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## An Arab Winter: Threats to the Right to Protest in Transitional Societies, Such as Post-Arab Spring Egypt

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# AN ARAB WINTER: THREATS TO THE RIGHT TO PROTEST IN TRANSITIONAL SOCIETIES, SUCH AS POST-ARAB SPRING EGYPT

TARA VASSEFI\*

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## I. INTRODUCTION

“O great people of Egypt, dear citizens standing here in the Revolution square, in freedom square, in Tahrir Square, in martyrs' square, and all citizens standing in all liberty squares across the homeland, Egypt, in villages, towns and cities, in all governorates of Egypt . . . I came to talk to you today, because I believe that you are the source of power and legitimacy. . . . I say it with full force ‘No authority is over or above this power’. You are the source of power. You are the owners of the will. You grant power to whomsoever you choose, and you withdraw power from whomsoever you choose.”<sup>1</sup>

- President Mohamed Morsi, Inaugural Speech in Tahrir Square, June 29,

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1. Mohamed Morsi, President of Egypt, Inaugural Address in Tahrir Square (June 29, 2012), *translated in President Mohamed Morsi's Speech in Tahrir Square, Friday June 29, 2012*, Ikhwan Web (June 30, 2012), <http://www.ikhwanweb.com/article.php?id=30153>.

2012

The initial victory of the Arab Spring<sup>2</sup> was entrenched within the people's right to protest.<sup>3</sup> When the first round of masses came onto the streets, the world watched as millions living under the rule of authoritarianism were able to bring about monumental change through protests.<sup>4</sup> Even in the murky and volatile post-Arab Spring world, the newfound right to protest remains at issue. In international law, the right to protest, or freedom of assembly as it is referred to in the legal context, is paramount for the legal rights of citizens within democratic societies. Article 21 of the International Covenant for Civil and Political Rights ("ICCPR") provides that "the right to peaceful assembly shall be recognized" barring certain enumerated restrictions.<sup>5</sup>

Egypt presents an interesting case for article 21 of the ICCPR

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2. Compare Roger Hardy, *Egypt Protests: An Arab Spring as Old Order Crumbles?*, BBC (Feb. 2, 2011), <http://www.bbc.co.uk/news/world-middle-east-12339521> (providing an example of "Arab Spring" as a means of referring to the protest movement in question), with *The Arab Awakening*, AL JAZEERA ENGLISH (Feb. 22, 2011), <http://www.aljazeera.com/indepth/spotlight/2011/02/2011222121213770475.html> (demonstrating an example of "Arab Awakening" as an alternative designation for the same movement). The term "Arab Spring" refers to the sweeping protests throughout several Middle Eastern and North African countries. Though the term is rather definitive, and the word "Spring" connotes a positive end that has yet to come into fruition. This paper will use the term "Arab Spring" as opposed to Arab Awakening or Arab Rising for its familiarity.

3. See Sudarsan Raghavan, *Inspired by Tunisia and Egypt, Yemenis Join in Anti-Government Protests*, WASH. POST (Jan. 27, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/27/AR2011012702081.html> (demonstrating that citizens of Arab states felt more empowered in their right to protest as the Arab Spring continued, thereby furthering its success in increasing the number of protesters and organized protests).

4. *Id.* (discussing the burgeoning threat to extant Arab regimes posed by protests even at an early point in the Arab Spring movement).

5. International Covenant on Civil and Political Rights art. 21, Dec. 16, 1966, 999 U.N.T.S. 171, 178, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf> [hereinafter ICCPR] (providing that restrictions may be permitted "in conformity with the law," and if they are "necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others").

because the country recently began its democratic process.<sup>6</sup> Since Egypt signed the ICCPR in 1981, it was not previously privy to a key element of article 21 of the ICCPR as “the focus of freedom of assembly is clearly on its *democratic function* in the process of forming, expressing and implementing political opinions.”<sup>7</sup> Therefore, it is clear that at least prior to the ouster of President Hosni Mubarak, and the decades of authoritarianism under his rule, Egypt did not qualify as a democracy in light of article 21’s emphasis on freedom to assemble as an essential democratic function.<sup>8</sup> However, democracy is a process rather than a definitive point.<sup>9</sup> Egypt, along with a few other post-Arab Spring countries, has embarked on the democratic process, and the codified right to protest within the post-revolution 2012 Constitution has been a great victory in this regard.<sup>10</sup>

Following the ratification of the 2012 Constitution, leaders have repeatedly violated their international obligation to ensure their citizens the right to protest. Egypt’s first violation occurred when the

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6. See *Egypt Crisis: President Hosni Mubarak Resigns as Leader*, BBC (Feb. 12, 2011), <http://www.bbc.co.uk/news/world-middle-east-12433045> [hereinafter *Mubarak Resigns*] (reporting on the ouster, clarifying that though his title was President and Egypt had the façade of a democracy, Mubarak “ruled for 30 years, suppressing dissent and protest, and jailing opponents.”).

7. See Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS COMMENTARY 481, 490 (2d rev. ed. 2005) (emphasis added) (comparing the unique quality of article 21 of the ICCPR to similar articles in other conventions such as the European Convention on Human Rights, as well as to other articles within the ICCPR).

8. Cf. William J. Dobson, *THE DICTATOR’S LEARNING CURVE: INSIDE THE GLOBAL BATTLE FOR DEMOCRACY* (2013) (writing about how Mubarak began slightly opening the political process before the 2011 Revolution though ultimately the country had an authoritarian governing structure).

9. Many in the transitional justice field feel that the democratic process itself is the goal, and there is no point at which we stop striving for that ideal. See Collette Rausch, *Democracy Is a Process – and a Journey*, U.S. INST. PEACE (July 12, 2011), available at <http://www.usip.org/olivebranch/democracy-process-and-journey>.

