The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits

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# TABLE OF CONTENTS

I. Introduction........................................................................... 398

II. Inherent Self-Determination Limits.................................399

   A. The International Community and Libya ......................... 401

   B. The International Community and Syria ......................... 404

   C. Assessing Self-Determination’s Limits ......................... 406

III. The Inherent Limits of International Law.........................411

   A. Tracing International Law’s Limits ................................. 411

   B. The Systemic Placement of International Laws’ Inherent Limits in the International Legal System ................................................. 414

IV. Conclusion..........................................................................418
The Quest for Self-Determination

I. Introduction

International law lacks the coherence that domestic law has. There is no world parliament, and judicial decisions, albeit binding, are not always respected. States seem to largely enjoy the discretion to shape international law according to their volition. Yet, quite paradoxically, and albeit not confined by any outer restraints, states feel inherently limited in their actions.

The present Article would like to trace these inherent limits of international law. In order to do this, the Article will use a paradigm that constitutes the awarding platform for all other human rights: the right to self-determination. Not by accident, in both human rights law cornerstone treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the specific right is entrenched in the opening provision. As such, the Article will first deal with the question of whether the right to self-determination is subject to any limits. Subsequently, it will proceed to examine the repercussions for international law and interstate relations on a doctrinal and practical level.

II. Inherent Self-Determination Limits

Self-determination can be synopsized in the people’s quest for freedom and their desire to shape their own political, economic, and social future. The notion has deep historical roots. Already from the beginning of the twentieth century and following World War I, the American President Woodrow Wilson supported the idea of ethnically identifiable peoples or nations governing themselves.

While Wilson’s vision was centered more on self-governance than self-determination, still, as the Aaland Islands case depicts, his vision contributed to the gradual consolidation of self-determination as a factor in the various international decisions.

After World War II, self-determination was normatively recognized, with its inclusion in the United Nations Charter, albeit still not defined and thus amorphous. The notion was

awarded the status of a “right” through the U.N. General Assembly Declaration against Colonialism. Gradually, it expanded to include also an internal facet, aside from its external repercussions in the decolonization process. This internal facet referred to the need for all peoples to freely and fairly participate in the democratic process of governance.

In order to penetrate the non-change-prone international law structures, self-determination has adopted a more flexible facet, more easily adaptable to the constantly changing economic, political, and security parameters. This means the inclusion of dialogue in any self-determination claims and the preference of bilateral, consensual solutions over unilateral measures. This bilateralism pervades not only the right itself, but also its limits. Any attempt to contravene this bilateralism is ultimately detrimental for international security and legality.

Until now, the question of whether the right to self-determination applied depended on criteria that did not have to do with any constraints embedded in the notion itself, but with external factors that had to be asserted. Without a specific repressive environment, not letting a certain people govern its fate, recourse to the right could not be supported.

The Arab Spring, namely the turmoil in the Arab world that led to protests and regime changes in a number of Arab countries, revealed first that self-determination is subject to limits and second, that these limits are inherent. By definition, self-determination is bound to be harnessed. This is not in order for self-determination to be subdued. Yet, like its other re-


12. CASTELLINO, supra note 6, at 18; Xanthaki, supra note 8, at 18; The Autocrat Has Fled, But the Danger of Civil War Remains, INDEPENDENT (June 6, 2011), http://www.independent.co.uk/opinion/leading-articles/leading-article-the-autocrat-has-fled-but-the-danger-of-civil-war-remains-2293514.html; Marc Weller, Why the Legal Rules on Self-Determination Do Not Resolve Self-Determination Disputes, in SETTLING SELF-DETERMINATION DISPUTES: COMPLEX POWER-SHARING IN THEORY AND PRACTICE 17, 28 (Marc Weller & Barbara Metzger eds., 2006).


16. Weller, supra note 12, at 26; CASTELLINO, supra note 6, at 26, 28, 40.

lated, highly cherished value—freedom—self-determination can end up in anarchy if not properly put in the right dimensions.\(^{18}\)

In an effort to trace these inherent limits, the current note will examine two recent Arab Spring cases: Libya and Syria. These cases took place in close temporal vicinity and inside the same factual framework, yet merited totally different approaches from the international community. This renders the examination of the self-determination limits more palpable and telling regarding also interstate relations.

