

International Law, Dignity, Democracy, and the Arab Spring

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Introduction

As recognized in the United Nations Universal Declaration of Human Rights, “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”¹ Although expressed nearly sixty-four years ago, this prescient affirmation of the need to continually protect human rights by the rule of law, and the interrelated need for rebellion against tyranny and oppression when relevant human rights are trampled, is clearly relevant to what some have termed the Arab Spring of 2011–2012 and the rebellion by individuals and groups against tyranny and oppression in Tunisia, Egypt, Libya, Yemen, and Syria.

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmb., U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration]. For more information on the evolution into customary international law of most of the human rights reflected in the Universal Declaration as well as the role of these rights as authoritative indicia of the content of human rights guaranteed to all persons through the United Nations Charter, see, for example, *Filartiga v. Pena-Irala*, 630 F.2d 876, 882–83 (2d Cir. 1980) (stating that with respect to “the ‘human rights and fundamental freedoms’ guaranteed to all by the Charter, . . . [the prohibition of torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights The General Assembly has declared that the Charter precepts embodied in this Universal Declaration ‘constitute basic principles of international law.’ . . . [T]he Universal Declaration . . . ‘is . . . an authoritative statement of the international community.’”); THOMAS BUERGENTHAL ET AL., *INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL* 39–44 (3d ed. 2002); HURST HANNUM, S. JAMES ANAYA & DINAH L. SHELTON, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 152–65, 167 (5th ed. 2011); MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* 272–74, 302, 325–30 (1980); JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 254 n.182, 273 n.372, 284 n.468 (2d ed. 2003).

More recently, various individual and group participants in the Arab Spring have embraced and reaffirmed predominant patterns of human expectation and claims occurring worldwide regarding individual dignity and worth; self-determination of peoples; human rights with respect to relatively free and genuine participation in governmental processes and the standard of legitimacy for governments; democracy as a universal core value; and the right of rebellion or revolution and the concomitant right of a given people to seek self-determination assistance.

Each of these forms of human expectation has a long history, and the exact contours of each and their interrelation and effectuation are still unfolding in the Middle East, North Africa, and elsewhere. Each form also has a present legal and policy mooring in basic international legal instruments, including the United Nations Charter and a number of authoritative human rights instruments. Therefore, one must address relevant norms and policies set forth in such instruments as part of an adequate international legal and policy analysis of non-state actor expectations and actions that have taken place during the Arab Spring as well as the international community's responses to them. Importantly, one must also keep in mind that international law has never been merely state-to-state, as it might be if states were the only formal actors in the international legal process with rights and duties or if private individuals and groups did not also have human rights duties.² Among early U.S. recognitions of private human rights duties was President Thomas Jefferson's Sixth Annual Message to Congress, in which he formally approved the withdrawal of "citizens of the United States from all further participation in those violations of human rights . . . so long continued on the unoffending inhabitants of Africa."³

I. General International Legal Policies at Stake

A. Human Dignity

Human dignity is a fundamental international legal precept. The right to human dignity is part of universal human rights law that is expressly related to the value and worth of each human being as well as the equality of men and women.⁴ As the United Nations Charter declares, when creating the Charter in 1945 the peoples of the United Nations had been deter-

2. See, e.g., Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT'L L. 977 (2011) (also documenting certain formal participatory roles of nations, peoples, cities, tribes, belligerents, and insurgents and identifying informal participatory roles of other non-state actors) [hereinafter Paust, *Nonstate Actors*]; Jordan J. Paust, *The Reality of Private Rights, Duties, and Participation in the International Legal Process*, 25 MICH. J. INT'L L. 1229 (2004) [hereinafter Paust, *The Reality of Private Rights and Duties*]; D.A. Jeremy Telman, *Non-State Actors in the Middle East: A Challenge for Rationalist Legal Theory*, 46 CORNELL INT'L L.J. 5 (2013); *infra* notes 47, 56.

3. PAUST, *supra* note 1, at 202; see also *United States v. Haun*, 26 F. Cas. 227, 231 (C.C.S.D. Ala. 1860) (No. 15,329).

4. See, e.g., Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 HOW. L.J. 145, 146-47, 185-86, 193 (1984).

mined to reaffirm their “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”⁵ The United Nations Charter also recognizes the global nature of each member’s obligation “to take joint and separate action”⁶ to promote “universal respect for, and observance of, human rights”⁷ and thus, universal respect for and observance of human dignity.

As noted in the 1948 Universal Declaration of Human Rights, the Declaration was promulgated in part to provide “a common understanding of these [Charter-based] rights”⁸ In fact, the first article set forth in the Declaration expressed the expectation that “[a]ll human beings are born free and equal in dignity and rights.”⁹ With respect to freedom, justice, and peace, the Declaration also proclaimed that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”¹⁰ an expression that also appears verbatim in the preambles to the two main global human rights treaties, the International Covenant on Civil and Political Rights (ICCPR)¹¹ and the International Covenant on Eco-

5. U.N. Charter, pmbl. Importantly, the Charter requires that human rights be respected and observed “for all without distinction as to . . . sex . . . or religion.” *Id.* arts. 1, para. 3, 55, para. c.

6. *Id.* art. 56.

7. *Id.* art. 55, para. c. The duty of universal respect and observance is necessarily operative both internally and externally. It applies in all social contexts and is without geographic or temporal limitations. Any limits regarding the reach of human rights are found in human rights law, and, as often recognized, some human rights are absolute and non-derogable.

8. Universal Declaration, *supra* note 1, pmbl.

9. *Id.* art. 1. Other human rights instruments also embrace human dignity. See, e.g., Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, pmbl., arts. 1, 3(a), U.N. GAOR, 61st Sess., Supp. No. 106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006); Arab Charter on Human Rights pmbl. (“dignity of the human person”), arts. 2(3) (“human dignity”), 3(3) (“human dignity”), 17 (“dignity”), 20(1) (“inherent dignity of the human person”), 33(3) (“dignity”), 40(1) (“dignity”), May 22, 2004, *reprinted in* 12 INT’L HUM. RTS. REP. 893 (2005), *available at* <http://www1.umn.edu/humanrts/instree/loas2005.html>; Inter-American Convention on the Forced Disappearance of Persons pmbl., June 9, 1994, 33 I.L.M. 1529, 1530 (1994) (“[F]orced disappearance of persons is . . . a grave and abominable offense against the inherent dignity of the human being.”); Convention on the Rights of the Child pmbl., Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl., Dec. 10, 1984, 1465 U.N.T.S. 85 (“[r]ecognizing that . . . [e]qual and inalienable rights of all members of the human family”] derive from the inherent dignity of the human person”); African (Banjul) Charter on Human and Peoples’ Rights art. 5, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (“Every individual shall have the right to the respect of the dignity inherent in a human being.”); Convention on the Elimination of All Forms of Discrimination Against Women pmbl., Dec. 18, 1979, 1249 U.N.T.S. 13; American Convention on Human Rights arts. 5(2) (“All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”), 11(1) (“Everyone has the right to have his honor respected and his dignity recognized.”), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; American Declaration of the Rights and Duties of Man pmbl., May 2, 1948, O.A.S. Res. XXX, *reprinted in* O.A.S. OAS/Ser.L/V/I.4 Rev. 9 (2003).

