

International Law, NATO's Campaign to Kill Gaddafi and the Need for a New *Jus Cogens*

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How to cite this paper: McNamara, T. S. (2018). International Law, NATO's Campaign to Kill Gaddafi and the Need for a New *Jus Cogens*. *Beijing Law Review*, 9, 499-523.

<https://doi.org/10.4236/blr.2018.94030>

Received: June 22, 2018

Accepted: September 22, 2018

Published: September 25, 2018

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Abstract

This essay surveys general and topical literature to place the NATO campaign against Gaddafi in a historical context. The history of war as a legal idea is examined, along with the practical limitations to applying “international law” as currently espoused. The essay finds both serious practical and philosophical shortcomings inherent in modern approaches and advocates the development of a new *jus cogens* based on the Right to be Protected (R2BP) to address these flaws. If successfully implemented, the R2BP would represent a fundamental shift in sovereignty away from States and towards citizens, albeit vested in a professionalized United Nations office.

Keywords

Libya Model, Just War, International Law, R2P, R2BP

1. Introduction

Trite commentary by political and legal analysts that a particular war is “legal” or “illegal” is now commonplace. Yet what is international law and, if the US-led 2002 invasion of Iraq really was illegal, then why is GW Bush not in jail? These and other questions point to the difficulty in establishing international law *qua* law. The primary purpose of this essay is to provide an overview of international law as it purports to be before applying it to the facts surrounding the NATO bombing of Libya in 2011.

2. Research Background

On March 17, 2011, ostensibly to avert a humanitarian crisis in the Benghazi area, the United Nations Security Council passed Resolution 1973 effectively authorizing NATO bombings.¹ Six months later, Colonel Gaddafi would be dead

and 5 years later, mass migration of “refugees” to Europe would become a major political issue.

Although the official account of how and why NATO involvement occurred is well known, alternative explanations do exist. One account focuses on a combination of political motives for NATO involvement and, in particular, a desire by the Presidential hopeful and then-US Secretary of State (Hillary Clinton) to show she was “strong” and had achieved something during her tenure²; a desire by the then-President of France (Nicholas Sarkozy) to silence Gaddafi after details of a campaign financing scandal began to emerge³; and a desire by the then-Prime Minister of the UK (David Cameron) to prevent Gaddafi from establishing a Libyan royal family line closely modelled on that of the UK.⁴ The other widely-discussed account focuses on economic motives, generally British, French and American oil interests and, in particular, the US desire to maintain the “petro-dollar”.⁵

In the absence of confessions from the three principal attackers, it is unlikely these alternative explanations will ever be proven/disproven conclusively. Instead, taking inspiration from statistical theory, an overview of the legal rationale will be given and then tested. Here, the “mandated by international law” explanation will be set as the null hypothesis (H0) and this essay will “attempt to prove the null”. If the international law framework fails to provide a satisfactory explanation for these extraordinary events, this may be taken as evidence to support the existence of an alternative explanation (H1), “not mandated by in-

¹UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.

²Micah Zenko, “Hillary the Hawk: A History” (*Foreign Policy*, 27 July 2016)

<<http://foreignpolicy.com/2016/07/27/hillary-the-hawk-a-history-clinton-2016-military-intervention-libya-iraq-syria/>> accessed 26 Feb 2018 and

<https://www.democracynow.org/2016/3/3/the_libya_gamble_inside_hillary_clinton> accessed 26 Feb 2018.

³Kim Willsher, “Gaddafi ‘gave Nicolas Sarkozy € 50 m for 2007 presidential campaign’” (*The Guardian*, 15 Nov 2016)

<<https://www.theguardian.com/world/2016/nov/15/muammar-gaddafi-allegedly-gave-nicolas-sarkozy-50m-euros-2007-presidential-campaign>> accessed 26 Feb 2018.

⁴Alan Howe, “Prince Andrew Duke of York’s good mate Gaddafi” (*Herald Sun*, 14 Sept 2009)

<<http://www.heraldsun.com.au/news/opinion/prince-andrew-duke-of-yorks-good-mate-gaddafi/news-story/da3c6440d94455041bcc0c171dae462c>> accessed 26 Feb 2018. See also Hugh O’Connell,

“Gaddafi wanted to be “like the Queen of England” (*the journal.ie*, 3 October 2011)

<<http://www.thejournal.ie/gaddafi-wanted-to-be-like-the-queen-of-england-243955-Oct2011/>> accessed 26 Feb 2018. It appears that the British press had become much more hostile towards Gaddafi by this point, and much more determined than the Americans to see him removed. Richard

Spencer, “Libya: Col Gaddafi compares himself to the Queen” (*The Telegraph*, 24 Feb 2011)

<<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8346339/Libya-Col-Gaddafi-compares-himself-to-the-Queen.html>> accessed 26 Feb 2018. Even UK left-wing newspapers,

such as the Guardian, took offence to the parallels: Stephen Bates, ‘Don’t mess with the Queen, Muammar!’ (*The Guardian* 28 Feb 2011)

<<https://www.theguardian.com/uk/2011/feb/28/queen-freezes-gaddafi-assets>> accessed 26 Feb 2018.

⁵“Saving the world economy from Gaddafi”, (*RT*, May 5, 2011)

<<https://www.rt.com/news/economy-oil-gold-libya/>> accessed 26 Feb 2018, later partly confirmed by discovery of Hillary Clinton’s e-mails: Brad Hoff, “Hillary E-mails Reveal True Motive for Libya Intervention” (*Foreign Policy Journal*, 6 Jan 2016)

<<https://www.foreignpolicyjournal.com/2016/01/06/new-hillary-emails-reveal-true-motive-for-libya-intervention/>> accessed 26 Feb 2018.

ternational law”.

Finally, the essay concludes with a novel suggestion: the need for a new legal principle to restore international law and thereby avoid such ideological and interest-driven quagmires in the future. Reversing the well-known “responsibility to protect” and introducing instead a new humanitarian law principle, the “right to be protected”, the essay focuses on the interests of third world citizens themselves rather than merely the intersection of first and third world interests. Thus, the new universal right, if found to exist, would not depend upon such externalities as whether or not one is located in a strategic region or a resource-rich area.

3. The Just War

Historical Development

A discussion of the legality/illegality of war should, of course, begin at the beginning. And it appears that the earliest written code comes from Moses in the Old Testament’s Book of Deuteronomy (Chapter 20), which historians have dated to the 13th - 12th centuries BC.⁶ In it, we are told that a city under siege should be offered the chance to surrender and, if accepted, the inhabitants would become the Israelites servants. However, if the city refused to surrender then the Israelites should slaughter all the adult males and take the women and children as slaves together with the property as booty. Although harsh by modern standards, these were relatively benevolent rules which applied only to peoples in distant lands. The conquered peoples within the Promised Land e.g. the Hittites, Amorites and Canaanites etc. were to be eliminated.⁷ The idea of *jus ad bellum* could not arise: God had sanctioned war.⁸

The Greeks established the Western tradition of laws of war, recognised from at least the Archaic period as unwritten rules.⁹ In keeping with ancient Greek and Roman cultures, Pericles referred to violation of these rules as “shameful”.¹⁰ A pledged word must be kept, oaths were sworn to the gods and heralds and temples were sacrosanct.¹¹ Here we have the origins of *jus ad bellum* and *jus in bello*: war should be openly declared and oaths kept as violation would incur punishment from the gods.¹² Likewise, honour proscribed surprise attacks.¹³

In *The Republic* (c. 380 BC), Plato devised a set of rules to limit destruction within the Hellenic sphere which Aristotle presumably responded to with greater detail in his *Just Acts of War* (c. 334 BC). Unfortunately, the latter work has been lost. At a practical level, to the extent Aristotle influenced the behaviour of his pupil Alexander the Great, some of his ideas may be inferred.

⁶<<http://www.historynet.com/making-rules-war.htm>> accessed July 18, 2018.

⁷Ibid.

⁸Ibid.

⁹Ibid.

¹⁰It has often been said that the ancient Greeks and Romans had shame cultures in contrast to the Jewish and Christian guilt cultures. See, for example, Gregory McNamee, “Shame vs Guilt”, (Winter 2015) Vol. 91, Virginia Quarterly Review 197.

¹¹<<http://www.historynet.com/making-rules-war.htm>> accessed July 18, 2018.

¹²Ibid.

¹³Ibid.