**A. The International Community and Libya**

In February 2011, violent demonstrations erupted in Libya against the Qaddafi regime.\(^{19}\) The international community's reaction was rather swift and decisive.\(^{20}\) In late February the U.N. Security Council convened and passed Resolution 1970.\(^{21}\)

The Resolution made note of the "gross and systematic violation of human rights" in Libya, and reiterated the state's obligation to protect its citizens.\(^{22}\) The Resolution called upon the International Criminal Court (ICC) to intervene in case Libya appeared unwilling or unable to respect its citizens' basic human rights.\(^{23}\)

Indeed, quite swiftly, the ICC prosecutor announced in the beginning of March that he would open an investigation in the case of Libya.\(^{24}\) The African Court on Human Rights followed suit, by issuing in the end of March its first judgment, asking Libya to refrain from any action that would result in loss of life or violate the physical integrity of people.\(^{25}\) In May, the ICC Prosecutor requested the issuance of arrest warrants for Qaddafi, his son and the Head of the Intelligence for crimes against humanity.\(^{26}\) In June 2011, these warrants were issued.\(^{27}\)

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Amidst fighting between rebel forces and those loyal to Qaddafi, in mid-March, the U.N. Security Council convened again and passed Resolution 1973.28 Adopted under Chapter VII of the U.N. Charter, the resolution authorized member-states to take all measures to protect civilians and civilian populated areas under threat of attack in Libya, tacitly endorsing the use of military means.29

Moreover, in the course of a global-regional interaction,30 regional bodies convened almost in parallel with the U.N. Security Council. Thus, the African Union decided to remain seized of the matter, establishing the ad hoc High-Level Committee on Libya,31 the Arab League suspended Libya as a member,32 and the U.N. General Assembly suspended Libya’s membership in the U.N. Human Rights Council.33

These developments gave the wrong impression that the whole international community stood opposite Libya. This rendered a highly bipolar, Armageddon-like character to a potential confrontation, augmenting its ethical and actual dimensions and impact.34

Libya’s suspension from the Human Rights Council was unanimous, but the representative of Venezuela stalled until the last moment in deciding whether to back it;35 actually Venezuela’s president, Hugo Chavez, was one of the few leaders who openly supported Qaddafi.36 The ICC arrest warrants met the opposition of the African Union, which recommended its state members not to cooperate with the Court.37

Resolution 1970 also enjoyed the support of states traditionally reluctant to endorse intervention, such as Russia and China.38 Yet these states, joined by a number of other key states

38. For the fact that this was perceived as a shift in China’s stance vis-à-vis international law and institutions and a more reserved position, see Evans, supra note 20.
like Germany, India and Brazil, abstained as to Resolution 1973 only some days afterwards. All of these countries voiced concerns over the protracted conflict character and stability building potential of a unilaterally-imposed solution in the case of Libya. The African Union also expressed similar fears.

These fears proved substantial when the North Atlantic Treaty Organization (NATO) military intervened in Libya in order to enforce the U.N. Resolution, and battles continued to be waged between rebels and Qaddafi forces on an indecisive scale. The Russian President likened the airstrikes to “crusades” and the Arab League Secretary-General, although continuing to support the U.N. Libya Resolution, stated that the Arab League had consented to something different. This partial international recoil from the unilateral, military intervention-line fostered by the Libya Resolution bolstered the view that internal self-determination in Libya should come as a result of bilateral talks and could not be unilaterally imposed.

The U.N. Secretary-General, echoing previous remarks of other senior U.N. officials, as well as calls by African states and the African Union, underlined in July 2011 that no military solution existed in the case of Libya and that parties should “engage in direct negotiations” to end the impasse. As such, the international community’s stance started to change gradually, from one advocating Qaddafi’s removal, to one accepting his departure from power.
under agreement, and ultimately to one allowing him to remain in Libya under certain conditions. As expected, such a scenario did not find any accord with the ICC Prosecutor. Yet, even after the fall of the Libyan despot, when seemingly things could be shaped as tabula rasa in an authoritative way, the United Nations continued to endorse a dialectical stance. Thus, a meeting was called to examine ways in which the international community could work together on the post-conflict phase.

Eventually, NATO military strikes continued, ending only after Qaddafi was overthrown and subsequently killed by a crowd during his efforts to flee and hide. Yet, the numbness and hesitance the international community had demonstrated regarding Libya had already put its stamp on the international community’s responsiveness to similar self-determination quests. The case of Syria will be elaborated in the next section.