10. Universal Declaration, *supra* note 1, pmbl.

11. International Covenant on Civil and Political Rights pmbl., Dec. 9, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

conomic, Social, and Cultural Rights.¹² Both of these global human rights treaties also affirm “the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms” and proclaim that equal and inalienable rights “derive from the inherent dignity of the human person.”¹³

Quite clearly, processes of political oppression and violent attacks on civilians during the Arab Spring violated the human dignity of oppressed human beings and thwarted equality, freedom, justice, and peace. Such forms of political oppression also violate other relevant human rights, including the right of a people to political self-determination and prohibitions of unlawful governmental force.¹⁴

B. Self-Determination and Relevant Human Rights

The precept of self-determination of peoples is enshrined in the United Nations Charter.¹⁵ Moreover, the ICCPR recognizes that political self-determination is a human right and expressly affirms that, “[b]y virtue of that right” all peoples have the right to “freely determine their political status and freely pursue their economic, social and cultural develop-

12. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

13. ICESCR, *supra* note 12, pmb1.; ICCPR, *supra* note 11, pmb1.

14. See President Barack Obama, Remarks by the President on the Middle East and North Africa (May 19, 2011) [hereinafter Obama Middle East Speech], available at <http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa>. President Obama spoke of violations of “human dignity” and “self-determination,” the “revolution” in Tunisia and elsewhere in the Middle East and North Africa sparked by “the actions of ordinary citizens,” “universal rights,” and U.S. opposition to “the use of violence and repression against the people of the region.” *Id.* In his 2012 State of the Union Address, President Obama stated that “[w]e will support policies that lead to strong and stable democracies . . . because tyranny is no match for liberty” and that “in Syria, I have no doubt that the Assad regime will soon discover that the forces of change cannot be reversed, and that human dignity cannot be denied.” President Barack Obama, Remarks by the President in State of the Union Address (Jan. 24, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>.

15. U.N. Charter, arts. 1, paras. 2-3, 55, para. c, 56; see also Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028, at 121 (Oct. 24, 1970) [hereinafter Declaration on Principles of International Law]. Concerning Charter-based human rights duties of states, see, for example, United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, ¶ 91 (May 24) (describing human rights violations as “manifestly incompatible with the principles of the Charter of the United Nations”); Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, ¶ 131 (June 21) (stating that to establish and enforce “distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter”) [hereinafter Advisory Opinion South West Africa]; *Filartiga v. Pena-Irala*, 630 F.2d 876, 882-83 (2d Cir. 1980). The precept of self-determination has express roots dating from the nineteenth century at the latest. See, e.g., PAUST, *supra* note 1, at 206, 253 n.170.

ment.”¹⁶ Importantly, the right of self-determination is that of peoples and not that of states, governments, political or religious factions, or terrorist minorities. In fact, an illegal regime, engaged in a strategy of denial of self-determination and violations of relevant human rights, has no right under international law to assure its own survival. Its claims of necessity are illegitimate.¹⁷

To the extent that persons are denied equal participation in their political processes, they are “denied the sharing of political power or shared participation in a process of political determination by an aggregate ‘self.’”¹⁸ In a given case, a denial of self-determination by a government or private actors operating in their own or foreign territory can also infringe on human rights to freedom of expression, including the free exchange of ideas nationally and internationally;¹⁹ freedom of assembly;²⁰ citizens’ abilities to take part in governmental processes directly or through freely chosen representatives;²¹ and individual dignity and worth,²² equality,²³ and freedom for all from impermissible discrimination on the basis of political or other opinion, race, sex, or other categories listed in human rights instruments.²⁴ Participation in political self-determination and enjoyment of human rights are therefore intertwined.²⁵

16. ICCPR, *supra* note 11, art. 1(1); *see also* U.N. Charter art. 1, para. 1; Promotion of a Democratic and Equitable International Order, G.A. Res. 55/107, pmb., ¶ 3(a), U.N. Doc. A/RES/55/107 (Dec. 4, 2000); Declaration on Principles of International Law, *supra* note 15, ¶ 5(1) (“the right freely to determine . . . their political status”); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 30-33 (2d ed. 2000). The Human Rights Committee created by the ICCPR has also recognized that “denying peoples the right to determine their own political status . . . would be incompatible with the object and purpose of the Covenant.” Human Rights Comm., General Comment No. 24, ¶ 9, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 2, 1994), *reprinted in* 34 I.L.M. 839 (1995). Additionally, the International Court of Justice has recognized a people’s right to self-determination as an obligation *erga omnes* (i.e., a right owing by and among all persons). *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶ 29 (June 30). Moreover, the African Charter recognizes that the right of a people to self-determination is an “inalienable” right. African (Banjul) Charter on Human and Peoples’ Rights, *supra* note 9, art. 20(1).

17. *See infra* Parts I.D, II.

18. *See* Paust, *The Reality of Private Rights and Duties*, *supra* note 2, at 1247.

19. ICCPR, *supra* note 11, art. 19.

20. *Id.* art. 22.

21. *Id.* art. 25(a).

22. *Id.* pmb.; *see also supra* Part I.A (discussing individual dignity as part of universal human rights law).

23. ICCPR, *supra* note 11, pmb., arts. 2(1), 26.

24. *See id.* arts. 2(1) (listing an extensive set of impermissible grounds for discrimination, including “political or other opinion”), 26; *see also* U.N. Charter, pmb., arts. 1, para. 3, 55, para. c (addressing the Charter-based guarantee of human rights and freedom from discrimination on the basis of race, sex, language, or religion).

25. *See* Human Rights Comm., General Comment No. 12, ¶¶ 1 (“self-determination[’s] . . . realization is an essential condition for the effective guarantee and observance of individual human rights”), 2 (the right of peoples and “corresponding obligations” of states “are interrelated with other provisions of the Covenant and rules of international law”), U.N. Doc. A/39/40, 21st Supp. (1984), *reprinted in* U.N. Doc. HRI/GEN/1/Rev. 9 (Vol. I), at 183 (May 27, 2008).

