within the domestic jurisdiction of any state;"⁵³ that they "shall give the United Nations

⁴⁶ *Id.* at 156–57.

⁴⁷ *Id.* at 156.

⁴⁸ See Linda Malone, *The Responsibility to Protect Haiti*, INSIGHTS (Am. Soc'y Int'l Law, Wash. D.C.), Mar. 10, 2010, available at <http://www.asil.org/files/insight100310pdf.pdf> (pointing to Security Council intervention in the face of gross human rights violations). Unlike the Kosovo and Iraqi Kurds cases, in its essence the Haiti situation presented a duty to protect in the face of an act of God, rather than a man-made humanitarian situation, though the immediate concern was the subsequent refugee situation that humans aggravated.

⁴⁹ U.N. Charter art. 55(a, c).

⁵⁰ *Id.* art. 56.

⁵¹ *Id.* art. 2(1).

⁵² *Id.* art. 2(4).

⁵³ *Id.* art. 2(7).

every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action;⁵⁴ and “shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.”⁵⁵

Additionally, the 2005 World Summit established a responsibility to protect.⁵⁶ The Austrian Initiative followed upon it by asserting that the rule of law must also apply to interventionists.⁵⁷ On this basis, it specifically recommended that the Security Council “(i) encourage Member States contributing . . . personnel to take . . . preventative action . . . to hold their nationals accountable for criminal conduct; (ii) . . . support the Secretary-General’s efforts to seek formal assurances from troop contributing countries (TCCs) that they will exercise jurisdiction over their personnel;” and (iii) commit to putting victims of sexual violence “at the centre of its attention.”⁵⁸

With these principles and their delineated limitations as background, this Article reviews whether the United States has been derelict in its duties where it has chosen to act in self-defense or to aid populations suffering from humanitarian disasters.

4. A DERELICTION OF DUTIES?

Although the motives in self-defense and in humanitarian missions aimed at protecting vulnerable populations appear to be similarly beneficent, some have argued that humanitarian motives can be corrupt. Kelly points to an extreme example: “The cover of humanitarian intervention can be used by somebody like Hitler to justify moving into the Sudetenland to protect the repressed

⁵⁴ *Id.* art. 2(5).

⁵⁵ *Id.* art. 2(6).

⁵⁶ See *supra* note 42. Cf. Kelly, *supra* note 37 at 399 (discussing INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, which, among other things, calls for humanitarian intervention to become an international obligation).

⁵⁷ See Simon Chesterman, *The UN Security Council and the Rule of Law* at i (Executive Summary, ¶ (iii)) (Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-57, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279849.

⁵⁸ See *id.* at iii (Summary of Recommendations, Recommendation 9).

German minority within that part of Czechoslovakia.”⁵⁹ This cannot be contended, though, and the capacity for corruption is intact even in the case of a coalition of powers avowing to take pre-determined actions (*e.g.*, the Axis alliance of Germany, Italy, and Japan). The criteria provided for an intervener to act responsibly, however, can be instructive in this regard.⁶⁰

4.1. Obama's Campaigns in the "Muslim World"

Whether or not we find persuasive the argument to broaden the circumstances in which a unilateral use of force in self-defense is justified, international law continues to require an imminent, armed attack. With these principles as background, we survey some of the United States' incursions into the "Muslim World" during the Arab Spring.

To begin, our terminology of a War on Terror is itself an obvious misnomer. Though such an appellation might match the Bush Administration's attempt to instill in the public mind a wartime mentality, this is itself irresponsible and misleading. Additionally, it has been suggested that a traditional "state of emergency" more accurately comports with legitimate attempts to target al-Qaeda for its role in the September 11, 2001 attacks. This approach has the collateral benefit of eliminating the false pretense of being at war.⁶¹

In outlining the American strategy of preventive war, President Bush pronounced that "[t]o forestall or prevent . . . hostile acts by our adversaries, the United States will, if necessary, act preemptively."⁶² In spite of this bold-faced assertion, as demonstrated above, this stance runs counter to international

⁵⁹ Kelly, *supra* note 37, at 431.

⁶⁰ See Joshi, *supra* note 27, at 30 (detailing four principal strategic policies of the United States).

⁶¹ See Bruce Ackerman, *This Is Not a War*, 113 YALE L. J. 1871 (2004). Ackerman contends that, instead of using the misleading rubric of a War on Terror, President Bush should request a temporary state of emergency so as to provide more flexibility in dealing with the sources of terrorism that enabled the attacks on September 11, 2001. In Ackerman's words: "So long as the general public accepts the notion that America can make 'war' on something as amorphous as 'terrorism,' future presidents will have a much easier time convincing the nation to engage in old-fashioned wars against sovereign states." *Id.* at 1876.