B. The International Community and Syria

In Syria, the Arab Spring flowers did not sprout suddenly, but were the result of a gradual process. On January 26, Hasan Ali Akleh set himself on fire. On February 2, a group of twenty people in civilian clothing beat people who had been holding a candlelight vigil in support for Egyptian demonstrators. On February 5, hundreds of demonstrators called for the departure of Assad. On March 6, a number of young boys were arrested for writing slogans supportive of the Arab Spring. After March 15, demonstrations became massive and took the form of an uprising. Thousands of civilians lost their lives.

Yet, in the case of Syria, the international community did not show the unilateral pulse and quick instincts it had demonstrated in the case of Libya. The U.N. Secretary-General in-

55. Payandeh, supra note 54, at 380–82.
58. Sarihan, supra note 56, at 67, 72.
60. Sarihan, supra note 56, at 67, 72.
The Quest for Self-Determination

deed swiftly condemned the deaths in the beginning of the riots. Nevertheless, Syria’s candidacy for the U.N. Human Rights Council was not rejected, despite calls for the opposite. It was only deferred for a two-year time, following a Syrian agreement with Kuwait to swap candidacies for the Council. The U.N. Security Council did not issue any resolution, but only a presidential statement, five months after the outburst of violence, condemning Damascus’ bloody crackdown on civilian protesters. The Arab League did not condemn the Syrian regime nor did it take any other action. The ICC did not even voice the need for any arrest warrants to be issued against the Syrian political and military echelon.

Rather, reaction on an international level was lukewarm. The U.N. Human Rights Council approved a fact-finding mission to Syria to explore possible human rights violations, and in July 2011 two of the U.N. Secretary-General’s advisers on issues of genocide and human rights protection actually voiced the possibility that “crimes against humanity may have been committed and continue to be committed in Syria.”

Countries such as the United Kingdom and the United States which had been active in the issue of military action against Libya, as well as the Organization of Islamic Cooperation, expressed only their concern for the reports about the violence used by the Syrian regime against the demonstrators. No military scenario was put on the table regarding Syria and reactions were restricted to a bilateral level, where the United States and the European Un-

ion, on separate bases, imposed sanctions on Assad's regime. Gradually, the regime was left to collapse on its own.

C. Assessing Self-Determination’s Limits

The international community’s reaction in the case of Syria palpably depicts the inherent limits that chain and constrain any self-determination quests. It is important that the international community does not compromise its moral doctrinal stance, which is based upon the ideals of freedom, human life, and dignity, enshrined in all major human rights instruments. The fact that in the case of Libya, the Security Council endorsed for the first time the “responsibility to protect” doctrine, demonstrates the international community’s resolution not to tolerate mass atrocities, even if that means that a military intervention has to take place. On the other hand, such intervention does not always bring the desired results as far as self-determination is concerned. Democratization is not always achieved and regional stability is not always ensured. This is partly due to the fact that self-determination cannot be achieved just through the imposition of outer, blitzkrieg solutions, but rather must result from the fermenting of certain conditions inside a society.

For example, the Egyptian revolution was succeeded by a military government, postponement of elections, and a slow pace of political change. Even when such elections took place,

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75. The “responsibility to protect” doctrine stipulates that states have the primary responsibility of protecting their populations from mass atrocities. To the extent that the state appears unwilling or unable to do so, the international community has the responsibility to intervene through coercive measures such as economic sanctions or a military intervention. See Max du Plessis, Chinese Arms Destined for Zimbabwe over South African Territory: The R2P Norm and the Role of Civil Society, 17 AFR. SECURITY REV. 17, 17, 20 (2008); Alex J. Bellamy, Libya and the Responsibility to Protect: The Exception and the Norm, 25 ETHICS & INT’L AFF. 263 (2011); A More Secure World: Our shared Responsibility, Rep., transmitted by letter dated Dec. 1, 2004 from the Chairman of the High-level Panel on Threats, Challenges and Change to the U.N. Secretary-General, ¶ 203 U.N. Doc. A/59/569 (Dec. 2, 2004), available at http://www.un.org/secureworld/report.pdf; Allen Buchanan, A Principled International Legal Response to Demands for Self-Determination, in IDENTITY, SELF-DETERMINATION AND SECESSION 139, 143 (Igor Primoratz & Aleksandar Pavkovic eds., 2006).