Such an interconnection is also recognizable in other ways. For example, the Universal Declaration of Human Rights affirms that the only legitimate or authoritative government is one based on the will of the people: "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."²⁶ The human right to a government

26. Universal Declaration, *supra* note 1, art. 21(3). Concerning this democratic basis for governmental authority, the core value of democracy, and relevant restraints on governmental conduct, see *id.* art. 29(2) (stating that limitations of human rights are only permissible in order to serve certain just requirements "in a democratic society"); Charter of the Association of Southeast Asian Nations (ASEAN) pmb., Nov. 20, 2007 (adherence "to the principles of democracy, the rule of law and good governance, respect for and protection of human rights"), available at <http://www.asean.org/archive/publications/ASEAN-Charter.pdf>; Arab Charter on Human Rights, *supra* note 9, art. 24(7) ("No restrictions may be placed on the exercise of these rights other than those which are prescribed by law and which are necessary in a democratic society . . ."); Inter-American Convention on the Forced Disappearance of Persons, *supra* note 9, pmb. ("in the framework of democratic institutions"); African (Banjul) Charter on Human and Peoples' Rights, *supra* note 9, art. 20(1)-(3); American Convention on Human Rights, *supra* note 9, pmb. ("within the framework of democratic institutions"), arts. 15 ("in a democratic society"), 16(2) ("in a democratic society"), 29(c) ("representative democracy as a form of government"), 32(2) ("in a democratic society"); ICESCR, *supra* note 12, art. 4 ("in a democratic society"); ICCPR, *supra* note 11, arts. 14(1) ("in a democratic society"), 21 (same), 22(2) (same); Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and 14 pmb. ("best maintained . . . by an effective political democracy"), arts. 6(1) ("in a democratic society"), 8(2) (same), 9(2) (same), 10(2) (same), 11(2) (same), Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (1950); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2(4) ("in a democratic society"), Sept. 16, 1963, E.T.S. No. 46 (1968); American Declaration of the Rights and Duties of Man, *supra* note 9, art. XXVIII ("advancement of democracy"); Jordan J. Paust, *The Illegality of Apartheid and the Present Government of South Africa*, 131 CONG. REC. 34073-75 (Dec. 4, 1985); S.C. Res. 940, pmb. (labeling the government in Haiti as an "illegal de facto regime" and "[r]eaffirming . . . the goal of the international community" regarding "the restoration of democracy in Haiti and the prompt return of the legitimately elected President"), ¶ 4 (authorizing states "to form a multinational force . . . to use all necessary means to facilitate the departure from Haiti of the military leadership . . . [and] the prompt return of the legitimately elected President"), U.N. Doc. S/RES/940 (July 31, 1994); Declaration on the Strengthening of International Security, G.A. Res. 25/2734, ¶ 22, U.N. GAOR, 25th Sess., Supp. No. 6, U.N. Doc. A/RES/2734 (Dec. 16, 1970) (condemning "all forms of oppression, tyranny and discrimination . . . wherever they occur"); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, intro., (June 29, 1990) (committing to the "development of societies based on pluralistic democracy"), reprinted in 29 I.L.M. 1305 (1990); CHEN, *supra* note 16, at 33; *infra* Part I.C; cf. Arab Charter on Human Rights, *supra* note 9, art. 30(2) ("in a tolerant society that respects human rights and freedoms").

In *Military and Paramilitary Activities in and Against Nicaragua*, the majority opinion of the International Court of Justice stated that "adherence by a State to any particular doctrine does not constitute a violation of customary international law," confused "sovereignty" with the "State," and assumed nonsensically that a totalitarian dictatorship comports with "freedom of choice." (*Nicar. v. U.S.*), 1986 I.C.J. 14, ¶ 263 (June 27). Such statements are in serious error, because the right of self-determination under the United Nations Charter is not that of a "State" but of a people, and both self-determination and human rights law require a domestic political process based on the relative free will of a given people. See Karima Bennouna, *Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM.

based on the relative free will of the people is necessarily mirrored in the concomitant right of a people to freely determine their political status, which is recognized in connection with self-determination.²⁷ As the International Court of Justice has recognized, “application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.”²⁸ Modes of enjoyment of the right of self-determination recognizably include not merely a relatively full and free participation in a present political process, but also “[t]he establishment of a sovereign and independent State . . . or the emergence into any other [freely determined] political status”²⁹ These modes of enjoyment are particularly relevant to a given people’s process of self-identification³⁰ and their consensual participation in a relatively new and independent political process.

C. Democracy as a Core Value

In 2005, the international community formally expressed its commitment “to actively protecting and promoting all human rights, the rule of law and democracy” and recognized that these “are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations”³¹ The international community also reaffirmed “that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems,” while reaffirming “the necessity of due respect for sovereignty and the right of self-determination.”³² Moreover, the international community declared that there is a “responsibility to protect” state populations or “R2P”: “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity”³³ and, quite clearly therefore, not to commit

RTS. L. REV. 635, 695 (2010) (“[T]he human right to political participation is not to be exercised toward the end of establishing totalitarian systems that seek to deny rights to others (such as women).”).

27. See Human Rights Comm., *supra* note 25, ¶ 2.

28. Western Sahara Advisory Opinion, 1975 I.C.J. 12, ¶ 55 (Oct. 16).

29. Declaration on Principles of International Law, *supra* note 15, ¶ 4; see also CHEN, *supra* note 16, at 33–34.

30. For a discussion concerning the general phenomenon of self-identification and “shared identity,” see, for example, CHEN, *supra* note 16, at 33–34, 36, 38; Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT’L L. 257, 276 (1981).

31. 2005 World Summit Outcome, G.A. Res. 60/1, ¶ 119, U.N. Doc. A/RES/60/1 (Oct. 24, 2005); see also Promotion of a Democratic and Equitable International Order, G.A. Res. 55/107, ¶ 5, U.N. Doc. A/RES/55/107 (Mar. 14, 2001) (stressing that “all human rights are universal . . . and that the international community must treat human rights globally in a fair and equal manner”); World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF.157/23 (July 12, 1993) (“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally” and “it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”).

32. 2005 World Summit Outcome, *supra* note 31, ¶ 135.

33. *Id.* ¶ 138. The U.N. Secretary General has recognized that this paragraph is “firmly anchored in well-established principles of international law.” U.N. Secretary-

such crimes against portions of its own population.

With regard to “due respect for sovereignty,” it should be noted that sovereignty is not absolute under international law nor impervious to its reach.³⁴ More specifically, the pretended cloak of state sovereignty ends where human rights begin. It is well recognized that human rights violations and international crimes are of international concern rather than internal affairs of a single state even if they occur totally within a single state. As the International Court of Justice recognized decades earlier, violations of basic human rights are violations of *obligatio erga omnes*, “are the concern of all States,” and all states “can be held to have a legal interest in their protection”³⁵

During the Arab Spring, it became especially evident that Qaddafi’s regime in Libya not only denied democracy, human rights, and self-determination to the people of Libya, but also engaged in murderous armed attacks against sections of the Libyan civilian population that constituted

General, *Implementing the Responsibility to Protect*, ¶ 3, U.N. Doc. A/63/677 (Jan. 12, 2009); see also S.C. Res. 1894, pmbll., U.N. Doc. S/RES/1894 (Nov. 11, 2009) (“[r]eaffirming the relevant provisions of the 2005 World Summit Outcome Document . . . , including paragraphs 138 and 139 thereof regarding the responsibility to protect”); S.C. Res. 1706, pmbll., U.N. Doc. S/RES/1706 (Aug. 31, 2006) (noting that its earlier Resolution 1674 (Apr. 28, 2006) reaffirmed “provisions of paragraphs 138 and 139 of the 2005 United Nations World Summit Outcome Document”).