Picking up where the Greeks left off, the idea of Just War (*bellum justum*) is most closely associated with ancient Rome.¹⁴ The most famous writer on the subject has been the Roman and early Catholic writer Saint Augustine (354-430 AD) who was strongly influenced by Greek thought and may have had access to some of Aristotle's now lost works.¹⁵ Saint Augustine distinguished between *jus ad bellum* (the right to go to war) and *jus in bello* (right conduct within war). For a state to have the moral right to go to war, he argued that 4 criteria had to be met: Just Authority, Just Cause, Right Intention and Last Resort.¹⁶ As for conduct within the war, the justice of a party's behaviour would be governed by 3 factors: Proportionality, Discrimination and Responsibility.¹⁷ Together, these core principles constitute the Just War doctrine.

Understandably, the doctrine of Just War has been controversial. On a practical level, one can argue both that it has been followed and also that it has not been followed even where there is agreement on the facts. For example, what is the time horizon for measuring the benefit element in a proportionality test? In a world with a rapidly evolving popular consensus on moral values, how does one know one's cause is just?

Inevitably, ideas closely associated with Catholic and natural law thought would not sit well with many Protestants during the Reformation and in his work *On the Law of War and Peace* (1625), the Dutch jurist Hugo Grotius tried to secularize and separate the idea of Just War from its roots.¹⁸ Temporally coinciding with a renewed European emphasis on international treaties and conventions as sources of international norms, the effort was partly successful.¹⁹ However, this period also saw the growth of colonial empires and, hence, renewed concerns relating to civilised vs uncivilised nations and uncertainty over how to develop and apply norms for dealing with primitives.²⁰

This was a new idea of international law, of law as something that went beyond merely affecting the prestige of the honour-bound sovereign. And for much of European history, the idea of military decisions as being subject to law in the strict sense would surely have appeared as quite alien if not downright preposterous. Only a weak sovereign would agree to limit his policy options by

¹⁴Ibid.

¹⁵<Tkacz, M. (2012). St. Augustine's appropriation and transformation of Aristotelian eudaimonia in J. Miller (Ed.), *The Reception of Aristotle's Ethics* (pp. 67-84). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511979873.005> accessed July 17, 2018. Augustine's understanding of Aristotle was been labelled "shaky" and it is said that Augustine's knowledge of Greek was too feeble to allow him to read Aristotle's works directly. F. Bömer, P. Courcelle, H.-I. Marrou, and M. Testard, among others argue that Aristotle relied on Latin translations which are no longer available. See Megino Rodriguez, C. (2016). Topics of Aristotle's Protrepticus in Augustine of Hippo the Transmission of Cicero and the Context of Their Use. *Traditio*, 71, 1-31.

¹⁶<https://oregonstate.edu/instruct/phl201/modules/Philosophers/Augustine/augustine_justwar.html> accessed July 18, 2018.

¹⁷Ibid.

¹⁸<<http://www.historynet.com/making-rules-war.htm>> accessed July 18, 2018.

¹⁹Ibid.

²⁰Ibid.

subjecting himself to a court he did not control and, indeed, it was understood as a principle of international law that a sovereign could not be sued in his own court, or another's court, as all sovereigns were equal.

As the world modernized and power was gradually wrested from hereditary sovereigns to elected representatives, and as society itself became increasingly meritocratic and less religious, perhaps it was inevitable that the sovereign's immunity would come to be doubted.

The historical tipping point may have been the changed nature of modern warfare. For the survivors, the events of The Great War (1914-1918) and its aftermath must surely have come as a tremendous shock. In Europe, the WWI death toll was over 18 million with an additional 23 million wounded.²¹ This was quickly followed by an associated "Spanish Flu" which killed another 20 - 40 million worldwide.²² (In contrast, industrial Europe's previous disaster, the Napoleonic Wars, had only resulted in 5 million deaths.²³) One reaction to the death toll was an affirmed isolationism within the United States²⁴ and a loss of prestige for Europe's ruling elites. The other was a worldwide "never again" movement focused on a novel idea: to make war illegal.

Although the League of Nations ultimately failed to prevent war from re-occurring, it did lay the intellectual groundwork for much of what is now referred to as "international law" including the Kellogg-Briand Pact (1928), the post-WWII military tribunals, the ICJ, the ICC, *jus cogens*, and the Responsibility to Protect (R2P) doctrine.

In order to discuss the legality/illegality of war, and why such a paradigm is problematic, it is necessary to first review the key concepts and tools to which pundits refer. We will now briefly consider the key sources which "international lawyers" typically cite when discussing international law as it relates to war.

4. A Modern Framework of International Law

...no one knows where *jus cogens* comes from, no one knows whether or how or why it is part of international law, no one knows its content, no one knows how to modify it once it is articulated, and indeed no one knows whether it even exists (although it is certainly talked about a lot).²⁵ Anthony D'Amato

4.1. Humanitarian Law (the Law of War)

International humanitarian law has its origins in the customs and practices of armies in times of war.²⁶ Its contents included prohibitions on behaviour that

²¹<http://necrometrics.com/20c5m.htm> accessed 26 Feb 2018.

²²<https://virus.stanford.edu/uda/> accessed 26 Feb 2018.

²³Gates, David (2011) *The Napoleonic Wars* 1803-1815, Random House. See also http://military.wikia.com/wiki/Napoleonic_Wars_casualties accessed 26 Feb 2018.

²⁴<http://www.andycrown.net/isolation.htm> accessed 26 Feb 2018

²⁵D'Amato (2010), "Human Rights as Part of Customary International Law: A Plea for Change of Paradigms", Paper 88 Faculty Working Papers 1 at 7.

<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/88> accessed 26 Feb 2018.

was deemed unnecessarily cruel or dishonourable.²⁷ The driving force behind humanitarian law has been the International Committee of the Red Cross (ICRC) which initiated the process that led to the Geneva and Hague Conventions.²⁸ The great majority of provisions of the Geneva Convention 1949 are now considered to be part of customary law; and this is also true in regards to the 1907 Hague Regulations.²⁹

4.2. The Vienna Convention

The Vienna Convention on the Law of Treaties (VCLT) was adopted on May 23, 1969 and entered into force on January 27, 1980. It is the “treaty on treaties” and is said to provide the authoritative guide as to the formation and effects of treaties.

Article 1 of the Vienna Convention restricts application of the VCLT to treaties between Member States. In other words, treaties between States and international organizations are not covered by the VCLT. But this is not stated explicitly and is instead done indirectly and implicitly, by limiting membership. To control access to the benefits of membership, Article 81 limits membership to those who are already State Members of the United Nations, the International Court of Justice or a few other specialized agencies.

Vienna Convention Articles 53 and 64 do not define *jus cogens* but they do, purportedly, establish its character as a peremptory norm. From the historical context (i.e. 1969 was the height of the Vietnam War) we may recall that developing and socialist states supported the idea of *jus cogens* when the Vienna Convention was being drawn up, as they hoped that the law would put them on an equal footing with powerful, developed countries.³⁰

4.3. Customary vs Conventional International Law

It is said that there are two sources of public international law: custom and convention.³¹ Conventional international law is governed by the Vienna Convention.³² Customary international law has three sources: 1) state practice and acknowledged obligation, 2) the judgments of domestic and international tribunals and 3) the general principles of law recognised by civilised nations and the teachings of the most highly qualified publicists.³³

The relationship between custom and convention is complex and open to analytical confusion. While the two are generally thought of as separate sources of law, any division between them is not so simple.³⁴ As Professor Bilder points

²⁶ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in> accessed 26 Feb 2018.

²⁷Ibid.

²⁸Ibid.

²⁹Ibid.

³⁰Gulgec (2017), “The Problem of *Jus Cogens* from a Theoretical Perspective”, 66(1) Ankara Un-iHukukFak. Dergisi, 73 at 84.

³¹Brooklyn For Peace, Conventional and Customary International Law, *International Law Fact Sheet*, International Law Committee, <<http://brooklynpeace.org/>> p. 1. accessed Feb 26 2018.

³²Ibid.

³³Ibid.

out, sometimes treaty law codifies a pre-existing customary law while at other times a treaty may give rise to a new and continuing custom, even if the treaty itself is later abandoned.³⁵ At still other times the treaty may hinder the development of custom or supersede the customary international law.³⁶ Thus, one cannot say generally which came first or even how they co-exist.