10. See generally Faith Lemon, *The Uncertain Future of Human Rights in the Arab Spring*, RTS. NEWS (Nov. 2011), available at [http://hrcolumbia.org/rightsnews/nov2011/uncertain\\_future](http://hrcolumbia.org/rightsnews/nov2011/uncertain_future) (cautioning that while rhetoric surrounding the Arab Spring movements highlights positive changes and optimism, “a summative evaluation of the Arab Spring as an impetus for durable democracy or improved human rights conditions in [The Middle East and North Africa] remains elusive.”).

Muslim Brotherhood-led parliament passed restrictive laws regarding the notification requirement prior to a protest.<sup>11</sup> Egypt's second violation occurred during the military-led government's violent crackdown on pro-Morsi protests during and after the July 2013 turmoil that resulted in President Morsi's ouster.<sup>12</sup>

As is unsurprising in post-revolutionary turmoil, Egypt's post-Arab Spring unrest resulted in a violation of international law, especially the legal right to freedom of assembly.<sup>13</sup> However, there are two unique elements to an analysis of post-revolutionary events in Egypt. First, Egypt falls within a gap in international legal discourse such that it is unclear if it is bound by the ICCPR's right to freedom of assembly during its period of transition into democracy.<sup>14</sup> Second, Egypt presents an inimitable case study in this neglected area of international law because Egypt's democratic transition was not brought on by war or civil conflict.<sup>15</sup> Unlike other post-Arab Spring transitional countries such as Libya and Syria, Egypt's civil society—legal and government institutions—remain largely intact following the 2011 revolution.<sup>16</sup> Therefore, there is a basis from

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11. See *New Egyptian Protest Law Threatens Right to Protest: NGO*, AHAM ONLINE (Mar. 27, 2013), available at <http://english.ahram.org.eg/NewsContent/1/64/67865/Egypt/Politics-/New-Egyptian-protest-law-threatens-right-to-protes.aspx> [hereinafter *New Egyptian Protest Law*] (explaining that the post-Arab Spring protest law in Egypt “obligates demonstration organisers to give an official notice to the authorities about the time, route and demands of any protest three days in advance,” and characterizing such obligations as “stringent and unrealistic restrictions”).

12. See Jeffrey Fleishman, *Death Toll in Egypt Hits 638; Morsi Supporters Vow to Keep Protesting*, L.A. TIMES (Aug. 15, 2013), <http://www.latimes.com/world/worldnow/la-fg-wn-egypt-crackdown-toll-20130815,0,1160232.story> (describing the violence including a climbing death toll following the July ouster of President Morsi, and its use in quashing protests by the Egyptian public).

13. See discussion *infra* Part III (explaining Egypt's violations of the ICCPR's article 21 guarantees of freedom of assembly).

14. See discussion *infra* Part III.C (categorizing Egypt's Goldilocks Complex in falling in the gap of governing international law regarding transitional societies).

15. *Hosni Mubarak Resigns as President*, AL JAZEERA (Feb. 11, 2011), <http://www.aljazeera.com/news/middleeast/2011/02/201121125158705862.html> (explaining that Egyptian President Hosni Mubarak resigned his office without being violently overthrown or removed).

16. See Sharif Abdel Kouddous, *What Led to Morsi's Fall – and What Comes Next?*, NATION (July 5, 2013), <http://www.thenation.com/article/175128/what-led-morsis-fall-and-what-comes-next#> (explaining that “the [Muslim] Brotherhood

which to evaluate both Egypt's domestic and international legal obligations to upholding its citizenry's right to protest.<sup>17</sup>

Egypt violated article 21 of the ICCPR in two general instances. As events in Egypt are fluid and likely to change, this comment will freeze analysis at the time of the military's violent suppression of demonstrations, just before the military declared a state of emergency on August 14, 2013. This comment will first provide background by focusing on Egypt's domestic and international laws at the time of the freezing point.<sup>18</sup> Subsequently, it will look closely at the language and interpretations of article 21 of the ICCPR and consider the unique significance of democracy to the legal right to freedom of assembly.<sup>19</sup>

Then, this comment will consider two elements within article 21 of the ICCPR: its basis in democracy and the impact of a transitional state's legal obligations. The analysis section will consider how these two elements intertwine and apply them to Egypt's recent history to determine whether Egypt violated article 21.<sup>20</sup> Finally, after concluding that Egypt did in fact violate international law, this comment will offer recommendations for holding Egypt accountable for its violations.<sup>21</sup>

## II. BACKGROUND

This section begins by breaking down the relevant elements of the ICCPR article 21, including its explicit and implicit permissible

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kept intact most institutions of the Mubarak regime").

17. See also Sreeram Sundar Chaulia, *The Turmoil in Egypt Underscores Just How Fragile the Post-Arab Spring Situation Is*, TIMES INDIA (Nov. 26, 2012), [http://articles.timesofindia.indiatimes.com/2012-11-26/edit-page/35347560\\_1\\_president-morsi-mubarak-regime-hosni-mubarak](http://articles.timesofindia.indiatimes.com/2012-11-26/edit-page/35347560_1_president-morsi-mubarak-regime-hosni-mubarak) (warning against the instability of regime changes and the attendant risks posed to the right of protest by new leaders – such as Morsi – attempting to consolidate power).

18. See discussion *infra* Part II.A (detailing events in Egypt following the ouster of President Mubarak that led to violations of article 21 of the ICCPR through August 2013, when Egypt declared a state of emergency).

19. See discussion *infra* Part II.B (expounding upon the various nuances of article 21 of the ICCPR).

20. See discussion *infra* Part III (considering the implications of international law on post-Arab Spring events in Egypt).

21. See discussion *infra* Part IV (listing four recommendations for responding to Egypt's post-Arab Spring violations of article 21 of the ICCPR).

restrictions to freedom of assembly. Then it provides a brief timeline of events in Egypt as well as the domestic law regarding the right to protest. Finally, it briefly discusses the gap in international law regarding a country's international obligations as it embarks on the process of democratic transition.