34. See, e.g., *United States v. Von Leeb (The High Command Case)* (Oct. 27, 1948), in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 462, 489 (1950) (“International law operates as a restriction and limitation on the sovereignty of nations.”); *United States v. Göring, Judgment*, (Oct. 1, 1946), in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 223 (1947) (“the principle of international law, which under certain circumstances [allows immunity of] representatives of a State, cannot be applied to acts which are condemned as criminal by International Law He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under International Law.”); *Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion*, 1923 P.C.I.J. (ser. B) No. 4, at 24-32 (Feb. 7); BUERGENTHAL ET AL., *supra* note 1, at 3-7; CHEN, *supra* note 16, at 314-17; HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard B. Lillich ed., 1973); RICHARD B. LILlich & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 613-14 (3d ed. 1995); McDUGAL, LASSWELL & CHEN, *supra* note 1, at 181-82, 208-15, 238-42, 670; FERNANDO R. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 6 (3d ed. 2005); HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 119-20 (1846) (noting that sovereignty is not an absolute barrier to military intervention and cannot be exercised in a manner “inconsistent with the equal rights of other States”); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 867-69, 875-76 (1990); Abraham D. Sofaer, *Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 106 (1989) (“territorial integrity is not entitled to absolute deference”); see also HUGO GROTIUS, 2 *THE LAW OF WAR AND PEACE* chs. 18 § 6, 21 § 3, 25 § 8 (Francis W. Kelsey trans., 1925) (describing restrictions on a nation’s sovereignty in cases of crimes against ambassadors, the citizens of another country, and the nation’s citizens); Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT’L L. 513, 521-22 (2009) (noting that under a shifting paradigm, only an internally legitimate state would enjoy full external sovereignty and freedom from intervention).

35. See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶ 33 (Feb. 5).

war crimes and crimes against humanity³⁶ and led to the United Nations Security Council's authorization for member states to use responsive military force to protect civilians and civilian-populated areas in Libya.³⁷ Despite similarly systematic and widespread murderous armed attacks on demonstrators and other civilians in Syria, the Security Council has not authorized member states to use force in order to protect civilians in Syria.³⁸

D. Unlawful Political Oppression

Clearly, the human right to participate freely in a domestic political process and to have a government based on the relative free will of the people is violated by a strategy designed to deny such rights and the related right of a people to political self-determination. Such a strategy and

36. See generally S.C. Res. 2016, pmb., U.N. Doc. S/RES/2016 (Oct. 27, 2011); S.C. Res. 2009, pmb., U.N. Doc. S/RES/2009 (Sept. 16, 2011); S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (Mar. 17, 2011). Resolution 1973 also reaffirmed “the responsibility of the Libyan authorities to protect the Libyan population” and declared that “the widespread and systematic attacks currently taking place in [Libya] against the civilian population may amount to crimes against humanity.” S.C. Res. 1973, *supra*, pmb.; see also S.C. Res. 1970, pmb., U.N. Doc. S/RES/1970 (Feb. 26, 2011) (“[r]ecalling the Libyan authorities’ responsibility to protect its population”); Hannibal Travis, *Wargaming the “Arab Spring”: Predicting Likely Outcomes and Planning U.N. Responses*, 46 CORNELL INT’L L.J. 75, 112 (2013) (addressing “deliberately targeting a city and knowingly killing civilians” as crimes against humanity and noting statements of the Prosecutor of the ICC); *infra* note 49.

37. See *infra* Part II.

38. See Neil MacFarquhar & Anthony Shadid, *Russia and China Block U.N. Action on Crisis in Syria*, N.Y. TIMES, (Feb. 4, 2012), <http://www.nytimes.com/2012/02/05/world/middleeast/syria-homs-death-toll-said-to-rise.html?pagewanted=all&r=0>. At the time when the Security Council became veto-deadlocked, President Obama condemned “the Syrian government’s unspeakable assault against the people of Homs” and declared that Assad “has no right to lead Syria, and has lost all legitimacy with his people” President Barack Obama, Statement by the President on Syria (Feb. 4, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/04/statement-president-syria>; see also G.A. Res. 66/253, ¶¶ 2 (“[s]trongly condemns the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians”), 7 (“[c]alls for an inclusive Syrian-led political process”), 8 (“[f]ully supports the League of Arab States decision of 22 January 2012 to facilitate a Syrian-led political transition to a democratic, pluralistic political system”), U.N. Doc. A/RES/66/253 (Feb. 16, 2012); Human Rights Council Draft Res. 19/1, ¶¶ 1 (“[s]trongly condemns the continued widespread and systematic violations of human rights and fundamental freedoms by the Syrian authorities, such as the use of force against civilians, arbitrary executions, the killing and persecution of protesters, human rights defenders and journalists, . . . arbitrary detention, enforced disappearances”), 2 (“[d]eplores the brutal actions of the Syrian regime over the past 11 months, such as its use of heavy artillery and tanks to attack residential areas of cities and towns, which have led to the death of thousands”), 6 (“[s]tresses the importance of ensuring accountability and the need to end impunity and hold to account those responsible for human rights violations, including those violations that may amount to crimes against humanity”), 19th Sess., Feb. 27–Mar. 23, 2012, U.N. Doc. A/HRC/19/L.1/Rev.1 (Feb. 29, 2012); *Syrian Military Presses on Rastan*; *UN Rights Chief Slams Scale of Abuse, Crimes Against Humanity*, TORONTO STAR, Feb. 14, 2012, at A17 (quoting U.N. Human Rights Commissioner Navi Pillay who warned the U.N. General Assembly that more than 5,400 people have been killed and “the scale of abuses . . . indicate that crimes against humanity have taken place . . . and are continuing.”).

the resulting process of oppression are not tolerated under the United Nations Charter,³⁹ especially since respect for human dignity, equal rights of men and women, other human rights, self-determination of peoples, and democracy are among the major purposes and core values of the United Nations.⁴⁰

Where a government engages in a strategy to deny political participation of persons in a process of self-determination and to violate correlative human rights, such government engages, however indirectly, in a process of political oppression and politicide (or the destruction of an authoritative political process) that violates self-determination and related human rights, and therefore such government lacks authority and legitimacy under international law.⁴¹ It is not a government that functions in a democratic society, and, for this reason, it is not a government that can lawfully limit human rights to free speech, association, and assembly—rights that can only be subject to limitations that are prescribed by law and are reasonably necessary for certain purposes “in a democratic society.”⁴²

During the Arab Spring, there were the usual attempts by governmental elites in Tunisia, Egypt, Libya, Yemen, and Syria to control local and transnational media,⁴³ but advances in technology allowed numerous individuals within such countries, and some from abroad, to communicate and coordinate action through Facebook, Twitter, and other forms of electronic media.⁴⁴ Illegitimate regimes have always sought to control the media, but advances in technology have increased opportunities for democratic opposition and domestic and transnational participation by individuals and groups in the effectuation of human rights and political self-determination.