Customary and treaty law are also competitors.³⁷ The ICJ in the *Nicaragua*³⁸ case essentially said that a conventional rule could be superseded by a customary rule³⁹ and it is submitted this is inherently disturbing. The reason this is so disquieting is that, traditionally, such rules were always voluntary insofar as states chose to sign treaties or, through continuous and consistent state practice, they chose to be bound by customary norms.⁴⁰ If one is to draw an analogy to contract law, within the common law tradition, third party rights and obligations can only arise through legislation. It is difficult to see the Vienna Convention as being analogous to “legislation” or why new States/states that refuse to be bound by the pre-existing rules should be regarded as “renegades”.

There are two long-established sources of customary norms: state practice and *opinio juris*.⁴¹ Customary international law depends upon the consent of states: this can be explicit or implicit (i.e. the state does not object).⁴² However, for new states, they must accept the customary rules as they exist: it does not matter that they were in no position to object when the rules were being formed.⁴³

The non-traditional scholarship has created a hierarchy of obligations based on their contents, rather than the process by which they were created.⁴⁴ Some of these scholars have suggested there is also declarative international law⁴⁵ i.e. a pre-customary law developing from verbal expressions rather than behaviour.⁴⁶ When there is a lack of contrary *opinio juris* and the situation calls for it, tribunals such as Nuremberg and *Nicaragua* have sometimes been able to invent i.e. “discover” a necessary customary law.⁴⁷ As well, it is suggested that resolutions of the General Assembly of the UN could fit into this category.

Conventional international law finds its source in international conventions,

³⁴Richard B Bilder et al., “Disentangling Treaty and Customary International Law” (April 8-11, 1987) Vol. 81 Proceedings of the Annual Meeting (American Society of International Law), 157 at 157.

³⁵Ibid 157.

³⁶Ibid 157.

³⁷Ibid 158.

³⁸*Case Concerning Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports (1986).

³⁹Bilder, (n 34) 158.

⁴⁰Ibid 159.

⁴¹Baker (2010) “Customary International Law in the 21st Century: Old Challenges and New Debates” Vol 21, issue 1 European Journal of International Law 173 at 174.

⁴²Ibid 176.

⁴³Ibid 176.

⁴⁴Ibid 175.

⁴⁵Hiram Chodosh, “Neither Treaty nor Custom: The Emergence of Declarative International Law” (1991) 26 Texas International Law Journal 87 at 90.

⁴⁶Daniel Bodansky, “Customary (and Not So Customary) International Environmental Law” (1995-1996) 3 Indiana Journal of Global Legal Studies 105.

⁴⁷<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in> accessed Feb 26 2018.

whether particular or general.⁴⁸ Bilateral treaties are only binding on the signatories although they can give rise to customary law between them. It is said that multilateral treaties, however, can sometimes transform into sources of customary law binding on all states, even if there were a few non-signatories.⁴⁹ However, this view is controversial⁵⁰ and it is not clear how many non-signatory objectors would be required to foil the establishment of a customary rule.

The traditional view held that it is a fundamental concept of treaties that they cannot bind third parties.⁵¹ Therefore, they would also be unable to bind third parties under customary law.⁵² Another advantage of conventional norms is that they are more precise than customary norms.⁵³

4.4. Institutional Sources of *Opinio Juris*

If we accept the premise that international law is real, then we must consider the sources of legal opinions and a key difference between customary and conventional law is that the former relies on *opinio juris* as a distinguishing factor. Aside from academia and domestic courts, the main historical and existing institutional bodies are the post-WWII War Crimes Tribunals, the United Nations, the ICJ, the ICTY, the ICTR, and the ICC. We shall examine the main contributions of each in turn. Unfortunately, however, the mistake of one activist judge often leads to another and doctrine quickly becomes law.

4.5. The United Nations

The United Nations was founded in 1945 in response to WWII and its primary purpose was to ensure such a calamity would not re-occur. Unlike the ill-fated League of Nations, majority rather than unanimous votes are generally sufficient in order for measures to pass. Importantly as well, greater deference is given to the “heavy lifters” as there are 5 Permanent Members of the Security Council who carry veto powers over resolutions that would authorize the use of force. While the UN, as an institution, appeals to the idealistic impulses of lawyers, it must be recognised that the procedural safeguards in place, such as the veto powers of the permanent Security Council members, help to ensure that important UN policies generally incorporate *realpolitik* concerns.

Some scholars, such as Tunkin, wished for the Charter of the United Nations to be accepted by international lawyers as a kind of “constitution” of the international community.⁵⁴ I would argue that, unfortunately, they have largely succeeded.

⁴⁸Baker, (n 41) 177.

⁴⁹Baker, (n 41) 177.

⁵⁰See my comments above on the common law.

⁵¹Bilder, (n 34) 161.

⁵²Bilder, (n 34) 161.

⁵³Tunkin (1993), “Is General International Law Customary Law Only?” 4 *EJIL* 534 at 540.

⁵⁴*Ibid* 541. One of the problems, it is submitted, is that just as there is no international legal licensing system, so too there is no international law proper. Instead, a system of domestic licensing tends to foster domestic conceptions of natural law i.e. “the Good” onto an international setting. In the European context we can see how EU law offers a mishmash but democratically tends towards civil

4.6. Post-WWII Military Tribunals

The International Military Tribunal (IMT) at Nuremberg was created in 1945 to prosecute (German) individuals for “crimes against peace”, “war crimes” and “crimes against humanity”. This was followed in 1946 by the International Military Tribunal for the Far East (IMTFE) at Tokyo which prosecuted Japanese war criminals. In the 1990’s, special tribunals were created to deal with developments in Rwanda (ICTR) and the former Yugoslavia (ICTY). Unlike the IMT and IMTFE, the later tribunals have the advantage of being generally free from *ex-post facto* and victor’s justice accusations. New crimes have also been recognised, to wit, “grave breaches of the Geneva Convention of 1949”, “violations of the laws or customs of war”, and “genocide”.⁵⁵

4.7. International Court of Justice (ICJ)

The ICJ was established in 1945 to adjudicate State-to-State disputes. International law comes primarily from Article 38(1) of the ICJ statute.⁵⁶

In the *Nicaragua* case, due to the US reservation (i.e. the Vandenberg reservation) the Court could not rely on the UN Charter for its authority and was therefore compelled instead to base its decision on customary and general principles of international law regarding the use of force.⁵⁷ The Court held that the prohibition on the use of force contained in the UN’s Charter Article 2(4) had attained the status of a *jus cogen* norm.⁵⁸ However, identifying a customary international law in this way is ambiguous because of the very nature of its designation.⁵⁹

Nicaragua claimed that the US had violated the international rule prohibiting the use of force between States. The Court ruled in Nicaragua’s favour, even though the US had withdrawn from the proceedings after it had had its challenge to the Court’s jurisdiction rejected.⁶⁰

The only caveat established in *Nicaragua* is that there must be no inconsistent practice (as opposed to the holding in the *North Sea*, in which the Court had

and Catholic rather than common law and Protestant solutions. On some level, reaction against this imposed system and its values may have been a factor in the UK’s Brexit decision.

⁵⁵As even Cherif Bassiouni notes, however, “acceptable terminology” in this area changes over time. See Bassiouni (1983), ‘The Penal Characteristics of Conventional International Criminal Law’ Vol. 15 Issue 1 Case Western Reserve Journal of International Law 27 at 31.

⁵⁶Arajärvi (2011), “The Lines Begin to Blur? Opinio Juris and the Moralisation of Customary International Law” (Mar. 2011) 17 <http://www.ssrn.com/abstract=1823288>. See also, <<https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/AGuidetotheBasicsofIntlLaw.pdf>> accessed 26 Feb 2018.

⁵⁷Nicaragua vs United States: An Analysis of the Jurisprudence Relating to Customary International Law (2 of 2)

<<https://ruwanthikagunaratne.wordpress.com/2014/03/19/nicaragua-case-summary/>> accessed 26 Feb 2018.

⁵⁸Ibid.

⁵⁹Jean d’Aspremont, (2013) *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, OUP 162.

⁶⁰<<http://www.icj-cij.org/docket/>> accessed 26 Feb 2018.