#### A. EGYPT: A BRIEF TIMELINE

Egypt's transition toward democracy began in January 2011, with the ouster of President Hosni Mubarak.<sup>22</sup> By June 2012, President Mohamed Morsi became the country's first democratically elected leader in its long history.<sup>23</sup> Shortly thereafter, the Egyptian Assembly adopted its new Constitution in December 2012.<sup>24</sup>

In what was seen as a great victory of the Arab Spring,<sup>25</sup> the Constitution granted Egyptians the right to freedom of assembly, giving their citizens the right to peaceful demonstrations and gatherings with the requirement of prior notification.<sup>26</sup> The Constitution does not provide details or limits to the notification

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22. *Mubarak Resigns*, *supra* note 6 (discussing the reaction to President Mubarak's departure from members of the Egyptian political community, as well as from the protesters whose demonstrations had precipitated Mubarak's resignation).

23. Kouddous, *supra* note 15.

24. See Stephanie McCrummen, *Egyptian Assembly Rushes to Vote on New Constitution*, WASH. POST (Nov. 29, 2012), available at [http://www.washingtonpost.com/world/middle\\_east/amid-political-crisis-egypts-constitutional-assembly-prepares-to-vote-on-draft-document/2012/11/29/1aa3f2a2-3a20-11e2-9258-ac7c78d5c680\\_story.html](http://www.washingtonpost.com/world/middle_east/amid-political-crisis-egypts-constitutional-assembly-prepares-to-vote-on-draft-document/2012/11/29/1aa3f2a2-3a20-11e2-9258-ac7c78d5c680_story.html) (describing the push to adopt a new Constitution as President Morsi's government attempted to transition to normal governance); Peter Beaumont, *Mohamed Morsi Signs Egypt's New Constitution Into Law*, GUARDIAN (Dec. 26, 2012), <http://www.theguardian.com/world/2012/dec/26/mohamed-morsi-egypt-constitution-law>.

25. See Samantha Stainburn, *Egypt Protest Restrictions: Rights Groups Criticize New Draft Law*, GLOBAL POST (Feb. 14, 2013), <http://www.globalpost.com/dispatch/news/regions/middle-east/egypt/130214/egypt-protest-restrictions-rights-groups-criticize-ne> (writing that the codified right to protest in Egypt's new 2012 Constitution was a great victory as it was previously not a right provided to the Egyptian people by law).

26. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, art. 50, Nov. 29, 2012, as ratified Nov. 29, 2012, translated in Nivien Saleh, *The 2012 Constitution of Egypt*, Translated by Nivien Saleh, with Index, NIVIEN SALEH, <http://niviensaleh.info/constitution-egypt-2012-translation/#ch-two-2> (last visited May 2, 2014).



requirement.<sup>27</sup> However, the Egyptian parliament has stipulated a three-day, detailed notification requirement.<sup>28</sup>

Despite these developments, like many other post-revolutionary countries, Egypt's transition continued and still continues to experience vicissitudes. From around February to June 2013, the people's dissatisfaction with President Morsi and the Muslim Brotherhood gained traction. New rounds of protests erupted against President Morsi, some of them escalating to violence.<sup>29</sup>

In the months leading up to President Morsi's July 2013 ouster, a campaign emerged with the objective of holding Morsi accountable for the country's economic and cultural stagnation.<sup>30</sup> By June 2013, a campaign known as Tamarod (rebellion) collected over thirty million signatures demanding President Morsi's resignation on the one-year anniversary of his election for what many Egyptians saw as his failure to effectively govern the country, improve the economy, and follow through on his campaign promises.<sup>31</sup>

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27. *Id.* (stating only that the right to protest "requires a notification as stipulated by law," leaving the details to be decided upon by parliament).

28. See New Egyptian Protest Law, *supra* note 11 (showing the excessive limitations on protests through a long prior notice requirement as well as prohibitive restrictions on the demonstrations' movement); see also Hend Kortam, *EIPR Rejects Limitations on Right to Protest*, DAILY NEWS EGYPT (May 3, 2013), available at <http://www.dailynewsegypt.com/2013/05/03/eipr-rejects-limitations-on-right-to-protest/> (writing that the human rights organization Egyptian Initiative for Personal Rights (EIPR) rejected the substance and the philosophy behind the new protest law, arguing that "[p]rotests need protection, not legal limitations. What needs regulation and legal limitations is the authority's intervention in peaceful gatherings").

29. Chaulia, *supra* note 17 (describing the turmoil in the immediate aftermath of Morsi's election in response to his political maneuvers, "Morsi has unexpectedly ignited a war in domestic politics. His declaration on November 22 arrogating extraordinary powers to the office of the president over the judiciary and other public institutions blocking the revolution has triggered mass unrest across Egypt and kick-started a cycle of confrontation and realignment among different political factions. Massive crowds hailing from different ideological camps chanting, 'Morsi is the new Mubarak' . . . and that the 'revolution is incomplete' are demonstrating that nothing is settled yet").

30. See *Egypt's Tamarod Protest Movement*, BBC (July 1 2013), <http://www.bbc.co.uk/news/world-middle-east-23131953> (describing the movement, Tamarod, as being motivated by concerns over Egypt's perceived socioeconomic collapse during Morsi's presidency).

31. *Id.* (discussing the Tamarod's demands, and describing it as "a new

The Tamarod campaign culminated in a mass protest against President Morsi and the Muslim Brotherhood on June 30, 2013.<sup>32</sup> Just a few days later, on July 3, the Egyptian military followed through on its ultimatum against the President after he failed to effectively placate the protesters.<sup>33</sup> On that day, the military suspended the 2012 Constitution, and thus also suspended the people's right to protest. Before August 14, 2013, when the military declared a state of emergency, the interim Egyptian government suppressed dozens of peaceful retaliation protests and sit-ins carried out by the Muslim Brotherhood, leaving hundreds of fatalities.<sup>34</sup>

Though Egypt continues to experience turmoil in its transition to democracy, the events implicating article 21 of the ICCPR for the purposes of this paper focus on the period from the Muslim Brotherhood-led government to the military-led ouster of President Morsi up until the declaration of an emergency state, since this period serves as a model for impending transitions and difficulties moving forward.