Where a government uses armed force against a people as part of a strategy to deny self-determination and human rights, it violates Article 2, Paragraph 4 of the United Nations Charter, which prohibits the threat or use of force “against the . . . political independence” of another state “or in any other manner inconsistent with the Purposes of the United Nations.”⁴⁵

39. See, e.g., U.N. Charter, pmbl., arts. 1, paras. 2-3, 55, para. c, 56.

40. See *id.*

41. See *supra* note 26 and accompanying text.

42. For examples of human rights instruments that contain an express “in a democratic society” barrier to lawful limitations of certain human rights, see *supra* note 26; see also Jordan J. Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 *IND. L.J.* 621, 627-28 (1978).

43. See, e.g., S.C. Res. 1973, *supra* note 36, pmbl. (condemning “acts of violence and intimidation committed by the Libyan authorities against journalists, media professionals and associated personnel”).

44. See, e.g., Obama Middle East Speech, *supra* note 14 (“[E]vents of the past six months show us that strategies of repression . . . will not work anymore. Satellite television and the Internet provide a window into the wider world. . . . Cell phones and social networks allow young people to connect and organize like never before. And so a new generation has emerged. And their voices tell us that change cannot be denied.”); Travis, *supra* note 36.

45. See U.N. Charter, art. 2, para. 4. Article 2, paragraph 4 is conditioned by the phrase “in their international relations,” but international relations have never been merely state-to-state and formal actors can include states, nations, peoples, belligerents, and other actors. See *supra* note 2; *infra* note 70.

Because these purposes include promoting self-determination of all peoples and respect for and observance of human rights,⁴⁶ Article 2's prescription logically extends to armed attacks by a government not merely against a people abroad, but also against its own people or against a people or peoples within its territory that are part of its population.⁴⁷ Armed attacks by a government against a number of its own civilians would not only violate human rights law,⁴⁸ but would also constitute a crime against

46. See U.N. Charter, arts. 1, paras. 2-3, 55, para. c, 56.

47. See, e.g., Jordan J. Paust, *Aggression Against Authority: The Crime of Oppression, Politicide and Other Crimes Against Human Rights*, 18 CASE W. RES. J. INT'L L. 283, 287-90 (1986); *infra* notes 51-52 and accompanying text; see also *supra* note 33 (discussing R2P). Such forms of armed aggression can also trigger the right of a given people to secede from a state denying them self-determination and to seek self-determination assistance. See, e.g., Jordan J. Paust & Albert P. Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1, 20 n.69 (1978) (the 1970 Declaration on Principles of International Law does not protect the territorial integrity of a state that is denying the right of a people to self-determination and they have rights to self-determination assistance, to collective self-defense, and to secede); *infra* Part II.

48. See, e.g., Arab Charter on Human Rights, *supra* note 9, art. 8(1) ("No one shall be subjected to physical or psychological torture or to cruel, degrading, humiliating or inhuman treatment."), (2) ("Each State party shall protect every individual subject to its jurisdiction from such practices and shall take effective measures to prevent them. The commission of, or participation in, such acts shall be regarded as crimes."); ICCPR, *supra* note 11, arts. 2(1) ("All individuals within its territory" are among those entitled to rights under the treaty.), 6(1) (discussing arbitrary killings of civilians), 7 (discussing cruel and inhuman treatment or punishment of civilians). In a given instance, armed violence can also be connected to other human rights violations, such as violations of human dignity; self-determination; freedom of speech, assembly, and association; and freedom to take part in democratic political processes.

Additionally, human rights violations can occur at the hands of private groups and individuals, for example, during times of governmental oppression and during or after rebellion or revolution. See, e.g., African (Banjul) Charter on Human and Peoples' Rights, *supra* note 9, pmb. ("the performance of duties on the part of everyone"), arts. 27-29; American Convention on Human Rights, *supra* note 9, arts. 29(a), (d), 32; ICCPR, *supra* note 11, pmb. ("the individual, having duties to other individuals and to the community to which he belongs"), art. 5(1) (the treaty cannot be interpreted to imply "for any . . . group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant"), 14(1) ("obligations" of all persons can be addressed in a court of law); Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 26, art. 17 ("Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."); Universal Declaration, *supra* note 1, art. 29(1) ("[e]veryone has duties to the community"); American Declaration of the Rights and Duties of Man, *supra* note 9, pmb. ("duty [owed] by each individual . . . Rights and duties are interrelated in every social and political activity . . . Duties of a juridical nature . . . duty of man"); Human Rights Comm., General Comment No. 20, ¶ 2, U.N. Doc. CCPR/C/21/Rev.1 (Oct. 3, 1992), reprinted in *International Human Rights Instruments*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (May 27, 2008) (interpreting torture and cruel, inhuman, and degrading treatment under ICCPR Article 7 as prohibited, "whether inflicted by people acting . . . in a private capacity"); BUERGENTHAL ET AL., *supra* note 1, at 52, 128, 177-79; CHEN, *supra* note 16, at 78, 207-08, 232 ("all persons" have duties regarding genocide); HANNUM, ANAYA & SHELTON, *supra* note 1, at 151 (noting that private duties were not defined but their existence was recognized in Article 29 of the Universal Declaration),

humanity under customary international law, for which there is universal jurisdiction.⁴⁹ Moreover, such a strategy of denial of self-determination and human rights through the use of armed force can be threatening to international peace and international security, both of which are also listed among relevant purposes of the United Nations Charter.⁵⁰

Importantly, the authoritative 1970 Declaration on Principles of International Law expressly affirmed that the Charter prohibits “any forcible action” by a state that “deprives peoples . . . of their right to self-determination”⁵¹ Similarly, the 1974 Definition of Aggression adopted by the United Nations General Assembly reiterated “the duty of States not to use armed force to deprive peoples of their right to self-determination” and affirmed that violations of such duty constitute international crimes of aggression or offenses against peace.⁵² The end of governmental aggression against certain governments’ own people during the Arab Spring not only ended such forms of illegal force and oppression against those people, but also served overall international peace and security.

E. The Right of Rebellion or Revolution

A significant number of scholars have recognized that “the right of a people to revolt against tyranny is now a recognized principle of international law.”⁵³ As noted elsewhere,

166 (duties were recognized in the American Declaration); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 163, 174-79 (1988); McDUGAL, LASSWELL & CHEN, *supra* note 1, at 96-107, 585, 587, 807-10; THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 34 (1987); Paust, *The Reality of Private Rights and Duties*, *supra* note 2, at 1242-43; Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992).

49. For more information about crimes against humanity involving attacks against civilians, see, for example, Jordan J. Paust, *The International Criminal Court Does Not Have Complete Jurisdiction Over Customary Crimes Against Humanity and War Crimes*, 43 J. MARSHALL L. REV. 681, 684-97 (2010); *supra* note 36.

50. See U.N. Charter, art. 1, para. 1.

51. See Declaration on Principles of International Law, *supra* note 15.

52. See Definition of Aggression, G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142, (1975). For a discussion concerning early recognition that private individuals can be criminally sanctioned for acts of aggression and other offenses against peace, see, for example, Henfield’s Case, 11 F. Cas. 1099, 1108-15, 1117, 1118, 1120 (C.C.D. Pa. 1793) (No. 6,360) (Wilson, J., charge to grand jury) (regarding a relevant “duty of humanity,” “acts of hostility” and “aggression,” and crimes against “peace”); Territorial Rights—Florida, 1 Op. Att’y Gen. 68, 69 (1797) (“an offence against the law of nations” and “the peace of mankind”); Breach of Neutrality, 1 Op. Att’y Gen. 57, 58 (1795) (offense “against the public peace”).