Baker, (n 41) 179.

said there needed to be consistent State practice). In the *North Sea*, the Court held that there had to be some showing of *opinio juris* establishing that the behaviour observed had transformed the conventional norm into a customary one.⁶¹

The best way to understand the *Nicaragua* decision is to recall that 1) the Court is politicized even when it tries to appear not to be and 2) the decision was pre-R2P. Today, given the wide acceptance of the Responsibility to Protect (R2P) norm, it is possible the Court would rule differently.

4.8. ICTR and ICTY as Sources of Customary International Law

While most of the ICTR and ICTY cases are consistent with long-held norms and those of other UN bodies, there have been some notable departures, such as the variance in the definition of genocide.⁶² However, the departures in themselves were said to not be troubling to international lawyers as ICTR and ICTY jurisprudence was originally understood as only having internal applicability and did not establish new norms of customary international law.⁶³ On this point, Professor Baker maintains that the traditional view is simply not, or at least is no longer, valid: ICTR and ICTY rulings are now bleeding into the domestic legal systems of other countries such as Belgium (re: head of state/government immunity doctrine) and Kosovo (re: command responsibility and the objective *mens rea* standard).⁶⁴

4.9. International Criminal Court (ICC)

On July 17, 1998 the Diplomatic Conference in Rome adopted the Statute of International Criminal Court and on July 1st, 2002 the Rome Statute came into effect. Thus, the ICC is both an international organization and the product of treaty. It is also the first permanent international criminal court in history.

What makes the ICC unique is that it is a permanent court exercising universal jurisdiction. It can prosecute individuals for four of the most serious (international) crimes no matter where the suspected criminals happen to be apprehended. The four crimes are:

- 1) Genocide
- 2) Crimes against humanity
- 3) War crimes and
- 4) Crimes of aggression (as yet undefined)⁶⁵

The ICC may have jurisdiction over both crimes committed within State Par-

⁶¹Baker, (n 41) 179.

⁶²Arajärvi, (n 56) 5.

⁶³Baker, (n 41) 186.

⁶⁴Baker, (n 41) 199.

⁶⁵For the time being, aggression is incapable of being prosecuted. Yet to label something a most serious crime while still being unable to define it is a curious thing, to say the least. See also Mark A Drumbl (2008), "A hard look at the soft theory of international criminal law" in Leila Nadya Sadat and Micheal P Scharf (eds) *The Theory and Practice of International Criminal Law*, (Leiden: MartinusNijhoff Publishers, 2008) 3.

ties and over nationals from State Parties.⁶⁶ It also exercises universal jurisdiction in cases referred to it by the Security Council.⁶⁷ However, the formula by which jurisdiction has usually been exercised thus far is somewhat complicated. In practice, the ICC does not have an army or a substantive police force with which to apprehend suspects. Therefore, it depends on State Parties to apprehend and remit into custody the suspects. Furthermore, the Office of the Prosecutor does not have authority to seize files or other evidence from within the State Parties. He must rely on the information provided by the State Parties. This means, in practice, that the information he can use at trial is largely restricted to that which is provided to him. He will not have the resources to build a case if no State Party cooperates with him.

This situation often leads to peculiar outcomes. For example, after a civil war, the government may have information on the activities of opposition leaders which it can forward to the ICC. On the other hand, opposition members may not be in a position to forward such information regarding government leaders, let alone be in a position to enforce the law via arrest. In this way, government leaders can remove troublesome opposition figures while also enhancing their own relative standing as the opposition becomes tarnished with the label of being “war criminals”. Here, the opposition complaint of “victor’s justice” is analogous to that made during the Nuremberg and Tokyo war crimes trials, but the situation has also opened up the ICC to the suggestion of having a subtle racist agenda since the vast majority of ICC cases have involved post civil-war African leaders. Perhaps to avoid charges of unfairly “hunting Africans”, although hopefully because the facts genuinely merit it, the ICC has now authorized the Prosecutor to open an investigation into the situation in Georgia.⁶⁸

In practice, it may be that the ICC, as a leading institution of international law, falls short on the delivery of one of the key requirements of law: to apply the law fairly and equally.

4.10. *Jus Cogens* and Peremptory Norms

Jus cogens refers to the legal status that certain crimes reach while *obligatio erga omnes* relates to the legal implications arising from the crime’s characterisation as *jus cogens*.⁶⁹ *Jus cogens* means “compelling law” and the *jus cogens* norm holds the highest position among all norms and principles.⁷⁰ Recognising certain international crimes as *jus cogens* carries with it an obligation to prosecute or

⁶⁶It is also possible for the ICC to have jurisdiction over non-Party nationals if: 1) the UNSC so authorizes, or 2) the crimes were committed within the territory of a Party that accepts the jurisdiction of the ICC or 3) a non-Party state has consented to the Court’s jurisdiction. See Mohochi (2010), “Jurisdiction of the ICC; The *Realpolitik* by State Parties to the Rome Statute and United Nations Security Council in its Efficaciousness” (LLM diss., University of Ulster 2010) 18

⁶⁷Sadat (2008), “The International Criminal Court and the Transformation of International Law” in *The Theory and Practice of International Criminal Law*, ed. Leila Nadya Sadat and Micheal P Scharf (Leiden: MartinusNijhoff Publishers, 2008), 317.

⁶⁸<<https://www.icc-cpi.int/pages/situations.aspx>> accessed 26 Feb 2018.

⁶⁹Bassiouni (1996), “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, Vol. 59, No. 4 Law and Contemporary Problems 63.

extradite.⁷¹ Some scholars see *jus cogens* and customary law as being the same while others distinguish between them.⁷² It had been widely accepted that there was no hierarchy between customary and treaty law⁷³ but the idea of *jus cogens* challenges this.⁷⁴

An often mentioned source of the *jus cogens* norm is the Vienna Convention on the Law of Treaties (both 1969 and 1986) yet the term *jus cogens* is hardly mentioned therein. Instead, it has been implied by those scholars who believe “peremptory norms” and “*jus cogens*” are the same thing. The wording of the title of Art 53 might make this a reasonable supposition. Yet Article 53 does not define or list the contents of *jus cogens*/peremptory norms in any substantive way and, if it did, it would no doubt need to be periodically revised as norms are added to and subtracted from the list. Scholars suggest *jus cogens* norms come from 1) treaties, 2) international custom, 3) natural law or 4) some combination of #1 - 3.⁷⁵

In fact, there is little consensus on the contents or scope of *jus cogens* norms. For its supporters, *jus cogens* acts like a kind of unwritten constitution.⁷⁶ Although its advocates have trouble explaining it, it appears to be based on, or somehow connected to, natural law theories.

Professor Bassiouni has discussed how the relationship between *erga omnes* and *jus cogens* is also circular: what is “compelling” is “binding on all states” and vice versa.⁷⁷ But he also complains that the *jus cogens* and *obligatio erga omnes* relationship has never been clearly articulated by the PCIJ and the ICJ.⁷⁸ One wonders how this could be done, however, as they often seem to be the product of legal fictions driven by particular values and bold assertions. For example, the crime of “terrorism” is not on the traditional list, yet only an ideologue would consider piracy a more serious problem than terrorism today. In any case, if *erga omnes* and *jus cogens* exist separately then it may be possible to override or alter the *erga omnes* via treaty.⁷⁹ However, it is still not clear if that is the case or not.

One of the reasons for confusion is it is unclear whether *jus cogens* norms are the product of positive or natural law. In fact, no one knows.⁸⁰ Likewise, it is unclear if *jus cogens* can evolve or not.

Courts generally do not refer to *jus cogens* or peremptory norms although in the *Congo v Rwanda*⁸¹ case the ICJ affirmed the existence of such norms (yet grounded its decision on the consent of the parties). However, at least with the

⁷⁰Ibid 67.

⁷¹Ibid 65.

⁷²Ibid 68.

⁷³Gulgec, (n 30) 78.

⁷⁴Ibid 79 i.e. putting *jus cogens* at the top.

⁷⁵CA Ford, “Adjudicating Jus Cogens” (1994): 13 Wis Int’l L.J. 149.

⁷⁶GA Christenson, “Jus Cogens: Guarding Interests Fundamental to International Society” (1987) 28 Va. J. Int’l L. 586.

⁷⁷Bassiouni, (n 69) 72.

⁷⁸Ibid 73.

⁷⁹Gulgec, (n 30) 83.

⁸⁰Ibid 86.