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grassroots protest movement in Egypt that . . . was founded in late April by members of the Egyptian Movement for Change – better known by its slogan Kefaya (Enough) – which pushed for political reform in Egypt under former president Hosni Mubarak in 2004 and 2005. Although Kefaya joined in the mass protests that forced him to resign in 2011, it did not play a prominent role.”)

32. *Id.* (describing the June 30, 2013 protest as having been attended by “millions of people” in Cairo and elsewhere).

33. See Abigail Hauslohner et al., *Egyptian Military Ousts Morsi, Suspends Constitution*, WASH. POST (July 3, 2013), [http://articles.washingtonpost.com/2013-07-03/world/40336012\\_1\\_president-mohamed-morsi-wednesday-night-morsi-rally](http://articles.washingtonpost.com/2013-07-03/world/40336012_1_president-mohamed-morsi-wednesday-night-morsi-rally) (providing an in-depth timeline of events from the build-up before the military's ouster of President Morsi and the detailed and quick succession of events after the military intervened on July 3, 2013); see also Sarah Lynch, *Egyptians Celebrate in the Streets, but Instability Remains*, USA TODAY (July 3, 2013), <http://www.usatoday.com/story/news/world/2013/07/03/egypt-morsi-deposed-military/2488057/> (elaborating on the emergency procedures established by the military following Morsi's sidelining).

34. See Warren Murray et al., *Egyptian Military Government Declares Month-Long Emergency – As it Happened*, GUARDIAN (Aug. 14, 2013), <http://www.theguardian.com/world/2013/aug/14/egypt-clear-cairo-sitins-live> (describing the brutal tactics utilized by the Egyptian military to clear out camps and other demonstrations, leaving 278 PEOPLE DEAD ON ONE DAY).

## B. ARTICLE 21 OF THE ICCPR

### 1. *Language Specific to Article 21*

Article 21 of the ICCPR explicitly protects a citizen's right to peaceful assembly:

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in *conformity with the law* and which are *necessary in a democratic society* in the *interests of national security* or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.<sup>35</sup>

This background section considers first, the Convention's deliberate focus on democracy; second, the definition of a "democratic society" for the purposes of the ICCPR; and, third, the restrictions permitted by the language of article 21 and the Human Rights Committee's ("HRC") interpretation of this language.

### 2. *Article 21's Roots in Democracy*

Article 21 is one of a few articles in which drafting states deliberately included the language of democracy.<sup>36</sup> The right set out in article 21 is not only necessary to attain a certain purpose but also a contingency of democratic society.<sup>37</sup> Drafting states ultimately concluded that any limitation of the right to freedom of assembly must be implemented in accordance with "certain minimum democratic principles" to effectively protect this right.<sup>38</sup> Therefore, article 21 of the ICCPR and its restrictions clause implicate a threshold of democratic principles that the government in question

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35. ICCPR, *supra* note 5, at 171 (emphasis added to highlight elements of article 21 that will be expounded upon for the purposes of this comment).

36. *See* Nowak, *supra* note 7, at 490 (contrasting article 21 to the limitation clauses in article 12 freedom of movement, article 18 freedom of thought, and article 19 freedom of expression).

37. *Id.* (explaining that "interference with the rights set out in . . . [article 21] . . . must be not only necessary to attain a certain purpose but also 'necessary in a democratic society'").

38. *Id.* (elaborating on the role of the United Nations in setting these principles, particularly inasmuch as they should be devised in accord with the principles of the "the U.N. Charter, the [Universal Declaration of Human Rights] and the two Covenants.")

must meet.<sup>39</sup>

### 3. *The Definition of Democracy in International Law and the ICCPR*

International law does not provide a recognized, singular definition of democracy.<sup>40</sup> Nonetheless, it has come to narrow the meaning of democracy to the process of popular sovereignty.<sup>41</sup> Specifically, article 25 of the ICCPR codifies the right to political participation through free and fair elections.<sup>42</sup> This indicates that the extent of a state's compliance with certain minimum democratic principles under international law is generally judged, perhaps to the extent of oversimplification, by the presence of free and fair

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39. *Id.* at 482 (“It has been generally recognized in human rights theory and case law in many countries that the State is under a special duty of protection in the general interest of ensuring the functioning of a democratic process of forming, expressing and implementing political opinions and decisions.”). *Cf.* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 127, 131 (2006) (sparking a debate on the cost-benefit analysis proposed by the authors regarding why states, both liberal-democratic and authoritarian, ratify international treaties such as the ICCPR, concluding that “[f]or most states, the costs of ratifying the ICCPR are low because” of a lack of enforcement mechanisms and thus authoritarian states that “do not generally act in accordance with the treaty can ratify the treaty at little cost” in spite of its basis in democratic principles).

40. *See* Andreas Auprich, *The Democratic Entitlement and the Militancy or Not of the Austrian Legal Order*, in *THE ‘MILITANT DEMOCRACY’ PRINCIPLE IN MODERN DEMOCRACIES* 37, 38–39 (Marcus Thiel ed., 2009) (indicating through a collection of several sources that “there is no universal democratic concept, as democracy depends on particular sociocultural, structural and ethical preconditions”).

41. *See* Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 48, 49–50 (Gregory H. Fox & Brad R. Roth eds., 2000) (defining popular sovereignty as “the notion of citizen consent to the exercise of coercive power within a state,” which international law has modestly interpreted with a focus on the electoral process).