the rise of Islamist powers posed the question of whether democracy is indeed feasible in all states and whether the overthrowing of a despot equals necessarily the inauguration of a period of more freedom or ultimately serves the interests of the West.\textsuperscript{77} The will of Egypt’s new President to pass a constitution awarding broad powers to him sparked a new round of turmoil and violent protests.\textsuperscript{78} Likewise, in Tunisia, two years after the ousting of President Ben Ali, the country was still tormented by violence and high unemployment rates.\textsuperscript{79}

As past experience has demonstrated in regions like Eastern Europe,\textsuperscript{80} enthusiasm for democracy embodied in unilateral self-determination initiatives such as demonstrations, riots, and ultimately the overthrowing of a ruling cast, is positive and necessary for change. Yet, it is not enough on its own to yield that change. It has to be followed by bilateral concrete steps, aimed at strengthening, as in the cases of Egypt and Tunisia,\textsuperscript{81} civil society voices, accelerating democratization and supporting internal dialogue and interstate interaction.\textsuperscript{82}

The inherent limits of self-determination have been diagnosed by the international community. In Libya, there was an attempt to solve the crisis through resort to unilateral measures, such as Security Council resolutions and a military intervention. Yet, this approach, pervasive of unilateralism, did not prove adequate once transplanted to the exigencies of a non-U.S. hegemonic world, with Russia trying to recapture its former power and states like China emerging in the international arena.\textsuperscript{83} Once military operations began, all lurking disagreements regarding the strategy that should be followed towards the Qaddafi regime came to the surface.\textsuperscript{84} This in turn damaged the legal grounds and efficiency of the expedition on an international and domestic level.\textsuperscript{85}
Carrying the case of Libya in its collective sub-consciousness, the international community has appeared much less willing to intervene in Syria. The United States, France and the United Kingdom all have acquiesced to the Syrian people’s self-determination pleas and have acknowledged the Syrian opposition as the sole legitimate representative of the Syrian people.86 Yet, at the same time, with their reluctance to militarily or more actively diplomatically intervene, world powers have made clear that self-determination has limits.87 These limits stem from the possible chaos that escorts anything new and fills with fear an international community that is anchored to stability and to the current status quo.88

The unlimited fragmentation of states may lead to non-viable new states89 and this cannot be condoned by international law.90 Thus, for example, secession of Somaliland from Somalia has not been positively received,91 partly due to the fact that such secession would deprive Somalia of a region which could function as a stimulating factor for Somalia’s stability and the reorganization of its tattered state institutions.92

In order for self-determination to apply, the international community has to be convinced that the creation of a new state is the only way to end a civil war, human rights abuses, or an occupation.93 Yet, even in these cases, the confrontational element embedded in unilateral initiatives can negatively impact international security and legality.94 This negative impact
can be traced in all three self-determination quests that have taken a prominent place in the international diplomatic and legal agenda over the last decade: Kosovo, South Sudan and the issue of Palestinian statehood.

Kosovo’s unilateral declaration of statehood has been supported by a large part of the international community. Nevertheless, because it is not the product of a bilateral coordination with the mother-state of Serbia, Kosovo inherited problems of fighting. Moreover, it appeared unable to control parts of its territory, in particular in districts where Serbians constituted the majority. Although unilaterally created, Kosovo had to grapple with issues of its sovereignty only through a bilateral track, involving talks with Serbia and the signing of an EU brokered bilateral agreement between the two sides.

South Sudan declared its independence in 2011, seceding from the state of Sudan. In the case of South Sudanese independence, there was an attempt for the two parties—Sudan and South Sudan—to engage in a bilateral approach. As such, independence came under an agreement with the mother-state of Sudan. In fact, Sudan’s support was deemed critical. Still, even these bilateral steps did not ultimately erase frictions with Sudan regarding the border demarcation in an oil-rich frontier-territory.