ICJ, where the issue of sovereign immunity arises, the Court will be compelled to reject the *jus cogens* claim (see *Congo v Belgium*).⁸²

In the *Barcelona Traction*⁸³ case the ICJ stated that *erga omnes*⁸⁴ obligations are not just between the two states towards each other but rather they are obligations that states have towards the whole international community. If the *jus cogens* norms are peremptory, that means they transcend the consensual order of ordinary international law. But this idea has not been fully accepted either as there is continuing debate over how, or whether, *jus cogen* norms apply with respect to sovereign immunity (see *Congo v Belgium* above).

There seem to be two issues here: 1) narrow vs wide conceptions of international law and 2) whether universal jurisdiction gives rise to a special category of *jus cogens* or not. The narrow conception considers “law” to be only that which has been agreed to while the wide view adopts both that which has been agreed and also what should be agreed (i.e. both the *lex lata* and the *lex ferenda*).

If the wide view is adopted, a substantive test would be required to convert the *lex lata* into *lex ferenda*. But in that case, could the law be set by a simple majority, a massive majority or only unanimity? Most scholars hedge by saying at least an overwhelming, yet undefined, majority⁸⁵ although Article 53 of the Vienna Convention seems to suggest unanimity. Ultimately, the question revolves around whether general international law and universal international law really mean the same thing.⁸⁶

4.11. Universal Jurisdiction and *Jus Cogens*

The following international crimes are said to be *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices and torture.⁸⁷

The ICJ has held that the prohibition against genocide is a *jus cogens* norm against which it is not possible to reserve or derogate from.⁸⁸ And it may be that treaties and customary rules contrary to *jus cogens* are invalid *ab initio*.⁸⁹ However, if undertaken, would the entire treaty be void or only the relevant provisions? This is unclear as the Court has generally avoided using the term *jus cogens*.⁹⁰

Although a domestic court ruling, *Israel v Eichmann*⁹¹ is a rare example of the principle of universal jurisdiction being applied. As stated above, sovereign immunity defenses could fail if the allegations are too serious e.g. genocide or war

⁸¹ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*.

⁸² *Democratic Republic of Congo (DRC) v Belgium* (2002) ICJ 3.

⁸³ *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, 32.*

⁸⁴ The ICJ prefers to use the term *erga omnes* to *jus cogens*. (See Gulgec, at 107.)

⁸⁵ M Byers, “Conceptualising the relationship between *jus cogens* and *erga omnes* rules” (1997) 66 *Nordic Journal of International Law* 225-228.

⁸⁶ Gulgec, (n 30) 98.

⁸⁷ Bassiouni, (n 69) 68.

⁸⁸ *Ibid* 71.

⁸⁹ Gulgec, (n 30) 88, as per Art 53 of the Vienna Convention.

⁹⁰ Gulgec (n 30) 82-83. The Court prefers the (wider) term *erga omnes* to *jus cogens*.

crimes.⁹² In practice, however, the complementarity principle usually limits application of universal jurisdiction (since home courts often assert jurisdiction, thereby displacing the ICC).

4.12. Rethinking *Jus Cogens*

It is said that *jus cogens* can arise either by custom or by treaty⁹³ but what might be *jus cogens* for one State might not be *jus cogens* for another.⁹⁴ Article 53 of the Vienna Convention is often pointed to but it has no content. To state this fact another way, Article 53 shows *jus cogens* can have any kind of content.⁹⁵

One must hope the law is objective in nature, not governed by human sentiment. Yet there is no objective basis for determining any of the human rights on a scholar's list.⁹⁶ Foreshadowing the "Responsibility to Protect" debate, Professor D'Amato points out that in 1989 Professor Henkin attacked humanitarian intervention when stating "the use of force remains itself a most serious—the most serious—violation of human rights" but by 1994 it had been removed from his list.⁹⁷ D'Amato pointedly remarks that the world did not change so much in 5 years before asking: was Professor Henkin right in 1989 and wrong in 1994, or was he wrong in 1989 and right in 1994?⁹⁸

The claim of custom as a source of international law seems particularly circular, essentially stating that it is law because it is followed, and also, because it is followed, it is law. Advocates would say that human rights norms have become part of customary international law binding on all states.⁹⁹ However, the correct and exhaustive list of human rights, as we have seen, is far from certain. And as the world becomes more globalised, how will it play out if, for example, an Islamic state determines slavery is compatible with sharia law and therefore revives the practice?

Human rights, viewed as universal rights or norms seem incompatible with the Sovereignty Paradigm, strictly speaking¹⁰⁰ but Professor D'Amato says this tension could be resolved by eliminating any presumption favouring one over the other.¹⁰¹ As a matter of theory, he is probably correct on this point, but one suspects that, in practice, such a solution would be no solution at all: it would simply create more uncertainty and further paradigm fracturing. As a practical matter, the solution offered here, to escape such a quagmire, would be to simply recognise the supremacy of state sovereignty as the foundational principle in re-

⁹¹ *Israel v Eichmann* [1962] IsrSC 16 20133, reprinted in 36 I.L.R.277.

⁹² M Petsche, "Jus Cogens as a Vision of the International Legal Order" (2010) 29 *Penn State Int'l L. Rev.* 233 at 248.

⁹³ *Gulgec*, (n 30) 104.

⁹⁴ *Ibid* 109.

⁹⁵ *Ibid* 107.

⁹⁶ D'Amato, (n 25) 8.

⁹⁷ *Ibid*.

⁹⁸ *Ibid*.

⁹⁹ *Ibid* 32.

¹⁰⁰ *Ibid* 11.

¹⁰¹ *Ibid* 17.

lation to all conflict of law matters since the enforcement of all law, and even the sourcing of UN funding, rests upon this fact.

4.13. Responsibility to Protect (R2P)

Sudanese scholar and diplomat Francis Deng inverted the premise of the *jus cogens* norm from “right to intervene” to “Responsibility to Protect (R2P)”¹⁰² and, supported by the Canadian government,¹⁰³ the International Commission on Intervention and State Sovereignty (ICISS) in Dec 2001 released the report “Responsibility to Protect” as a “new idea”.¹⁰⁴ The “Responsibility to Protect” was said to embrace three specific responsibilities: 1) to prevent, 2) to react and 3) to rebuild.¹⁰⁵ In the Commission’s judgement, all of the relevant decision-making criteria can be summarized under six headings: 1) right authority, 2) just cause, 3) right intention, 4) last resort, 5) proportional means and 6) reasonable prospects.¹⁰⁶

It was later codified, in a somewhat modified form, at the 2005 UN World Summit.¹⁰⁷ The humanitarian aspect applies in regards to four distinct crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. Responsibility to Protect has been invoked by Russia in its 2008 incursion in Georgia¹⁰⁸ and by some activists with respect to post-cyclone Burma.¹⁰⁹

R2P is not yet a rule of customary law but it is a new international norm according to the former ICISS co-chair and Labour politician Gareth Evans.¹¹⁰ Libya marks the first time the Security Council authorised an international R2P operation¹¹¹ although Evans points to the “success” of managing Kenya in 2008, as an example of a disaster averted thanks to early pressure from the international community.¹¹²

One must admit to a certain scepticism regarding any “disaster averted” argument. Perhaps there are still GW Bush fans who claim the Iraq war was a “success” because the disaster (in the form of Saddam Hussein developing nuclear weapons) has now been averted. But if we are playing the “what ifs” game, how do we know what is the better or inevitable long run result? Might not the

¹⁰²Stark et al. (2011), “The Responsibility to Protect: challenges and opportunities in light of the Libyan intervention” November (2011) e-International Relations 1 at 28.

¹⁰³Human Rights Center (2007), Religion, Politics and Globalization Program, International Human Rights Clinic, “The Responsibility to Protect (R2P): Moving the Campaign Forward’ October (2007) University of California, Berkeley i at 9.

¹⁰⁴Gagro (2014), “The Responsibility to Protect (R2P) Doctrine” (2014) International Journal of Social Sciences, III (I) 61 at 64.

¹⁰⁵Ibid 61.

¹⁰⁶Evans & Sahnoun (2001), “The Responsibility to Protect” December (2001) Report of the International Commission on Intervention and State Sovereignty 32.

¹⁰⁷Stark (n 102) 4.

¹⁰⁸Jennifer Welsh, ‘Implementing the “Responsibility to Protect”’ (2009) Policy Brief No. 1, Oxford Institute for Ethics, Law and Armed Conflict, 2.

¹⁰⁹Ibid 6.