42. ICCPR, *supra* note 5, art. 21 (stipulating that “[e]very citizen shall have the right and the opportunity . . . (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors”); *see also* Gregory H. Fox, *The Right to Political Participation in International Law*, 17 *YALE L.J.* 539, 552–53 (1992) (arguing that the right to political participation is concrete, binding, and enforceable since it is derived from specific treaty language in the ICCPR and other international treaties that set a minimum criteria for elections to be considered free and fair – namely, that they be by universal, equal suffrage, by secret ballot, at reasonable and periodic intervals, and not discriminatory against voters or candidates).

elections.<sup>43</sup>

### C. RESTRICTIONS TO FREEDOM OF ASSEMBLY AND OTHER SIMILAR ARTICLES OF THE ICCPR

The ICCPR's list of acceptable restrictions is similar to those found in other international conventions providing for the right to freedom of assembly.<sup>44</sup> There are several key issues in the restrictions paragraph that require further attention. First, it is necessary to clarify the definition of assembly. Second, in looking at perhaps the most pertinent element of justified restrictions, the HRC has narrowed the scope of what impingements on the right to freedom of assembly can be justified in the interests of national security. Third, the implied restrictions on the right to freedom of assembly (those not codified in article 21) provide useful background to the scope and range of such restrictions: those restrictions are the commonly utilized notification requirement and the use of force in response to assemblies.

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43. Cf. U.N. Secretary-General, *Support by the United Nations System of the Efforts of Government to Promote and Consolidate New or Restored Democracies*, ¶¶ 29–30, U.N. Doc. A/52/513 (Oct. 21, 1997) [hereinafter U.N. Efforts to Promote New Democracies] (acknowledging that while concentration on observing elections has been the U.N.'s focus in reviewing a state's democratic process, moving forward "the observation of elections alone will . . . not suffice as a yardstick for measuring democratization").

44. Compare ICCPR, *supra* note 5, art. 22 (enumerating language limiting restrictions on the freedom of assembly such that "[n]o restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others"), with Convention for the Protection of Human Rights and Fundamental Freedoms, art 11(2), Nov. 4, 1950, 213 U.N.T.S. 222 ("No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."), and OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 59 (1982) ("Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.").

### *1. Restriction Through the Definition of Assembly*

There is a degree of ambiguity as to what qualifies as an “assembly.”<sup>45</sup> In the HRC case *Kivenmaa v. Finland*,<sup>46</sup> the plaintiff, a Finnish citizen, was charged with violating the country’s Act on Public Meetings by holding what the Finnish government considered to be a public meeting without the requisite notification.<sup>47</sup> In response to a visit from a foreign head of state, the plaintiff and twenty-five members of her organization gathered across from the Presidential Palace amid a larger crowd.<sup>48</sup> The plaintiff successfully argued that her presence at the Presidential Palace, being amid a larger crowd of people, did not fall under Finland’s definition of a public meeting that would require an advance notification of at least six hours. At the same time, the court held that Finland had violated article 21 of the ICCPR by charging the plaintiff with a violation of Finland’s protest law.<sup>49</sup> Therefore, *Kivenmaa* established that a gathering that fails to meet a state’s definition of assembly might still

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45. See Human Rights Committee Commc’n 412/1990, *Kivenmaa v. Finland*, 50th Sess., Mar. 31, 1994, U.N. Doc. A/49/40, para. 9.2, available at [http://www.worldcourts.com/hrc/eng/decisions/1994.03.31\\_Kivenmaa\\_v\\_Finland.htm](http://www.worldcourts.com/hrc/eng/decisions/1994.03.31_Kivenmaa_v_Finland.htm). (adjudicating a dispute over whether a group of individuals qualifies as a demonstration versus an assembly for the purposes of article 21 of the ICCPR); see also Nowak, *supra* note 7, at 484–86 (clarifying the discussion and intent of the HRC in word choice and comparing the language in the ICCPR to other international conventions, concluding “the type of assembly has to do with the permissible or necessary measures for its protection or limitation”).

46. H.R. Comm. Commc’n 412/1990, *supra* note 45.

47. *Id.* para. 2.1.

48. *Id.* paras. 2.1, 2.3 (focusing on the plaintiff’s argument that “she did not organize a public meeting, but only demonstrated her criticism of the alleged human rights violations by visiting head of State . . . amid a larger crowd” in contrast to the state’s argument that the plaintiff’s group of twenty-five persons and their specific behavior were “distinguishable from the crowd and could therefore be regarded as a public meeting [when] no other group or subgroup which could be characterized as demonstrators, distributing leaflets or displaying banners” like the plaintiff were present).

49. *Id.* para. 9.2 (“Insofar as the State party contends that displaying a banner turns [the plaintiff’s] presence into a demonstration, the Committee notes that any restrictions upon the right to assemble must fall within the limitation provisions of article 21 . . . . [T]he application of Finish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant.”).

be protected by article 21 of the ICCPR.<sup>50</sup>

## 2. *Explicit Restrictions to Freedom of Assembly in Article 21*

The second noteworthy element of article 21 of the ICCPR is that it allows restrictions based on national security interests.<sup>51</sup> The HRC and other sources narrow the definition of interest of national security. In *Kim v. Republic of Korea*,<sup>52</sup> the court held that South Korea's national security claims vis-à-vis North Korea did not render the suppression of an assembly organized by the National Coalition for Democratic Movement permissible because the state's claimed national security interest was insufficient.<sup>53</sup> There, the plaintiff prepared and distributed documents that criticized the South Korean government, and argued for reunification with North Korea at the Movement's inaugural meeting of 4000 participants.<sup>54</sup> Subsequently, the plaintiff was arrested and tried under the National Security Law, the Law on Assembly and Demonstrations and the Law on Repression of Violent Activities for "anti-state" activities.<sup>55</sup> Addressing South Korea's national security concerns with their northern neighbor, the Committee nonetheless held that the influence

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50. *Id.* para. 9.2. *But see id.* para. 2.5 (Herndl, J., dissenting) (questioning the seemingly contradictory logic that if the gathering of people at the Presidential Palace for the purpose of publicly denouncing the presence of a foreign head of state "does not constitute a demonstration, indeed a public gathering within the scope of article 21 of the Covenant, what else would constitute a 'peaceful assembly' in that sense?").

