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## The Arab Spring, the Responsibility to Protect, and U.S. Foreign Policy - Some Preliminary Thoughts

### Keywords

Feminism, Women, International Law: History, Communications Law, Human Rights Law, Internet, Internet Service Providers, Science and Technology

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

VED P. NANDA\*

## I. INTRODUCTION

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

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

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

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

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

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

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

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

## II. RECENT DEVELOPMENTS IN SELECTED COUNTRIES

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

### A. Egypt

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

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

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

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

officially recognized on June 24, 2012—the winner of Egypt’s first competitive presidential election.<sup>5</sup> He was “the first Islamist elected as head of an Arab state.”<sup>6</sup>

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

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

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

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

6. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. *Id.*

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

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

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

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

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

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

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

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

24. Bel Trew, *The Trial: Egypt’s NGO Staffers Speak Up About Political Dogfight*, AHRAM ONLINE (Oct. 20, 2012), <http://english.ahram.org.eg/NewsContentPrint/1/0/55888/Egypt/0/The-Trial-Egypt-NGO-staffers-speak-up-about-polit.aspx>.

25. *Id.*

26. *Id.*

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

28. *Id.*

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

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

which was reached on November 21, after eight days of conflict, through an American diplomatic push.<sup>31</sup>

### B. Tunisia

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

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

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

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

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

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

33. *Id.*

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

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

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

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



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

### C. Libya<sup>41</sup>

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

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

lties-in-embassy-attacks.html.

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

39. *Id.*

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

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

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

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

44. *Id.* ¶¶ 4-8.

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

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

overthrown, ending his forty-two year rule. Ultimately, he was captured and killed by rebels on October 20, 2011.<sup>47</sup>

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

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

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

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

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

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

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

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

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

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

53. *Id.*

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

55. *Id.* ¶ 13.

56. *Id.* ¶ 45.

57. *Id.* ¶¶ 15-94.

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

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

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

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58. *Id.* ¶¶ 127-28.

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

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

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

Alarming, much of this smuggling involves weapons, including heat-seeking missiles and rocket-propelled grenades, looted from Qaddafi-era depots.<sup>62</sup>

#### D. Yemen<sup>63</sup>

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

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

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

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

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

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

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

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

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

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

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

### E. Syria<sup>71</sup>

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

70. Worth, *supra* note 63.

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

72. J.A., *Syria’s Agony: Recognizing the “United” Opposition*, THE ECONOMIST (Nov. 20, 2012), <http://www.economist.com/blogs/theworldin2013/2012/11/syrias-agonny/print>.

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

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

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

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

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

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

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

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

77. *Id.*

78. Fassih, *supra* note 73.

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

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

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

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

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

#### *F. Other Countries in the Region*

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

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

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

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

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

84. Christian Caryl, *Where the Arab Spring Has Not Yet Sprung*, *FOREIGN POLICY* (Oct. 17, 2012), [http://www.foreignpolicy.com/articles/2012/10/17/where\\_the\\_arab\\_spring\\_has\\_not\\_yet\\_sprung](http://www.foreignpolicy.com/articles/2012/10/17/where_the_arab_spring_has_not_yet_sprung).

85. *Id.*

86. *Id.*

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

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

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

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

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

The “Arab Spring” is indeed becoming the “Arab Decade,” as many experts predict.<sup>95</sup> The future direction of the countries in the region is unclear. Two analysts have aptly stated:

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

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

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

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

92. *Id.*

93. *Id.*

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

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

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



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

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

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

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

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

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

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

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

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

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

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

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

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

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

104. *Id.*

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

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

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

108. See *id.* ¶ 12.

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

110. *Id.* ¶¶ 11, 12.

111. *Id.* ¶ 16.

112. *Id.* ¶ 20.

coercive responses under Chapters VI and VIII and coercive tools under Chapter VII.<sup>113</sup>

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

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

113. *Id.* ¶¶ 21-37.

114. *Id.* ¶ 50.

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

116. *Id.* ¶ 11(a).

117. *Id.* ¶ 7.

118. *Id.* ¶ 11(c).

119. *Id.* ¶¶ 11(d)-(f).

120. *Id.* ¶ 6.

121. *Id.* ¶¶ 11(g)-(i).

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

123. *Id.*

124. *Id.*

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

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

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

#### IV. SUTTON COLLOQUIUM CONTRIBUTIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

#### V. CONCLUDING COMMENTS

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

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

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

127. Clinton, *supra* note 98.