⁶² PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY OF THE UNITED STATES OF AMERICA 15 (2002), available at <http://www.state.gov/documents/organization/63562.pdf>.

law.⁶³ In turn, as a result of the Bush-era support of religious parties, an American “democracy-promotion” policy enabled through the efforts of non-governmental organizations and social media, and a consistent development of a responsibility to protect populations suffering from a humanitarian crisis, President Obama inherited a world in which Iraq had already become a theocracy.⁶⁴ Conversely, Obama played a role in the Egyptian transition in power by calling upon Hosni Mubarak to transfer power to the Egyptian opposition, even though that opposition had a record of female genital mutilation.⁶⁵ The transition in power was relatively peaceful, with Mubarak stepping down after previously refusing to do so.

In Libya, Obama inherited the Bush-era policies of providing defense armaments that benefited American defense contractors and securing lucrative oil and gas deals that benefited American oil companies.⁶⁶ In its turn, the Obama Administration supported the Libyan opposition party, the Libyan Transitional National Council (“LTNC”); in response to rebel activities, Colonel Muammar Qaddafi’s regime brutally suppressed the secessionist movement. These actions were largely considered to be genocidal in nature and in violation of the Libyan government’s obligation to protect its own people from torture and crimes against humanity. Ultimately, the United Nations and NATO were prompted to intervene in favor of the LTNC. The Security Council issued Resolution 1973, authorizing members to intervene and establishing a “no-fly” zone but specifically forbidding a “foreign

⁶³ See U.N. Charter art. 51 (preserving the right of individual or collective self-defense in the event of armed attack); see also Byman, *supra* note 26, at 54 (noting that United States intervention in the Arab region may be perceived as an attempt to “conquer the Middle East,” and that such an interpretation may lend itself to “anti-U.S. sentiment”). Additionally, the United Nations recently confirmed the limitation on preemptive self-defense in the absence of collective action initiated by the Security Council. See *A More Secure World: Our Shared Responsibility*, Rep. of the High-level Panel on Threats, Challenges and Change, 59th sess, ¶¶ 183–198, U.N. Doc. A/59/565 (Dec. 2, 2004).

⁶⁴ See Hannibal Travis, *Wargaming the “Arab Spring”: Predicting Likely Outcomes and Planning U.N. Responses*, 46 CORNELL INT’L L.J. (forthcoming 2013) (manuscript 5-11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2062578 (explaining the multiple factors that enabled political reform to take root in Arab countries).

⁶⁵ *Id.* at 24–25.

⁶⁶ See *id.* at 28–29 (noting, for example, the Obama Administration’s approval of a \$60 million sale of fifty refurbished armored troop carriers to Libya, and oil and gas deals that would yield “billions” for American corporations).

occupation force.”⁶⁷ Obama seized upon the opportunity to intervene but was careful to avoid violating the Security Council proscription. An advisor to the President explained the rationale for the nature of U.S. participation:

[T]he President decided . . . we were willing to back a military action if we could get a coalition together because we weren't going to do it 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 . . . UAE and the Jordanians and we have had a good legal basis. And we tried to put together a coalition.⁶⁸

This attempt to forge a genuine coalition force puts the United States on the right side of international law. Additionally, by providing only aerial support for the LTNC, the United States complied with the terms of the Security Council Resolution.

In the case of Syria, evidence of fatalities emanating from fighting between protesters and President Bashar al-Assad's governmental forces led the European Union and the United States to propose a U.N. resolution blocking arms shipments and imposing economic sanctions. However, the BRICS states (Brazil, Russia, India, China, South Africa) opposed this initiative on the ground that such measures would encourage social unrest and promote war. Still, the General Assembly condemned Assad's violent crackdowns, and the members of the Security Council condemned the widespread human rights violations.⁶⁹ The United States has recognized the Syrian National Council as the legitimate

⁶⁷ See S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011) (“Authoriz[ing] Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya . . . while excluding a foreign occupation force of any form on any part of Libyan territory . . .”). *Id.* ¶ 6 (“Decid[ing] to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians . . .”).

⁶⁸ Travis, *supra* note 64, at 41 (citing *The Charlie Rose Show* (Charlie Rose LLC television broadcast Jan. 26, 2012)).

⁶⁹ See *Syria – Uprising and Conflict*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html> (last visited Jan. 18, 2013) (noting that China and Russia impeded the Security Council from doing more); Rick Gladstone, *General Assembly Votes to Condemn Syrian Leader*, N.Y. TIMES, Feb. 16, 2012, http://www.nytimes.com/2012/02/17/world/middleeast/secretary-general-ban-ki-moon-castigates-syria-ahead-of-general-assembly-vote.html?hp&_r=0 (the resolution passed with 137 in favor, 12 votes against, and 17 abstentions).

government, although of the coalition Council's leadership includes the Muslim Brotherhood. Again, the United States has played its role from a distance, as there has been no outright U.S. intervention other than through the United Nations; thus, the question of violating international law does not arise.