¹¹⁰Stark, (n 102) 36.

¹¹¹Ibid 14.

¹¹²Ibid 38.

Yugoslavian civil war have been the result of many decades of managed frustrations finally exploding at the first crack of freedom? It seems that under the “Soviet-lite” model proposed by Evans, putting some additional pressure on the pressure cooker is the preferred solution because such outside pressure might be needed to solve the “internal problem”. And yet, this bizarre and oppressive logic perfectly encapsulates the thought process behind many R2P supporters’ wish to control “hate speech”.¹¹³

It appears that R2P supporters can be divided into minimalists and maximalists, based on how much support they would give and how early they would intervene.¹¹⁴ The maximalists like Evans seem to support thought control under the guise of controlling hate speech, since “thinking bad thoughts” and “saying bad things” is presumably the cause of much conflict. (If nothing else, perhaps Evans also knows how to prevent middle-aged divorce?) Minimalists would wait until hostilities were at least imminent or had already begun before intervening.

Unfortunately, only four black sheep countries (Venezuela, Cuba, Nicaragua and Sudan) have sought to roll back the R2P consensus in favour of unqualified state sovereignty.¹¹⁵

5. Applying the Framework to the Facts: International Law and NATO’s Libyan Adventure

We came, we saw, he died... (laughter).¹¹⁶ Hillary Clinton

5.1. Libya under Gaddafi (1969-2010)

In 1969, at the age of 27, the Arab nationalist and socialist—later “Colonel”—Muammar Gaddafi became the leader of Libya. Given his ambitions, he supported terrorist groups abroad and, over the years, according to numerous reports, provided money or safe haven to various groups dedicated to the destruction of Israel.¹¹⁷ In 1984 he declared a right and a capability to export terrorism to the US; and in 1985 a Libyan diplomat at the UN was declared *persona non grata* in connection with a plot to kill Libyan dissidents in the US.¹¹⁸

In the early hours of April 15, 1986, US Air Force and Naval aircraft simultaneously bombed targets within Libya.¹¹⁹ In total, thirty-seven people, including

¹¹³Gagro, 66. The dominant ideology holds that the Holocaust and Rwanda genocides started with hate speech, discrimination and marginalization. I would argue instead, however, that the real instigator of such atrocities was a strong sense of group identity among the perpetrators followed by feelings of past victimisation and fear of further victimisation.

¹¹⁴Stark, (n 102) 33.

¹¹⁵Ibid 39.

¹¹⁶<<https://www.collective-evolution.com/2016/10/20/we-came-we-saw-he-died-how-gaddafi-was-hunted-ruthlessly-killed/>> accessed 31 July 2018. The CBS video of Secretary Clinton laughing has become harder to find but can still be found here:

<<https://www.globalresearch.ca/hillarys-war-crime-the-murder-of-muammar-gaddafi-we-came-we-saw-he-died/5552094>> accessed 31 July 2018.

¹¹⁷Intocchia (1987), “American Bombing of Libya: An International Legal Analysis” 19 Case W. Res. J. Int’l L. 177 at 181.

¹¹⁸Ibid 181-182.

¹¹⁹Ibid 179.

Gaddafi's four-year-old adopted daughter, were killed and ninety-three injured.¹²⁰ The US and Canada also imposed sanctions on Libya, in retaliation for bombings that took place in Rome and Vienna on December 27, 1985 and which they attributed to the Libyan government.¹²¹ However, most European countries refused to impose sanctions for reasons that ranged from a belief that they would not be effective in countering terrorism (Margaret Thatcher) to concerns over the safety of German expatriates (Helmut Kohl).¹²²

America's unilateral strike was widely condemned and there was much ensuing public debate over its legality. Under the norms in place at the time, the consensus view was that such an attack, if done only as a retaliatory measure, would be illegal. As well, the US was under an obligation to employ all peaceful methods available to it in resolving the problem of Libyan terrorism.¹²³ However, it was also argued that if done in self-defence, perhaps even pre-emptively, then the airstrike would have been legally permitted.¹²⁴

In 1988 Pan Am Flight 103, en route from London to New York blew up over Lockerbie, Scotland. Referred to in the Western media as the "Lockerbie bombing", it eventually resulted in the conviction of the suspected intelligence official Abdelbaset Ali Mohamed al-Megrahi on 270 counts of murder.¹²⁵ The Libyan official always maintained his innocence although western media reports speculated that the bombing had been motivated by a Libyan desire for revenge after the April 15, 1986 US aerial bombings.

The main consequence of the Lockerbie bombing was a further deterioration in relations between Libya and the Western world; and this "bad blood" would define Libya's status for the rest of the 1990s.

After the US-led invasion of Iraq in 2002, in what may have been one of the few US foreign policy successes under the GW Bush Presidency, Gaddafi was persuaded to co-operate with foreign officials and abandon his own nuclear weapons program.¹²⁶ In return he was promised, and in 2006 duly received, a lifting of economic sanctions and the removal of his country from the State Department's list as a state sponsor of terror.¹²⁷

The late 2000s also saw Gaddafi's nascent personal rehabilitation on the world stage. He renounced terrorism and was able to visit Paris and London. Many Western governments also eagerly hoped to make contracts or support investment in the Libyan petroleum sector. For Gaddafi personally, and Libyans generally, the future seemed bright.

¹²⁰Ibid.

¹²¹Ibid 182-183.

¹²²Ibid 183.

¹²³Ibid 207.

¹²⁴Ibid 205.

¹²⁵<<http://www.terrorismcentral.com/Library/Legal/HCI/Lockerbie/LockerbieVerdict.html>> accessed 26 Feb 2018.

¹²⁶Charles Krauthammer, "We are safer" (*Townhall* 9 Jan 2004)

<<https://townhall.com/columnists/charleskrauthammer/2004/01/09/we-are-safer-n853312>> accessed 26 Feb 2018.

¹²⁷See <<http://abcnews.go.com/International/story?id=1965753>> accessed 26 Feb 2018 and <<https://www.cfr.org/background/how-libya-got-list>> accessed 26 Feb 2018.

5.2. Surprising Denouement—R2P in Practice

On December 17, 2010, Mohamed Bouazizi self-immolated himself in an act of protest in Tunisia. The following month, the country's long time President, Zine El Abidine Ben Ali, would be compelled to resign. This was followed by populist challenges to authority in several other Arab countries, in what has been referred to as the "Arab Spring".

Given the ethnic divisions which exist in Libya, it is perhaps unsurprising that the uprising would find greatest support in Benghazi, some 404 miles from Tripoli. In response to the uprising, Gaddafi began mobilizing his troops en route towards Benghazi, no doubt with the intention of crushing the insurrection. Before the rebellion could be put down, however, the UN Security Council passed Resolutions 1970 and 1973.

Although evidence on the ground of Libyan compliance was mixed, Western leaders labelled Gaddafi a liar and, under the guise of protecting the people of Benghazi, rushed to war.¹²⁸ In fact, however, Gaddafi made many extraordinary offers to avoid war, including a willingness to accept international monitors, and to step down and leave the country, all of which were rejected.¹²⁹

Resolution 1970 of Feb 26, 2011 applied targeted sanctions against the regime and also threatened ICC prosecution for crimes against humanity.¹³⁰ As Gaddafi

¹²⁸Curtis Doebbler, "The Use of Force against Libya: Another Illegal Use of Force" (*Jurist* 20 March 2011)

<<http://www.jurist.org/forum/2011/03/the-use-of-force-against-libya-another-illegal-use-of-force.php>> accessed 26 Feb 2018.