51. ICCPR, *supra* note 5, art. 21.

52. Human Rights Committee Commc'n 574/1994, *Kim v. Republic of Korea*, 64th Sess., Nov. 3, 1998, U.N. Doc. A/54/40, paras. 12.4–12.5, *available at* [http://www.worldcourts.com/hrc/eng/decisions/1998.11.03\\_Kim\\_v\\_Republic\\_of\\_Korea.htm](http://www.worldcourts.com/hrc/eng/decisions/1998.11.03_Kim_v_Republic_of_Korea.htm).

53. *See id.* paras. 12.4–12.5 (reasoning that in South Korea's case, national security was not a viable excuse for quelling Kim's expression).

54. *Id.* para. 2.1 (bringing Kim's case forward as a freedom of expression case rather than a freedom of assembly case as would seem more appropriate since passing out documents was a byproduct of his initial aim of bringing together 4000 participants in an assembly).

55. *Id.* para. 2.3 (focusing the complaint on article 7, paragraphs 1 and 5 of the Republic of Korea's National Security Law proving that "any person who assists an anti-State organization by praising or encouraging the activities of this organization shall be punished" and that "any person who produces or distributes documents, drawings or any other material(s) to the benefit of an anti-State organization, shall be punished").

of national security implications on public order in South Korea should not be overestimated.<sup>56</sup>

Analogizing the HRC's clarification of national security restrictions with respect to freedom of expression in *Kim*, it seems that national security interests cannot be used as a blanket justification for state action against the right to freedom of assembly.<sup>57</sup> Indeed, the national security and public order restrictions require narrowing the limiting of acts to those that are truly dangerous for state security.<sup>58</sup>

### 3. *Implicit Restrictions to Freedom of Assembly in Article 21*

Although article 21 does not explicitly specify the acceptable methods for restricting the right to freedom of assembly, states commonly require prior notification to organizing a protest or demonstration.<sup>59</sup> In *Kivenmaa* the HRC held "that a requirement to notify the police of intended demonstration in public place six hours before its commencement *may* be compatible with the permitted

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56. *Id.* para. 3.3 (referring to the Comments of the HRC following South Korea's report on measures adopted pursuant to being a new signatory of the ICCPR that "[a]lthough the particular situation in which the Republic of Korea finds itself has implications on public order in the country, its influence ought not to be overestimated. The Committee believes that ordinary laws and specifically applicable criminal laws should be sufficient to deal with offences against national security").

57. *Id.* paras. 12.4–12.5 (stressing the importance of specificity in establishing domestic legal justifications for state action in pursuit of national security interests, the court found that South Korea's National Security Law in *Kim* included vague terms that allowed for broad interpretation).

58. *Id.* para. 12.4; *see also* Nowak, *supra* note 7, at 491–92 (concluding that "[a]s in comparable provisions of the Covenant (Arts. 12, 13, 14, 19 and 22), restrictions on freedom of assembly to protect national security are permissible only in serious cases of political or military threat to the entire nation").

59. H.R. Comm. Commc'n 412/1990, *supra* note 45, para. 8.3; Human Rights Committee Commc'n 1157/2003, *Coleman v. Australia*, 87th Sess., Jul. 17, 2006, U.N. Doc. A/61/40, para. 7.3, *available at* [http://www.worldcourts.com/hrc/eng/decisions/2006.07.17\\_Coleman\\_v\\_Australia.htm](http://www.worldcourts.com/hrc/eng/decisions/2006.07.17_Coleman_v_Australia.htm) (considering Australia's notification requirement through a permit system where the Committee held that "[e]ven if a State party may introduce a permit system aiming to strike a balance between an individual's freedom of speech and the general interest in maintaining public order in a certain area, such a system must not operate in a way that is incompatible with [the Covenant]").



limitations laid down in article 21 of the Covenant.”<sup>60</sup> While six hours may be acceptable, the HRC has not provided an explicit upper limit for what is considered an acceptable notification requirement.<sup>61</sup> Furthermore, the notification should not be used to quell assembly, but rather should invoke a positive duty to ensure that citizens can exercise their right to freedom of assembly.<sup>62</sup> Therefore, while the notification requirement is a legitimate restriction to freedom of assembly, it is meant to be a tool used by the state in fulfilling its duty to protect its citizenry’s right to freedom of assembly.

Finally, on the general issue of use of force, the ICCPR requires restraint both on the part of the protesters and the state. The right to freedom of assembly only covers peaceful protests. Under article 21 of the ICCPR, protests that use any form of violence are not protected.<sup>63</sup> Any response or restriction to the right to freedom of assembly implies a “principle of proportionality” that requires that the means were absolutely necessary to achieve the end.<sup>64</sup> *Coleman v. Australia*<sup>65</sup> addressed the issue of proportionality in force with respect to a similar right under freedom of expression in article 19 of the ICCPR.<sup>66</sup> There, the plaintiff gave a fifteen to twenty minute speech at a shopping mall in Australia and was subsequently

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60. See H.R. Comm. Commc’n 412/1990, *supra* note 45, para. 9.2 (emphasis added) (suggesting that the court seems reluctant to offer a bright line rule of what is an acceptable amount of time to require notification prior to a protest or demonstration, and that here even six hours was not definitively within acceptable time constraints).

61. See, e.g., *id.*

62. See Nowak, *supra* note 7, at 487–88 (clarifying that this positive duty is to ensure that the notification requirement be utilized by the state to guarantee individuals are “protected against all kinds of interference with the exercise of their freedom of assembly”).