Under this lens, the Palestinian U.N. statehood should be seen also on a broader security, political, and economic base. Self-determination has been acknowledged for the Palestinians. A Palestinian state is endorsed by the United Nations and the wider international


100. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 118 (July 9); Peter Malanczuk, Some Basic Aspects of the Agreements between Israel and the PLO from the Perspective of International Law, 7 EUR. J. INT’L L. 485, 489 (1996).
community, but this should be the start and not the end of the Palestinian statehood journey.101 Self-determination should be coupled with stability.102

Self-determination is not anymore based just on the assertion of the classical Montevideo statehood criteria, but also on other factors such as political and economic viability parameters.103 In the case of Palestinian statehood, this is shared by all interested parties. The international community has supplied financial aid to the Palestinians104 and has long documented the economic growth in the West Bank and Gaza.105 Israeli politicians have underlined the role of economic prosperity in regional Middle East stability,106 and economic cooperation between Israel and the Palestinian Authority was included in the Oslo accords signed between Israel and the PLO.107 As for Palestinians, they have both aspired to achieve reconciliation between the Hamas and Fatah rival fractions108 as well as draw investments and economic help from Arab states.109

It is these parameters that largely determine whether the international community will ultimately sanction secession. International law is silent on the legality of secession.110 Nevertheless, self-determination is further limited by the assertion that any secession quests, both before as well as after their configuration, must be based on a bilateral, dialectic platform.111

Thus, in the case of Quebec, the Canadian Supreme Court affirmed these limits, ruling in favor of secession only in case of a bilateral approach failure and the closing of all channels of


103. Nevo & Megiddo, supra note 93, at 108.


110. Borgen, supra note 2, at 8.

dialogue with the central government.112 In cases like Quebec and Canada, where secession is being asked in the framework of a democratic state respecting human rights and the rule of law, even a pro-secession majority in a referendum cannot unilaterally lead to such secession. Rather, if it materializes, it must be the fruit of a dialectic process with the main government. The latter is expected to respect the people’s will and facilitate the process.113 Similar are the cases of Catalonia,114 Scotland,115 Gibraltar,116 and Puerto Rico,117 where any pleas of independence or autonomy acknowledge the fact that they have to be agreed by the central government through a bilateral process, engaging the central government’s ultimate consent.118

III. The Inherent Limits of International Law

A. Tracing International Law’s Limits

The right to self-determination is an inalienable, erga omnes right.119 It constitutes the platform for the exercise of all other rights.120 Nevertheless, even this right is subject to limits. If limits apply to such a cardinal, absolute right, this must be true also for other international law notions. In essence, self-determination functions as a paradigm for the ultimate exploration of international law’s inherent limits.

118. Cárdenas & Cañas, supra note 111.
By definition, law is restricted in its efforts to coordinate social behaviors. Courts are restrained in providing an effective solution in cases where a political solution is needed. For example, the European Court of Human Rights has widely resorted to the “margin of appreciation” doctrine, granting state authorities discretion regarding the measures they have to take in order for the European Convention’s goals to be met.

Even when domestic courts appear to make major breakthroughs, they are quickly entrenched in their previous conservative jurisprudence. Thus for example, even though the Israeli Supreme Court has agreed to hear Palestinian petitions and has intervened in security projects such as the security fence, still on a doctrinal level, the Court has appeared reluctant to question the view of the military commander as far as security issues are concerned. Similarly, in the question of the Israeli settlements, the Court has held that a settlement cannot be built on Palestinian private land. Yet, the Court has systematically refrained from pronouncing on the legality of the settlements.

In U.S. constitutional law, the Supreme Court’s ruling in Brown v. Board of Education was immediately credited as one of the Court’s most groundbreaking decisions. Nevertheless, the decision, itself, was not able to change things on the ground. Similar to domestic law where limits aspire to safeguard social peace and harmony, in the international arena these limits try to ensure global peace and stability. Mimicking the fact that limits in domestic jurisdictions are also dictated by other non-positivist parameters, such as politics and ideology, international law limits equally do not always source from a positivist duty.