¹²⁹Ibid. It is worth bearing in mind that the US government is not monolithic, however. For example, by late spring 2011, senior US military personnel and at least one Democratic lawmaker had grown so concerned by the rush to war that they opened their own diplomatic channel with Gaddafi's son, in order to circumvent the State Department and Hillary Clinton. See Jeffrey Scott Shapiro and Kelly Riddell, "Exclusive: Secret tapes undermine Hillary Clinton on Libyan war" (*The Washington Times* 28 Jan 2015)

<<https://www.washingtontimes.com/news/2015/jan/28/hillary-clinton-undercut-on-libya-war-by-pentagon-/>> accessed 26 Feb 2018. Western media has generally given more coverage to the role of Sidney Blumenthal's own conflicts of interest and unsolicited memos to Hillary Clinton as explanation for her strong advocacy of the war effort i.e. the "Hillary was manipulated" narrative. For more on this, see Nicholas Confessore and Micheal S Schmidt, "Clinton Friend's Memos on Libya draw scrutiny to Politics and Business" (*New York Times*, 18 May 2015)

<<https://www.nytimes.com/2015/05/19/us/politics/clinton-friends-libya-role-blurs-lines-of-politics-and-business.html>> accessed 26 Feb 2018. More recently, however, Blumenthal has again come under scrutiny for the role he played in disseminating (and possibly also creating) the now largely discredited "Trump pee dossier". For more on this, see Aaron Klein, "Jonathan Winer, Chris Steele's Inside Man at State Dept, Was Exec at Firm Working for Clinton Global Initiative" (*Breitbart*, 26 Feb 2018)

<<http://www.breitbart.com/jerusalem/2018/02/26/jonathan-winer-chris-steeles-inside-man-state-dept-exec-firm-working-clinton-global-initiative/>> accessed 26 Feb 2018. As the two articles remind us, not only do Blumenthal, Shearer and the Clintons have a long history of working together, but Blumenthal and Shearer have a long history of successfully planting false or misleading stories in the US mainstream media. See for example, Fan Dick Morris, "The Massive Dirt on Sidney Blumenthal. Dick Morris" (*Youtube*, 8 Feb 2018) <https://www.youtube.com/watch?v=VlnDQ3i5ap8> accessed Feb 28, 2018. Morris has suggested that Blumenthal, Shearer, former CIA officer Tyler Drumheller and Major General David L Grange (head of Osprey Global Solutions) were all agitating for war as they hoped to be awarded the security contract for post-Gaddafi Libya.

¹³⁰Stark, (n 102) 40.

was seen as having failed to comply with UN demands, and in view of the pressing humanitarian risk in Benghazi, the Security Council then passed Resolution 1973 on March 17, 2011. It should be noted, however, that neither Resolution 1970 nor Resolution 1973 specifically mention the term “responsibility to protect”¹³¹ although the term “in order to protect civilians” is used in paragraph 6.¹³² The Responsibility to Protect doctrine is also controversial because, although formally endorsed by the UN General Assembly in 2005, it has not achieved the status of international law one associates with a binding treaty.¹³³ (Professor Posner claims that this was because member States were unwilling to embody the principle as a stand-alone treaty.)¹³⁴

The resolutions on Libya made no explicit mention of regime change as a stated goal, although NATO took advantage of the legal ambiguity to attempt to kill Gaddafi.¹³⁵ As the ICC has no death penalty sanction, had Gaddafi been captured and remitted to the ICC, his loyalists might have been inspired to destabilize Libya for a long time.¹³⁶ So, if for this reason alone, assassination might well have been NATO’s preferred outcome. However, once captured, he was no longer a threat to anyone. Thus, summary execution of Gaddafi, as performed by the rebels, would have been illegal under international law and no public statements can be found by Western officials either encouraging or endorsing this outcome. On the other hand, so far no evidence of an ICC prosecution of the rebels who murdered Gaddafi can be found, either.

5.3. Legality of the Coalition and NATO Attacks

The decision to use the humanitarian crisis in Libya to force through regime change is surprising. If unwritten promises had been made to Gaddafi during the denuclearization and rehabilitation period, one wonders if the Western/NATO countries broke other customary rules or norms of international law. Unfortunately, one can only speculate.

In contrast to President GW Bush, who received Congressional authorization for the invasion of Iraq, President Obama appears to have violated US domestic law (i.e. the War Powers Resolution). However, he was able to rely on rather dubious advice from within the government that the 7000 aircraft sorties did not count as “hostilities” and thus did not trigger the resolution.¹³⁷ (President Obama did attempt to gain authorization, through Joint Resolution 68, for US military involvement in a campaign lasting up to a year but the House of Represent-

¹³¹Ibid 18.

¹³²Ademola Abass, Assessing NATO’s involvement in Libya.

<<https://unu.edu/publications/articles/assessing-nato-s-involvement-in-libya.html>>accessed 26 Feb 2018.

¹³³Posner (2011), “Outside the Law: From flawed beginning to bloody end, the NATO intervention in Libya made a mockery of international law” (*Foreign Policy*, 25 October 2011)

<<http://foreignpolicy.com/2011/10/25/outside-the-law>>accessed 26 Feb 2018.

¹³⁴Ibid.

¹³⁵Ibid.

¹³⁶Ibid.

atives rejected the request.)¹³⁸ The bombing, which started as a coalition action, gave way within a couple weeks to NATO bombing.¹³⁹

Within the UN context, NATO involvement in the Libyan escapade could only be legal in one of two contexts: Article 51 (self-defense) or Article 2(4) (Security Council authorization). Since NATO members could not reasonably claim to be under attack by Libya—and indeed, Libya was in the process of rehabilitation towards becoming a civilized nation—only Article 2(4) might apply.¹⁴⁰

Resolution 1973 authorized member States acting “nationally or through regional organizations or arrangements”¹⁴¹ to create a no-fly zone. Professor Abass argues that a regional organization is a reference to the UN’s self-identified Chapter VIII organizations such as the OAS and the AU etc. but not to NATO, in part because it does not self-identify as a regional organization and, in any case, it is unwilling to satisfy the Article 54 condition of the Charter (i.e. keeping the Security Council fully informed of its relevant activities).¹⁴² As he puts it, as things stand, NATO currently has the freedom to choose the level of involvement it wishes to undertake.¹⁴³ The solution, as he sees it, is for the Security Council to use more specific drafting language so as to prevent this sort of NATO “cherry-picking”.¹⁴⁴ Of course, it is worth bearing in mind that the 2001 invasion of Afghanistan was also done under NATO, but not UN, auspices. And the operation in Afghanistan, unlike Libya, was most likely legal under customary international law.¹⁴⁵

Many scholars claim that NATO overstepped the UN authorization in Libya, by attempting to overthrow the Gaddafi regime, and that this was an illegal use of force.¹⁴⁶ Indeed, one wonders how NATO would be inclined to respond to separatist/rebel groups in Spain, Quebec or even Tibet.

That the Western policy towards Libya was a failure (aside from its success in

¹³⁷Ibid for the student of history, this is doubly ironic as Barrack Obama himself had been elected in 2008 on a promise to “follow the law” and “end torture” in the form of waterboarding by the US government. However, GW Bush had at one point similarly relied on dubious internal legal advice that determined waterboarding was “not torture”, but simply an enhanced interrogation technique, under international law.

¹³⁸House rejects Libya authorization measure. The Hill.

<<http://thehill.com/blogs/floor-action/house/168347-house-rejects-libya-authorization-resolution>> accessed 26 Feb 2018.

¹³⁹Robert Booth, “Libya: Coalition bombing may be in breach of UN resolution’s legal limits” (*The Guardian*, 28 March 2011)

<<https://www.theguardian.com/world/2011/mar/28/libya-bombing-un-resolution-law>> accessed 26 Feb 2018.

¹⁴⁰Ademola Abass, Assessing NATO’s involvement in Libya.

<<https://unu.edu/publications/articles/assessing-nato-s-involvement-in-libya.html>> accessed 26 Feb 2018.

¹⁴¹Ibid.

¹⁴²Ibid.

¹⁴³Ibid. “As things stand, NATO has developed the ability to step into the UN Charter (to assist the Security Council implementing its resolutions) and step out of it (to avoid the Security Council’s regulation of regional organizations engaged in implementing such resolutions.”

¹⁴⁴Ibid.

¹⁴⁵There are some key differences. In Afghanistan, the local Taliban had been harbouring Osama Bin Laden and NATO could claim to be acting in collective self-defence as one of its members, the US, had been attacked.

killing Gaddafi) should not be doubted. The major consequence was a refugee crisis on Europe's shores. Of course, the attempt to save rebel lives may have been a partial success. Yet these rebels might not have been the universally wonderful people portrayed at the time by Western media: the American ambassador to Libya was later killed in Benghazi.¹⁴⁷ And it has been suggested that the 2017 Manchester Arena bombing by the British Muslim of Libyan descent was also "blowback" for the failed Western policy in Libya.¹⁴⁸

Mary Ellen O'Connell argues that NATO action in Libya was illegal because the principle of necessity requires 1) war be a last resort and 2) have the prospect of achieving more harm than good.¹⁴⁹ The interveners failed on both counts.¹⁵⁰

She also argues that in attempting, at least in a *de facto* sense, to bring about regime change, NATO went beyond what it was authorized by the Security Council to do.¹⁵¹ On the other hand, Malcom Shaw QC states that the resolution was to protect civilians from the *threat* of attack (broader), not just to protect them from attack.¹⁵² This can be taken to mean Gaddafi's forces needed to be neutralized.