By contrast, the United States and the world community have used no military force against Sudan, whose President, Omar al-Bashir, has consistently violated human rights. As elsewhere in the "Muslim World," student protesters in Sudan began to demonstrate, but the government quickly crushed them. Although former U.S. President Jimmy Carter attempted to alleviate the humanitarian crisis that resulted from the long-lasting civil war between the North and South, there is hope due to the fact that South Sudan finally obtained its independence in 2011. Additionally, the long-standing conflict in the Darfur region has resulted in 400,000 deaths, 2.7 million internally-displaced persons, and more than 4.7 million people reliant on humanitarian aid.⁷⁰ Nonetheless, Bashir has been able to avoid a full-scale Security Council resolution to intervene militarily; instead, the United Nations Mission in Sudan aimed to provide humanitarian assistance until it disbanded last year with recognition of South Sudan as an independent state. Still, a military intervention was justifiable as the violence in Darfur alone threatens the maintenance of international peace and security. President Obama attempted to pressure Bashir through the imposition of economic sanctions⁷¹ and by ostensibly taking the side of South Sudan in light of Bashir's atrocious humanitarian record. Additionally, the International Criminal Court charged Bashir with war crimes, crimes against humanity, and genocide.⁷² Fortunately, Sudan and South Sudan recently concluded an agreement to resolve the dispute over payments by South Sudan for use of Sudanese export infrastructure, hopefully bringing an end to their conflict.⁷³ These

⁷⁰ *What Has Happened in Darfur?*, SAVEDARFUR, <http://www.savedarfur.org/pages/primer> (last visited Jan. 18, 2013).

⁷¹ Andrew Quinn, *U.S. Extends Long-standing Sanctions on Sudan*, REUTERS (Nov. 1, 2011, 6:16 PM), <http://www.reuters.com/article/2011/11/01/us-sudan-usa-idUSTRE7A07BD20111101>.

⁷² Marlise Simons, *International Court Adds Genocide to Charges Against Sudan Leader*, N.Y. TIMES (July 12, 2010), <http://www.nytimes.com/2010/07/13/world/africa/13hague.html?ref=omarhassanalbashir>.

⁷³ Katrina Manson & William Wallis, *US Seeks \$3bn for Sudan Oil Deal*, FINANCIAL TIMES (Aug. 7, 2012), available at http://www.cnbc.com/id/48563106/US_Seeks_3_Billion_for_Sudan_Oil_Deal (reporting that the South Sudan has

actions on the part of President Obama are laudable; not only has he avoided unauthorized force, but the United States has also certainly acted within its right to impose economic sanctions in an effort to force cooperation with South Sudan.

5. CONCLUSION

Although most reviews of presidential conduct find flagrant violations, the United States' recent actions in the Arab Spring states under President Obama have been laudable. America is acting responsibly, consistent with its responsibilities under international law. Some claim that we are inconsistent in our rallying for regime change in some oil-producing states, such as Libya and Iraq, but not in others such as Sudan. This is a valid critique, but inconsistent foreign policy is not a violation of international law. Perhaps then it is not a cloak we hide under so much as a thin veil that we fool only ourselves into believing preserves our legitimacy. After all, in spite of our efforts to encourage development in the "Muslim World," headline-making protests tend to show that America and Americans arouse disdain more than awe in this part of the world.

The next and perhaps even more important question is whether we can expect this pattern of behavior to continue based on what we know about American foreign policy priorities. Although it is interesting from an academic perspective to query whether the current Administration has acted in conformity with international law, children in Iran are denied the 'blessings of liberty' if the next administration is unwilling to conform with international law and bombs Tehran because it assumes a subsequent government would be better able secure American oil interests.

Alexander Benard and Paul Leaf support certain potential reforms to Article 51 of the U.N. Charter;⁷⁴ these reforms are unlikely, however. In fact, a recent review initiated by Kofi Annan confirmed the existing language and unwillingness of the United Nations to broaden the bases of unilateral use of force; rather, anything outside of the limited circumstances requires collective action by the Security Council.⁷⁵ By the same token, American

agreed to pay the equivalent of \$9.48 per barrel of oil for the use of export infrastructure in Sudan and to transfer to Sudan an additional \$3.028 billion).

⁷⁴ See *supra* note 36.

⁷⁵ See Simon Chesterman, *The Outlook for UN Reform* 18 (N. Y. Univ. Pub. Law & Legal Theory Working Papers, Paper No. 295, 2011), available at

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policies are grounded in historical precedent that define the nation's character and psyche; thus, it is unlikely that America will depart from its current regional policies. Rather, we can expect to violate international law if we are more interested than the other permanent members of the Security Council in taking a specific action; if the other members agree, however, we will readily march to the same beat.

http://lsr.nellco.org/cgi/viewcontent.cgi?article=1297&context=nyu_plltwp
("[T]he risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventative action, as distinct from collectively endorsed action, to be accepted.") (quoting *A More Secure World: Our Shared Responsibility*, *supra* note 63, ¶ 191).