Often international players engage in or refrain from certain actions because, unconsciously and habitually, they feel they must. States comply with international law and respect its

121. Eric Claes et al., Introduction to Facing the Limits of the Law 1, 12–13 (Eric Claes et al. eds., 2009).
125. HCJ 2056/04 Beit Sourik Village Council v. Gov’t of Israel, 58(5) PD 807, ¶ 29 [2004] (Isr.); see also Guy Davidov & Amnon Reichman, Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel, 35 LAW & SOC. INQUIRY 919, 921 (2010) (arguing that Israeli courts have started limiting deference to the military commander’s discretion).
limits either due to a certain non-explicit cooperation dynamic developed in interstate politics\textsuperscript{132} or due to belief in faith values.\textsuperscript{133} Rooted in something deeper than just the exigencies of parochial interests, international norms and their limits acquire a metaphysical facet. They become internalized in domestic legal conscience\textsuperscript{134} and inherent to state behavior. Eventually, international law’s limits become an inherent element of the international system, because they embalm stability, including the restoration of the status quo ante, in cases where global order has been transgressed.\textsuperscript{135}

Such restoration can be achieved either through outer military interventions or through the delimitation of the legitimacy of state actions. States must feel there are things they cannot do without facing legal implications, that certain red lines cannot be crossed.\textsuperscript{136} Otherwise, states resort to antagonizing each other. The U.S.-Soviet arms’ race during the Cold War,\textsuperscript{137} the nuclear competition between India and Pakistan,\textsuperscript{138} and the nuclear aspirations of the Arab Sunnite world in response to Iran’s nuclear ambitions\textsuperscript{139} are all palpable examples.

The cases of Libya and Syria have shown that sometimes outer interventions are not so easy to take place. As such, international law’s inherent limits become the ultimate hope for the preservation of global peace and stability, mirroring the \textit{pacta sunt servanda} principle, which holds that international treaties must be enforced and respected\textsuperscript{140}.

Although the principle does not apply to non-treaty obligations,\textsuperscript{141} still, it fosters a certain dynamic, with the ability to impact international law. Ultimately, international law’s inherent limits become the political manifestations of basic legal principles, such as that of \textit{pacta sunt servanda} or of \textit{bona fides}, obliging international actors to try to reach a negotiable rather than an imposed solution to their disputes.\textsuperscript{142}


\textsuperscript{133} Thomas M. Franck, The Power of Legitimacy Among Nations 24 (1990); Otto Spiijkers, Global Values in the United Nations Charter, 59 Netherlands Int’l L. Rev. 361 (2012). For the fact that non-legal parameters, such as morality, can limit law, see Lawrence Douglas et al., At the Limits of Law: An Introduction, in The Limits of Law 1, 7 (Austin Sarat et al. eds., 2005).

\textsuperscript{134} Koh, supra note 131, at 2005.


\textsuperscript{137} Andrew Richter, Avoiding Armageddon: Canadian Military Strategy and Nuclear Weapons 1950–63, at 120 (2002).


Of course, non-positivist limits are hard to trace. Yet, paradigms of their manifestation exist. First, they can be asserted on a cost-benefit analysis, tied to the cost certain policy decisions entail. For example, a country can voluntarily denounce a common currency it shares with other countries. Still, such a decision has disastrous financial consequences for all the countries sharing the common currency to the extent that in the case of Greece and the Eurozone, other member countries have done everything they can to avert such a scenario.

Second, they can stem from political parameters. Thus, Belgium dropped war crimes charges against former U.S. Minister of Defense, Donald Rumsfeld, once the U.S. threatened to move the NATO seat from Brussels. Third, they can just constitute a negating pole to a new legal reality. States like Belgium and the United Kingdom altered their universal jurisdiction laws once they felt that this legislation had become the vehicle for foreign warring parties to begin bringing lawsuits against one another. But fourth and more importantly, the limits of international law are more clearly felt once legal mechanisms and balances do not transmit the essence of omnipotence. The importance of this will be discussed in the next section.

B. The Systemic Placement of International Laws' Inherent Limits in the International Legal System

The question is what is the practical utility of acknowledging international law’s inherent limits? The answer is simple: it systemizes international law. Limits bring order. States do
not act arbitrarily whenever they want and the in whatever way they want. They take into consideration also other states’ reactions. Deterrence is being achieved not through military means and nuclear armament, but through emphasis on international law’s limits. For example, once rumors became more intense that Syria’s Assad was about to use chemical weapons against his people, the international community did not try to deter such use by taking any military actions or any sanctions against the Syrian regime. Instead, the United States, the United Kingdom, Russia, France and NATO simply reminded Assad that any use of chemical weapons would mean the crossing of red lines. Consequently, once deterrence is achieved through cognizance of international law’s limits, resort to other more coercive methods, bearing either military or diplomatic cost, is minimized.