53. Gerald Sumida, *The Right to Revolution: Implications for International Law and World Order*, in POWER AND LAW: AMERICAN DILEMMA IN WORLD AFFAIRS 130, 134 (Charles A. Barker ed., 1971), reprinted in MYRES S. McDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE - THE PUBLIC ORDER OF THE WORLD COMMUNITY 176, 168 (1981); accord Antonio Cassese, *Terrorism and Human Rights*, 31 AM. U. L. REV. 945, 946-47 (1982); Edward Collins, Jr. & Timothy M. Cole, *Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide*, 5 J. INT’L L. & PRAC. 199, 210 (1996); Adama Dieng, *Role of Judges and Lawyers in Defending the Rule of Law*, 21 FORDHAM INT’L L.J. 550, 551 (1997); Alejandro Lorite Escorihuela, *Humanitarian Law and Human Rights Law: The Politics of Distinction*, 19

[T]he right of revolution is an important international precept and a part of available strategies for the assurance both of the authority of the people as the lawful basis of any government and of the process of national self-determination. Under international law, the permissibility of armed revolution is necessarily interrelated with legal precepts of authority and self-determination, as well as with more specific sets of human rights. For example, the right to change a governmental structure is necessarily interrelated with the question of the legitimacy of that structure in terms of the accepted standard of authority in international law and with the precept of self-determination, both of which are interrelated and are also interconnected with human rights of individuals to participate in the political processes of their society.⁵⁴

These international precepts also limit the permissibility of rebellion or revolution. For example, the rights of revolution and self-determination are rights of the people; therefore, they are rights that are often exercised by

MICH. ST. J. INT'L L. 299, 349–51 (2011); Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT'L HUM. RTS. 2, 4 (2004); Tony Honoré, *The Right to Rebel*, 8 OXFORD J. LEGAL STUD. 34 (1988); M. Rafiqul Islam, *Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville in International Law*, 13 U. HAW. L. REV. 453, 473 (1991); Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 13 n.53 (2003); David Kopel et al., *Is Resisting Genocide a Human Right?*, 81 NOTRE DAME L. REV. 1275, 1325 (2006) (citing JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING AND INTENT* 307–12 (1999)); Matthew Lippman, *The Right of Civil Resistance Under International Law and the Domestic Necessity Defense*, 8 DICK. J. INT'L L. 349 (1990); Jordan J. Paust, *The Human Right to Participate in Armed Revolution and Related Forms of Social Violence: Testing the Limits of Permissibility*, 32 EMORY L.J. 545, 560–70 (1983); Quincy Wright, *Subversive Intervention*, 54 AM. J. INT'L L. 521, 529 (1960) (“international law recognizes the right of revolution”); see also Definition of Aggression, *supra* note 52, art. 7 (recognizing “the right to self-determination . . . of peoples forcibly deprived of that right” and “the right of these peoples to struggle to that end”); Declaration on Principles of International Law, *supra* note 15 (peoples forcibly deprived of self-determination are entitled to take “actions against, and [in] resistance to, such forcible action in pursuit of the exercise of their right to self-determination, [and] such peoples are entitled to seek and to receive support”); ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 211 (1963) (noting the then “widespread view that there may now be a legal right of revolution; that is to say, that under the principle of self-determination the peoples of a territory must be allowed—if absolutely necessary by forceful means—to replace the government by one of their own choice.”); TESÓN, *supra* note 34, at 5 (addressing permissible intervention when people “are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government”); Karima Bennouna, *Toward A Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 201 n.144 (2004) (the preamble of the Universal Declaration “may be read to implicitly reserve the possibility of resort to armed force”); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 45 (1993) (“some reaction against oppression is undoubtedly justified; even the Universal Declaration of Human Rights refers to ‘rebellion against tyranny and oppression’”); Natalie Oman, *The ‘Responsibility to Prevent’: A Remit for Intervention?*, 22 CAN. J. L. & JURISPRUDENCE 355, 360 (2009) (noting that if a state “fails to execute its redefined responsibility to protect . . . the populace has a legitimate right of revolution”); Bereket Habte Selassie, *Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience*, 29 COLUM. HUM. RTS. L. REV. 91, 99 (1997) (“[A] violation of human rights may give rise to a ‘just rebellion.’”).

54. Paust, *supra* note 53, at 562.

a majority or in their name against an oppressive minority elite.⁵⁵ Yet, the majority should seek to “ensure authoritative government, political self-determination, and the human rights of all members of the community equally and freely to participate.”⁵⁶ Also, international law places limits on the methods and means of violence and the types of treatment of human beings that must be considered when addressing the propriety of private individual and group participation in rebellion or revolution and in post-rebellion or post-revolution processes.⁵⁷ The legitimacy of a rebellion or revolution does not legitimize the use of certain tactics or conduct that are absolutely proscribed under international law.⁵⁸ Of particular importance during and after the Arab Spring is the need to protect fundamental universal rights of women to dignity and equality and their absolute, non-derogable, and peremptory jus cogens rights to freedom from torture and cruel, inhuman, and degrading treatment⁵⁹ at the hands of radical fundamentalists.⁶⁰ Effective protection of women’s human rights will require continued affirmation of (1) the existence of human rights duties of private groups and persons,⁶¹ and (2) the primacy of fundamental universal and peremptory jus cogens rights of women over contradictory claims in the name of the limited right to practice one’s religion.⁶²

55. *Id.* at 567.

56. *Id.* at 566, 569-70.

57. See BUERGENTHAL ET AL., *supra* note 1; Paust, *supra* note 53, at 578-80; see also Daniel H. Derby, *A Democratic Response to Foreign Political Offenses: The Need for Legislation to Counter Anti-Terrorism Excesses*, 1 *TOURO J. TRANSNAT'L L.* 1, 26 (1988); Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 *VT. L. REV.* 461, 489 (1992); Patricia Y. Reyhan, *Genocidal Violence in Burundi: Should International Law Prohibit Domestic Humanitarian Intervention?*, 60 *ALB. L. REV.* 771, 780-84 (1997); Travis, *supra* note 36, at 141 (affirming international duties to prevent, promote, and protect the right to rebellion, but also warning of potentially dire consequences, especially for women, if, “after the flight of many middle-class secularists and religious minorities” and impermissible social violence, post-revolution elections “will be swept by the best-funded and organized radical theocratic groups,” who engage in violations of human rights and self-determination).