63. *Id.* at 486–87 (defining a peaceful protest as an assembly with the absence of violence and weapons and evaluating peacefulness by focusing on the conduct of the protesters as opposed to the content of their message).

64. *Id.* at 491 (expounding on what is meant by proportionality: “The prohibition and forceful breaking up of an assembly may therefore *ultima ratio* come under consideration only when all milder means have failed. When there is danger of clashes, the organizers of an assembly are primarily responsible for preventing disturbances. . . Even the arrest of isolated, violent extremists may be a milder means than the collective prohibition of the entire assembly”).

65. H.R. Comm. Commc’n 1157/2003, *supra* note 59.

66. *Id.* para. 7.3.

convicted for giving a public address without a proper permit from the town council.<sup>67</sup> The plaintiff was fined \$300 and held in custody for five days even though, as the court explained, the plaintiff's address was not threatening or unduly disruptive.<sup>68</sup> The HRC held that the plaintiff's peaceful presence in a shopping mall did not justify the state party's disproportionate restriction of the plaintiff's rights (by charging him with violating a local law) even if he did not adhere to the permit law.<sup>69</sup> Therefore, while the HRC has yet to establish an explicit test regarding proportionality of laws limiting the right to freedom of assembly, permissible restrictions implied in the practical applications of article 21 of the ICCPR (that is, notifications and use of force against protestors) are subject to a consideration of proportionality.

### III. ANALYSIS

#### A. EGYPT'S TRANSITIONAL PERIOD FROM AUTHORITARIANISM TO DEMOCRACY MAKES IT UNCLEAR HOW ARTICLE 21 OF THE ICCPR APPLIES

If the basis for evaluating a state's democratic character relies on the presence of free and fair elections, then Egypt's newfound (post-Arab Spring) status meets the criteria.<sup>70</sup> However, given that international law does not provide a clear definition of democracy<sup>71</sup> from which to determine Egypt's definitive status, it is necessary to evaluate its violations in further detail, especially in the context of its tumultuous transition.

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67. *Id.* para. 2.1 (describing plaintiff's actions as an act of individual speech protesting government policy, which was penalized as a violation of a public address ordinance).

68. *Id.*

69. *Id.* para. 7.3 (holding that such a serious response to a peaceful and undisruptive public address by one man was incompatible with the ICCPR's intent).

70. See discussion *supra* Part II.B.3 (listing the criteria for democracy as first, by universal, equal suffrage; second, by secret ballot; third, at reasonable and periodic intervals; and fourth, not discriminatory against voters or candidates).

71. See *U.N. Efforts to Promote New Democracies*, *supra* note 43, at ¶¶ 29–30 (explaining that even these criteria is an insufficient “yardstick” for measuring democracy).

*I. International Law Applies to Transitional States*

The volatile situation in Egypt evokes a fascinating question of what happens to a country's international legal obligations to the right to freedom of assembly when a transitional state is faced with swift and unpredictable changes in their democratic functions. These obligations are clear when a country has established democratic institutions that can ensure their citizen's right to freedom of assembly.<sup>72</sup> The obligations are perhaps even clearer when countries without any semblance of democratic functions violate international law.<sup>73</sup> However, it is unclear how international legal obligations that are rooted in principles of democracy<sup>74</sup> apply to transitional societies.

Egypt was still bound to the ICCPR, at least until the military declared a state of emergency on August 13, 2013.<sup>75</sup> First, unless a successive regime or ruler proclaims public emergency or the country's membership is suspended by a certain international organization or convention, the state is still bound to those international obligations even in periods of democratic transitional turmoil.<sup>76</sup> For example, following what the African Union

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72. See, e.g., GOLDSMITH & POSNER, *supra* note 39, at 109 (explaining that both democratic and authoritarian states sign on to the ICCPR because the cost of doing so outweighs the benefits even though most democratic states naturally comply with most aspects of the ICCPR and most authoritarian states do not always or even generally act in accordance with the ICCPR, at little cost).

73. *Id.* at 112 (arguing that human rights compliance is often based on cooperation and concern by one state for another state's adherence to human rights norms).

74. Nowak, *supra* note 7, at 482, 488 (noting that this right requires "stiffer duties," such as providing access to assembly rooms or police protection at events, which might not be necessarily feasible in a transitional state).

75. *State of Emergency: What Does It Imply?*, AHRAM (Aug. 14, 2013), <http://english.ahram.org.eg/NewsContent/1/64/79036/Egypt/Politics-/State-of-emergency-What-does-it-imply-.aspx> (explaining the impact of declaring a state of emergency on what the state is legally allowed to do for the purposes of security including allowing the President or interim leader to arrest citizens without court order as well as prohibiting public gatherings, restricting movement through curfews and other means, and increasing surveillance on citizens).

76. See *International Community Urges Egyptian Authorities to Respect Rule of Law and Human Rights, Amid Mixed Reactions to President's Ouster*, INT'L JUST. RES. CTR. (July 15, 2013), available at <http://www.ijrcenter.org/2013/07/15/international-community-urges-egyptian-authorities-to-respect-rule-of-law-and-human-rights-amid-mixed-reactions-to-presidents-ouster/#sthash.ApbrP8GN.2KDLG1Yp.dpbs> [hereinafter *International Community*

characterized as a coup d'état in Egypt, the African Union suspended Egypt's membership until Egypt restored constitutional order.<sup>77</sup> Therefore, since Egypt's membership to the ICCPR was not suspended, it was still bound by the Covenant, including article 21.