Regime change *per se* was beyond the scope of the UN resolutions and therefore illegal according to Professor Sands but, according to Professor Grief, legal if necessary to protect civilians.¹⁵³ China stated "There must be no attempt at regime change or involvement in civil war by any party under the guise of protecting civilians."¹⁵⁴ However, others suggest that sometimes the only way to protect civilians is to bring about regime change.¹⁵⁵

The differing Western government reactions to the factually similar Arab government-rebel citizen conflicts in Syria and Libya also point to the impracticability of the Responsibility to Protect principle.¹⁵⁶ Specifically, bringing the concept of international law into even further disrepute, it appears that both the Western response to Libya (i.e. intervention), and the Western response to Syria (i.e. generally non-intervention), have been legal. Or, depending on one's pers-

¹⁴⁶GeirUlfstein and Hege Fosund Christiansen, "The Legality of the NATO Bombing in Libya" (2013) Vol 62 Issue 1 British Institute of International and Comparative Law 159.

¹⁴⁷Fred Burton and Samuel M Katz, "40 Minutes in Benghazi" (*Vanity Fair Hive*, August 2013) <<https://www.vanityfair.com/news/politics/2013/08/Benghazi-book-fred-burton-samuel-m-katz>> accessed 26 Feb 2018.

¹⁴⁸Max Blumenthal, "The Manchester bombing is blowback from the West's disastrous interventions and covert proxy wars" (*Salon*, 27 May 2017)

<http://www.salon.com/2017/05/27/the-manchester-bombing-is-blowback-from-the-wests-disastro-us-interventions-and-covert-proxy-wars_partner/> accessed 26 Feb 2018.

¹⁴⁹Stark, (n 102) 15.

¹⁵⁰Ibid 15.

¹⁵¹Ibid 16.

¹⁵²Robert Booth, "Libya: Coalition bombing may be in breach of UN resolution's legal limits" (*The Guardian*, 28 March 2011)

<<https://www.theguardian.com/world/2011/mar/28/libya-bombing-un-resolution-law>> accessed 26 Feb 2018.

¹⁵³Ibid.

¹⁵⁴S/PV.6531, 10 May 2011.

¹⁵⁵Stark, (n 102) 22.

¹⁵⁶Ibid 26.

pective, illegal.

In his new capacity at the Council on Foreign Relations, Gareth Evans now notes that Libya is the first, and so far only, case of R2P being implemented through the Security Council.¹⁵⁷ However, Professor Doebbler says that both the UN Security Council and the military coalition acted in violation of international law.¹⁵⁸ In particular, Doebbler cites the demand for political reform in Resolution 1973 as a violation of Article 2(7) of the Charter because it seeks to interfere with the internal affairs of Libya.¹⁵⁹

Doebbler reminds us that the most fundamental principle of international law is that a State should not use force against another, as expressed in Art 2 (4) of the UN Charter. Arguably, no State can violate this principle, not even the Security Council, according to Art 24(2) which requires the Security Council to “act in accordance with the Principles and Purposes of the United Nations.”¹⁶⁰

Some commentators even reject self-defence arguments, claiming that the use of force in Afghanistan and Iraq were widely seen as violating international law¹⁶¹ and failure to apply the law consistently now undermines the law and its ability to restrain action.¹⁶²

For American adventurists, or even students of the American Revolution, it is worth remembering that non-state actors are allowed to use force against an oppressive occupying power (the self-determination right) but not against their own government.¹⁶³ Today, this is the position many Afghani and Iraqi citizens find themselves in.

6. The Need for a New People-Centered Principle of International Law

Right to Be Protected (R2BP)

Given the difficulties associated with the Responsibility to Protect (R2P) principle, I have found it necessary to invent a new norm for international law: the Right to be Protected (R2BP). While R2P was in principle a State duty rather than a State’s right, in practice not all States participated or felt compelled to assist (compare Libya and Syria, above). This shortcoming with R2P meant that, in practice, it was simply a State right to intervene when it had some interest to protect and could plausibly argue the thresholds had been met.

In contrast, R2BP would be a citizen’s humanitarian right, not a State power. The vested interest of the UN Members would not be a relevant consideration as

¹⁵⁷J. Bajoria, “Libya and the Responsibility to Protect”, Council on Foreign Relations, 24 March 2011. <http://www.cfr.org/libya/libya-responsibility-protect/p24480> accessed 1 March 2018.

¹⁵⁸The Use of Force against Libya: Another Illegal Use of Force.

<http://www.jurist.org/forum/2011/03/the-use-of-force-against-libya-another-illegal-use-of-force.php> accessed 26 Feb 2018.

¹⁵⁹Ibid.

¹⁶⁰Ibid.

¹⁶¹Ibid.

¹⁶²Ibid.

¹⁶³Ibid.

an Independent UN Commissioner would issue Continuous Reports, specifying whether the humanitarian thresholds in the Monitored Zone had been triggered or not. But more importantly, the right, like other UN Charter recognised rights, would be unconditional, unrestricted and apply all over the world. And as a *jus cogens* norm, it could not be voided or derogated out of.

I will leave it to others to work out the criteria under which the Independent UN Commissioner would make his determinations and how Member States would share the burden of protecting the world's most vulnerable.

7. Conclusion

The international legal order as it stands now is in a highly dissatisfying place. For those of us who still believe that power corrupts and absolute power corrupts absolutely, the idea of a one world government enforcing a unified conception of “international law” is a highly disconcerting prospect. In fact, it is difficult to envision such a government bringing about ever increasing “international standards” and “global norms” without also becoming increasingly totalitarian. And yet, moving towards such a world seems to have been the trend for most of the post-WWII era. Perhaps even more disturbingly, the idea of “global norms” appears as little more than an empty shell, a circular, self-referential and at times evolving tautological construct that supports or opposes whatever conceptual its advocate holds.

On the other hand, for those who do believe in international law, dealing with the shortcomings of the *status quo* must be equally frustrating. The dream of international law is understandable. For lawyers, it offers a way to bypass the problem of corrupt third world institutions and overrides domestic procedural safeguards without fixing them. And for progressive globalists, the goal of a conflict-free world living in harmony will always appear ever achievable.

As we have seen with the NATO campaign in Libya, a case can be made that the campaign was both legal and necessary in order to uphold international law. However, that case would be an extremely weak one. The better view seems to be that international law as currently practiced does not really reflect law so much as politics, nor rights so much as interests, and in particular it is the confluence of interests and public opinion in centers of power which ultimately holds sway.

It could also be said that the natural law conception of international law, like *jus cogens*, does not exist at all, except perhaps in the minds of some lawyers and social activists. Indeed, the case for international law can be a difficult one. Without it, ordinary countries might act with impunity. But, under the fractured enforcement mechanism in place now, only politically or militarily weak players are bound: strong countries can still afford to ignore it.

Replacing the Responsibility to Protect (R2P) with the Right to be Protected (R2BP) would not fix international law overnight and, given the difficulty in establishing an objective international law, might not even be workable. But, if nothing else, the R2BP should, hopefully, either succeed in professionalizing

both the UN and the application of international law by shedding light on the obscure or fail so completely as to finally expose the hypocrisy of the major powers and the political nature of international law. Either way, bringing clarity to the muddy waters underlying international law would be a step in the right direction.

8. Epilogue

The recent uncovering of new evidence in relation to former President Sarkozy's dealings with Libya and his subsequent, extensive questioning by French police must be seen as a positive development.¹⁶⁴ As well, the June 12, 2018 summit between North Korean leader Kim Jong-un and US President Donald Trump has drawn attention to the importance of learning from the Libyan fiasco. Although many of the discussions were held in secret, it can be inferred that the Chinese government has highlighted, as a warning, the remarkable similarities between the North Korean and Libyan rehabilitations.¹⁶⁵

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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- ¹⁶⁵See, for example,
<https://www.upi.com/John-Bolton-Libya-model-for-North-Korea-under-consideration/6261525111403/> accessed 20 June, 2018 and
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