This is also true for the U.N. Security Council veto power, which has been deemed anachronistic and undesirable and has led the five permanent members to be negatively portrayed in the eyes of the rest of the international community. While it is expected that permanent members would continue to exert the veto in order to prevent measures that could harm the interests of their ideological and political allies, this discretion could be curtailed


155. ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 41–42, 211–12 (2008) (arguing that the more the cost of the violation is increased, the more compliance is promoted).


158. This has been particularly stressed regarding U.S. and Israel, but it is also the case with China and Russia concerning their allies, such as Burma. See Zvi Bar’el, West Does Not Have Monopoly on Veto Morality, HAARETZ (Feb. 8, 2012), http://www.haaretz.com/print-edition/opinion/west-does-not-have-monopoly-on-veto-morality-1.411637; China and Russia Veto US/UK-Backed Security Council Draft Resolution on Myanmar, U.N. NEWS CENTRE (Jan. 12, 2007), http://www.un.org/apps/news/story.asp?NewsID=21228#UVuYuqKiyBQ.
in major crises where, as aptly put, the international community "could not . . . opt for passivity." 159

States, ultimately interested in safeguarding their interests,160 would be more ready to forego their veto power if they were reassured that these interests would not eventually be harmed.161 Positivist law cannot provide such assurances. Rather, they have to be provided by international law’s non-positivist, inherent limits. Only such limits can guarantee that states will not appear unrestrained in their actions, in cases where any positivist burdens and constraining rules do not apply.

In essence, international law’s inherent limits politically epitomize mutatis mutandis the view held by the International Court of Justice that an international organization can have implied powers as long as these powers do not change the distribution of functions inside the organization’s realms.162 Initiatives by states should meet implied assertions by the rest of the international community as long as they are taken in tandem with the U.N. Charter provisions and procedures163 and do not aspire to change the distribution of regional or global balance. This is particularly true in self-determination quests, which by definition entail the element of change.

The limits of international law aspire to balance between such change and the will of states to see their interests preserved. As such, the limits of international law are based on a deeply balancing concept, totally necessary in the general international constitutional structure. International constitutionalism164 is built along the pattern of domestic constitutions. International constitutionalism is thematic.165 The international constitution must be envisioned as a document, where instead of different articles and provisions, whole legal fields are subject to harmonization.166

161. See Moffett & Brown, supra note 157 (citing a statement made by Turkey’s Foreign Minister’s regarding the Syrian, Chinese and Russian veto that “Russia and China did not vote based on the existing realities but more a reflexive attitude against the West.”).
164. International constitutionalism has been defined as the attempt to form a new normative, internationalist framework. See Thomas Kleinlein, Non-State Actors from an International Constitutionalist Perspective: Participation Matters!, in PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 41 (Jean d’Aspremont ed., 2011).
166. Id. at 77.
In this interpretational quest and similar to domestic constitutions, the concept of human dignity serves as a guiding torch. Human dignity indicates both under which lens action should be undertaken in the international field, as well as its limits. Yet, human dignity does not always apply to all international law fields. International law needs an explicit notion that will be autonomous and serve solely the purpose of halting state action in cases where this infringes on other states’ rights and interests. In this aspect, domestic law can again provide useful insights.

In domestic jurisdictions, limitation clauses ordain to the State up to which point it can infringe a certain constitutional right. This way the balancing and harmonization of the different constitutional provisions is achieved and constitutional rights are not infringed beyond a reasonable extent.

Thus for example, Canada’s Charter of Rights and Freedoms states in Section 1 that it guarantees these rights and freedoms subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. South Africa’s constitution contains a similar provision, while Israel’s Basic Law of Human Dignity and Liberty, which is deemed to have a constitutional status, prohibits any violation of the contained rights except by a law befitting the values of the State of Israel, enacted for a proper purpose and to an extent no greater than is required.

In Germany, in absence of a limitation clause, the Federal Constitutional Court has held that the unity of the Constitution and the values protected by it dictate constitutional rights to be limited. In South Africa, Chief Justice Chaskalson eloquently stated that the Supreme Court should wage a balance of interests and in this process the nature of the right limited as well as its importance to a free and democratic society should be taken into consideration.