58. For example, the legitimacy of a self-determination struggle does not legitimize tactics that violate non-derogable human rights or are designed to result in the impermissible terrorization of others or related crimes against humanity. See, e.g., Jordan J. Paust, *Terrorism’s Proscription and Core Elements of an Objective Definition*, 8 *SANTA CLARA J. INT’L L.* 51, 52, 59-60 (2010). With respect to armed rebellion and revolution, conduct that is not intended to produce terror and does not result in terror should not be labeled terrorism. See *id.* at 58-59. For this reason, mere opposition to an illegitimate regime through selective acts of violence is not terrorism.

59. For a discussion concerning the non-derogable and jus cogens nature of such absolute human rights, see, for example, ICCPR, *supra* note 11, arts. 4(2), 7; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702(d), § 702 cmts. a, n (1987); Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 *VAL. U. L. REV.* 1535 (2009).

60. See, e.g., Bennoune, *supra* note 26, at 677 (women are “often swallowed by what is considered ‘culture’ or disappeared by what is called ‘religion’”), 696 (international lawyers need to recognize both “state and non-state forms of coercion of women”).

61. For a discussion concerning the existence of private duties under treaty-based and customary human rights law, see, for example, *supra* notes 2-3, 48, 60.

62. Freedom from distinction on the basis of sex or religion is recognized in Articles 1(3) and 55(c) of the United Nations Charter, but the human right to freedom of relig-

II. Regime Change in Libya and Self-Determination Assistance to the People of Libya

In March 2011, the United States and other members of NATO began a campaign using significant military force in Libya that clearly amounted to participation in an international armed conflict under international law.⁶³ In Resolution 1973, the United Nations Security Council authorized the use of military force to protect civilians and civilian-populated areas.⁶⁴ The Security Council has authority to authorize enforcement measures under Articles 39 and 42 of the United Nations Charter in response to “any threat to the peace, breach of the peace, or act of aggression.”⁶⁵

ion is expressly subject to limitations, for example, “the fundamental rights and freedoms of others.” ICCPR, *supra* note 11, art. 18(3); see also Universal Declaration, *supra* note 1, art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject . . . to such limitations . . . determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . .”). Additionally, the exercise of religion is subject to limitations required by peremptory rights and duties *jus cogens*, such as the right to freedom from torture and cruel, inhuman, and degrading treatment. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, *supra* note 59, § 702(d). The Arab Charter on Human Rights recognizes the equal dignity and general equality of men and women, but adds an ambiguous phrase concerning “the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments.” Arab Charter on Human Rights, *supra* note 9, art. 3(3). It should be noted, however, that such a potentially limiting phrase cannot limit the reach of the United Nations Charter (which, under Article 103 of the Charter, must prevail over any inconsistent international agreement), global rights and duties under the ICCPR, or customary human rights *jus cogens* (which will prevail over any inconsistent international agreement). Also, the preamble to the Arab Charter reaffirms “the principles of the Charter of the United Nations, the Universal Declaration of Human Rights and the provisions of the International Covenant on Civil and Political Rights,” and Article 43 of the Arab Charter expressly states that “[n]othing in this Charter may be construed or interpreted as impairing the rights and freedoms . . . set forth in the international . . . human rights instruments which the states parties have adopted or ratified, including the rights of women.” Arab Charter on Human Rights, *supra* note 9, art. 43.

63. See, e.g., Jordan J. Paust, *Constitutionality of U.S. Participation in the United Nations-Authorized War in Libya*, 26 EMORY INT’L L. REV. 43, 43-45 (2012); Elisabeth Bumiller & David D. Kirkpatrick, *Allies Pressure Qaddafi Forces Around Rebel Cities*, N.Y. TIMES (Mar. 23, 2011), <http://www.nytimes.com/2011/03/24/world/africa/24libya.html>; Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES (June 20, 2011), <http://www.nytimes.com/2011/06/21/world/africa/21powers.html>; Press Release, U.S. Dep’t of State Legal Advisor Harold Hongju Koh, Statement Regarding Use of Force in Libya (Mar. 26, 2011), available at <http://www.state.gov/s/l/releases/remarks/159201.htm> (“U.S. forces have targeted the Qaddafi regime’s air defense systems, command and control structures, and other capabilities of Qaddafi’s armed forces used to attack civilians and civilian populated areas.”).

64. S.C. Res. 1973, *supra* note 36, ¶ 4 (expressly authorizing “[m]ember States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”). The Resolution also noted “the escalation of violence, and the heavy civilian casualties” and the “widespread and systematic attacks currently taking place” in Libya. *Id.* pmb1. The Security Council also condemned “the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions.” *Id.*

65. See U.N. Charter, arts. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles

With respect to Libya, the Council decided that attacks on and continued threats to civilians and civilian-populated areas in Libya “continue[d] to constitute a threat to international peace and security”⁶⁶ and the Council decided to authorize all necessary measures of protective force, including creation of a no-fly zone.⁶⁷

Later in 2011, the United States and other members of NATO continued to use armed force in Libya and it grew from protection of civilians to support for rebel forces, which contributed to rebel control of Tripoli and regime change some seven months after NATO members’ use of armed force had begun.⁶⁸ Over this period of months, it became reasonably necessary to provide support for regime change in Libya to effectively protect civilians who were under a series of murderous armed attacks and serious threats of imminent future attacks by the Qaddafi regime. In addition to the United Nations Security Council authorization to use all necessary measures of protective force, which covered the subsequent need to support regime change to protect civilians from armed attacks, during later stages of the Libyan armed conflict there was a change in the international legal status of the Libyan rebel-insurgents to belligerents, and they con-

41 and 42, to maintain or restore international peace and security.”), 42 (the Security Council “may 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 . . . blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

66. S.C. Res. 1973, *supra* note 36, pmbl.

67. *Id.* ¶¶ 6-8. Because “all necessary measures” had been authorized, it would be improper to claim that the Security Council had only authorized the creation of a no-fly zone.

68. See, e.g., Thom Shanker and Eric Schmitt, *Seeing Limits to ‘New’ Kind of War in Libya*, N.Y. TIMES (Oct. 21, 2011), <http://www.nytimes.com/2011/10/22/world/africa/nato-war-in-libya-shows-united-states-was-vital-to-toppling-qaddafi.html#> (U.S. predator drone “helped to guide a French warplane to attack Colonel Qaddafi’s convoy”); Eric Schmitt & Steven Lee Myers, *Sharper Surveillance and NATO Coordination Helped Rebels Race to Capital*, N.Y. TIMES (Aug. 22, 2011), <http://www.nytimes.com/2011/08/22/world/africa/22nato.html> (stating that the United States provided intensified aerial surveillance in and around Tripoli during the rebel takeover of Tripoli, NATO coordinated with the rebels, and “[t]hrough Saturday, NATO and its allies had flown 7,459 strike missions . . . attacking thousands of targets”); Larry Shaughnessy, *U.S. Has Nearly Doubled Air Attacks on Libya in Past 12 Days*, CNN (Aug. 23, 2011), http://articles.cnn.com/2011-08-22/politics/us.libya.costs_1_attacks-civilians-libyan-mission?_s=PM:POLITICS (“[t]here was an average of 1.7 strike sorties a day from April 1 to August 10, compared with 3.1 strike sorties in the past 12 days” and attacks by predator drones has more than doubled); Jim Garamone, *Situation Fluid, but Gadhafi Regime Nears End, Obama Says*, U.S. DEP’T OF DEFENSE (Aug. 22, 2011), <http://www.defense.gov/news/newsarticle.aspx?id=65104> (“More than 5,300 American sorties have been flown as part of Operation Unified Protector; 1,210 were strike sorties and 101 were Predator unmanned aerial vehicle strikes. The targets included air defenses, arms caches and ground forces.”). The General in command of NATO’s air operation in Libya has noted that selective use of force by NATO involved continual protection of civilians and civilian-populated areas from armed attacks by pro-Qaddafi forces (PGF). Anti-Qaddafi forces (AGF) were not attacked because “[w]e saw when the . . . [AGF] entered towns, they liberated the town and the people. They did not indiscriminately attack civilians and in fact, kept the civilians away from any of the fighting between the AGF and PGF.” E-mail from Lieutenant General Ralph J. Jodice II to author (Apr. 20, 2012, 09:50 CST) (on file with author).