Courts use limitation clauses in order to, or not to, curtail certain practices according to the convictions and beliefs prevalent in their respective societies. Any law that questions constitutional rights is considered acceptable as long as it does not end up questioning the

167. Id. at 69.
168. Id. at 68.
169. Id. at 74–75.
171. Id. at 136.
177. For the different treatment of the same issues in Canada and South Africa through resort to the similar-phrased limitations clause, see Andrea Lollini, THE SOUTH AFRICAN CONSTITUTIONAL COURT EXPERIENCE: REASONING PATTERNS BASED ON FOREIGN LAW, 8 UTRCHT L. REV. 55, 68, 72 (2012).
constitution’s ideological structure. The normative framework is guided by constitutionally prescribed values, interpreted by courts.178

For example, coming to assess the urgency and importance of an initiative which overrides constitutionally protected rights, the Canadian Supreme Court looks at whether the initiative addresses concerns that are pressing and substantial in a free and democratic society.179 Ultimately, limitation clauses are an attempt of the lawmaker to safeguard the existing constitutional and consequently socio-political status quo.180

On an international level, the inherent limits of international law have the task of maintaining the global status quo. As such, they function in a way similar to that of limitation clauses. They dictate to states up to which point they can take action that can be deemed as intrusive to other states’ interests, similar to domestic law on state intrusiveness in individual affairs.

It is this antithesis, or, in other words, the pulses created by the consecutive contraction and expansion of state action, which fills in and perfects the international constitutional pattern.181 In the limitation clause function of international law’s limits, the interpretational guide torch of human dignity finds its nemesis, and international constitutionalism gets more systemically complete. Ultimately, international law reaches its catharsis.

IV. Conclusion

The right to self-determination holds a conspicuous place in contemporary international law and constitutes the normative platform for all other rights. Still, it is subject to inherent limits which stem from the dialectic approach amongst state and other global actors.182 Unilateral approaches, where the international community intervenes in order to configure the right to self-determination according to its dicta and convictions, and without first opening a dialogue with all interested parties is sometimes essential in cases where gross human rights


180. See, e.g., Constitution of the Republic of Kazakhstan Aug. 30, 1995, art. 39, available at http://www.akorda.kz/en/category/constituciya; Конституция Российской Федерации [Конст. РФ] [CONSTITUTION] art. 51 (Russ.) (stipulating that rights and freedoms can be limited for the protection of the constitutional system). These limitations differ partly from the role limitation clauses play in international human rights instruments where their purpose is to limit protected rights under certain circumstances and not to change the existing international framework into which states interact with each other. For some international human rights limitations clauses, see, e.g., ICCPR, supra note 120, arts. 12, 19, 21, 22. See also Eur. Conv. on Human Rights, supra note 74, art. 8.


violations occur. Yet equally essential is the striking of balance between unilateralism and bilateralism.

Undoubtedly this is not easy. Nevertheless, if the unilateral approach to self-determination is pursued with indiscretion, it can ultimately have negative rather than positive effects. These negative effects are bound to have an impact both on the people vindicating their right to self-determination as well as on the international decision making system.

A self-determination quest imposed with no subsequent emphasis and international supervision of the international community can easily lead to equally despotic or fragile regimes. Apart from the cases of Egypt and Tunisia, the current note referred also to the cases of Kosovo and South Sudan. Moreover, as the case of the Libya military intervention has demonstrated, international community efforts to drastically intervene and solve issues of self-determination and governance can be successful in the short term. Yet, in the long term, such action can weaken the international community’s ability to intervene, even in cases of gross human rights violations, like the case of Syria.

This reluctance of international law to show omnipotence in the securing the right to self-determination can be compared to similar arteriosclerotic tendencies perceived in domestic law. Considering examples of pivotal cases in U.S. and Israeli jurisprudence that failed to make the aspired difference on their own, I argued that in essence these limits in the exercise of the right to self-determination should be deemed as inherent to international law. In that sense, they parallel the limitation clauses in domestic constitutions that indicate the point up to which state action is sanctioned. Thus, international thematic constitutionalism is rendered complete and stability is instilled in the international arena.

This stability is greatly craved-for in a world in turmoil. Eventually, either through the gradual relaxing of the veto recourse or through the continuation of the constitutionalization process, cognizance of international law’s inherent limits can further entrench trust for the international system and its major players: the states. If this is done, the inherent limits will not have chained, but liberated international law and the international community at large.