sented to and welcomed U.S. and NATO uses of force.⁶⁹ Still later, the Libyan National Transitional Council (NTC) gained recognition as the legitimate representative of the Libyan people,⁷⁰ and its consent provided additional independent legitimacy for the use of force to support regime change, provide self-determination assistance to the Libyan people, and participate in collective self-defense⁷¹ against continuous armed attacks by remnants of the Qaddafi regime.

Self-determination assistance can be permissible under international law.⁷² The 1970 Declaration on Principles of International Law affirms that self-determination assistance can be permissible under the United Nations Charter when recognizing that “[i]n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples [seeking self-determination] are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.”⁷³ Moreover, the 1970 Declaration implies that the territorial integrity of states can be disrupted if they do not conduct themselves in compliance with the principle of equal rights and self-determination of peoples.⁷⁴ The 1974 Declaration of Aggression also seems to allow for the right of a people to self-determination assistance by declaring that “[n]othing in this definition . . . could in any way prejudice the right to self-

69. Paust, *supra* note 63, at 43 n.4.

70. For sources discussing the recognition in July 2011 by thirty-two countries (including the United States) of the NTC as “the legitimate governing authority in Libya,” see, for example, Press Release, Republic of Turk. Ministry of Foreign Affairs, Fourth Meeting of the Libya Contact Group Chair’s Statement (July 15, 2011), available at http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_15-july-2011_istanbul.en.mfa; see also William Wan & William Booth, *Libyan Rebels Given Full U.S. Recognition*, WASH. POST, June 16, 2011, at A9; Stefan Talmon, *Recognition of the Libyan National Transitional Council*, 15 ASIL INSIGHTS (June 16, 2011), available at <http://www.asil.org/insights110616.cfm>. With respect to recognition of the NTC of Libya and Security Council encouragement of the NTC (or “the Libyan authorities”) to implement its plans, for example, to protect Libyan civilians, restore governmental services, prevent violations of human rights, and ensure an inclusive political process involving free elections, see, for example, S.C. Res. 2009, *supra* note 36, ¶¶ 5, 7.

71. See Paust & Blaustein, *supra* note 47, at 11–12 n.39 (“Contextual reality and the serving of all goal values require a new reading of article 51 of the Charter” where a given people are denied self-determination by an oppressive elite using military force, “especially in the light of massive violations of human rights of their people. Outside states cannot precipitate violence, but where an armed attack has occurred against a people seeking self-determination it is not improper to assist those being attacked.”) (parentheses omitted). Recognition of the right of self-defense and collective self-defense of a people entitled to self-determination who are under armed attack is all the more appropriate given that such peoples have formal participatory roles in the international legal process. Moreover, international law and international relations have never been merely state-to-state. With respect to documentation of these facts, see, for example, Paust, *Nonstate Actors*, *supra* note 2, at 979–81, 1000. International relations also recognizably exist once a status of belligerency is reached. At such a moment at least, all of the customary laws of war are applicable. *Id.* at 981 n.7.

72. See, e.g., Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT’L L.J. 533, 547–48 (2002).

73. Declaration on Principles of International Law, *supra* note 15.

74. Declaration on the Principles of International Law, *supra* note 15; see Paust & Blaustein, *supra* note 47, at 19–20 n.69.

determination . . . of peoples forcibly deprived of that right . . . nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter . . . ”⁷⁵

In 1984, the United Nations General Assembly responded to the illegal regime in South Africa by affirming the permissibility of self-determination assistance and “recognizing the legitimacy of [the people of South Africa’s] struggle to eliminate *apartheid* and establish a society based on majority rule with equal participation by all the people of South Africa,”⁷⁶ urging “all Governments and organizations . . . to assist the oppressed people of South Africa in their legitimate struggle for national liberation,”⁷⁷ and condemning “the South African racist regime for . . . persisting with the further entrenchment of *apartheid*, a system declared a crime against humanity and a threat to international peace and security.”⁷⁸

With respect to Libya and other countries in Africa, the African Charter on Human and Peoples’ Rights provides additional support for some forms of self-determination assistance. As the African Charter affirms, “[O]ppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community,”⁷⁹ which would include rebellion or revolution, and “[a]ll peoples shall have the right to assistance of the States parties to the present Charter in their liberation struggle against foreign domination, . . . ”⁸⁰

As I noted previously,

Various . . . Security Council resolutions and international instruments and decisions indicate that use of force to overthrow a foreign government and to provide self-determination assistance to a people is not absolutely impermissible under the [United Nations] Charter.⁸¹ However, permissibility must rest on a relatively free will of a given people and their request for assistance, unless there is an independent basis for support in an authoritative Security Council or regional authorization.⁸²

Conclusion

Various individuals and groups during the Arab Spring have reaffirmed international expectations regarding individual dignity and worth; self-determination of peoples; human rights with respect to relatively free and genuine participation in governmental processes and the standard of legitimacy for governments; democracy as a universal core value; and the

75. Definition of Aggression, *supra* note 52, art. 7.

76. Situation in South Africa, G.A. Res. 39/2, pmb., U.N. Doc. A/RES/39/2 (Sept. 28, 1984).

77. *Id.* ¶ 7.

78. *Id.* ¶ 3.

79. African (Banjul) Charter of Human and Peoples’ Rights, *supra* note 9, art. 20(2).

80. *Id.* art. 20(3).

81. See Paust, *supra* note 72, at 548 n.72.

82. *Id.* at 548. For information concerning the propriety of certain forms of regional action authorized by regional organizations under Article 52 of the United Nations Charter, such as NATO, the OAS, the OAU, and the Arab League, see, for example, *id.* at 545-47.

right of rebellion or revolution against an oppressive government and the concomitant right of a given people to seek self-determination assistance. Efforts to achieve each are still unfolding, as they progress in all sectors of the human community. In fact, their effectuation is not merely an outcome at a given social moment, but rather a process involving the evolution of human relations. More generally, human dignity and democratic freedoms must be continually nurtured through affirmative, optimistic involvement with others.