Aside from this bright line rule regarding suspension of membership, there is a dearth of legal principles regarding what happens to a country's international legal obligations as it experiences transition.<sup>78</sup> While the law of state succession governs transitioning states, as well as some other legal principles, these legal principles do not fully answer the question of the ICCPR article 21's application to a transitional state like post-Arab Spring Egypt.<sup>79</sup> There is one similar HRC case that provides an example of a transitional society grappling with ratification of the article on freedom of assembly. The plaintiff's arrest in *Kim v. Republic of Korea* occurred in 1989 when South Korea was in a period of transition.<sup>80</sup> In 1987 the authoritarian government decided to open the political process.<sup>81</sup> The HRC held South Korea to its legal obligation to the ICCPR, regardless of the country's status as having recently transitioned from authoritarianism to democracy.<sup>82</sup> Therefore, from the one example provided by the HRC thus far, it

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*Urges Respect Rule of Law and Human Rights*].

77. African Union Communiqué, para. 6, July 5, 2013, PSC/PR/COMM.(CCCLXXXIV), available at <http://www.peaceau.org/uploads/psc-384-com-egypt-05-07-2013.pdf> (“[B]y the relevant AU instruments, Council decides to suspend the participation of Egypt in the AU's activities until the restoration of constitutional order.”)

78. See discussion *supra* Part II.C.2 (noting that the HRC found that the restriction of freedoms for the purposes of national security was not a sufficient reason to suspend the right to assemble, but failing to articulate a clear standard for when such rights may be derogable).

79. See *id.*

80. See *History of South Korea: The Transition*, LIBR. CONGRESS, available at <http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field%28DOCID+kr0038%29> (last updated June 1990) (detailing the troubled history of South Korea and its regime changes that precede the 1989 case).

81. See HEEMIN KIM, *KOREAN DEMOCRACY IN TRANSITION: A RATIONAL BLUEPRINT FOR DEVELOPMENT SOCIETIES* (2011), available at <http://muse.jhu.edu/books/9780813129952>; see also Jerome A. Cohen, *Law in Political Transitions: Lessons from East Asia and the Road Ahead in China*, N.Y.U. J. INT'L L. & POL. 423, 436–37 (2005).

82. H.R. Comm. Commc'n 574/1994, *supra* note 52, para. 3.3.

would seem that countries transitioning into democracy are still obligated to their ratification of the ICCPR. Therefore, Egypt is still bound by the Covenant since its membership was not suspended and the ICCPR applies to states transitioning from authoritarianism to democracy like South Korea during the late 1980s.

B. EGYPT'S POST-ARAB SPRING LAWS AND EVENTS UNDER THE  
MUSLIM BROTHERHOOD-LED GOVERNMENT VIOLATED ARTICLE  
21 OF THE ICCPR

First, this subsection considers events and laws in Egypt prior to the July 2013 suspension of the Constitution; then it analyzes the military's actions following the suspension of the Constitution.

*1. Egypt's Post-Arab Spring Notification Requirement is More  
Restrictive Than the ICCPR Intends*

While Egypt's 2012 Constitution provided the basis for the right to protest, its proposed and adopted laws regarding the restriction in the notification requirement went beyond the intention of the drafters of the ICCPR and the HRC's interpretation of this restriction. If in *Kivenmaa* the HRC would only go so far as to say that Finland's six-hour notification requirement "may be"<sup>83</sup> within the confines of article 21 of the ICCPR, Egypt's law regarding the notification requirement went beyond this standard.<sup>84</sup> The proposed law required demonstration organizers to provide specific details about the time, route, and demands of the protest at least three days in advance.<sup>85</sup> Additionally, the law placed unrealistic restrictions on avoiding government buildings, which are scattered throughout many cities and difficult to recognize.<sup>86</sup> Human rights groups in Egypt repeatedly denounced this blatant extension of the notification requirement as the proposed law gained approval in Egypt's lower house of

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83. See H.R. Comm. Commc'n 412/1990, *supra* note 45, para. 9.2 (showing no bright line rule of what is an acceptable amount of time to require notification prior to a protest or demonstration).

84. See New Egyptian Protest Law, *supra* note 11 (writing that the law dictates that protests cannot come within 200 meters of state buildings, government offices, ministry headquarters, and prisons while many of these buildings are scattered all across major cities and are not always clearly distinguishable).

85. *Id.*

86. *Id.*

parliament and then the cabinet.<sup>87</sup>

Egypt's interest in the notification requirement is both for national security or public order and for the state's fulfillment of its duty to ensure citizens' right to freedom of assembly.<sup>88</sup> Therefore, the purpose of the notification requirement is to allow Egyptian authorities to prepare for facilitation of the demonstrations, rather than to have notice to impede the demonstrations.<sup>89</sup> Foreign governments, including the United States, also stressed this positive obligation to protect the right to protest on the part of the state.<sup>90</sup>

The stipulation of the protest law's constitutional outline was far more restrictive than the ICCPR's intent of the restrictions. Hence, Egypt's protest laws before the July 2013 suspension of the Constitution violated article 21 of ICCPR.

## *2. The Military's Suppression of Pro-Morsi Demonstrations Following the July 2013 Suspension of the Constitution Violated*

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87. See Stainburn, *supra* note 25 (articulating the concerns of the Association for Freedom of Thought and Expression and Human Rights Watch; both organizations decry the law as "imposing restrictions on the right to demonstrate" and as "designed to actually increase restrictions" on the right to assembly); Tom Perry & Paul Taylor, *Egyptian Cabinet Backs Bill on Protests Critics Cry Foul*, REUTERS, Feb. 13, 2013, available at <http://www.globalpost.com/dispatch/news/thomson-reuters/130213/egyptian-cabinet-backs-bill-protests-critics-cry-foul> (noting the concerns of Human Rights Watch and U.S. Assistant Secretary of State for Human Rights, Michael Posner who called on Egypt to "respect international principles of free assembly and association and the critical role civil society plays in any democratic society").

88. See discussion *supra* Part II.C.3 (determining that while a notification requirement can be legitimate restriction to freedom of assembly, it is meant to be used in the state's positive duty in protecting its citizens' right to freedom of assembly).

89. See Nowak, *supra* note 7, at 482 ("The controversy surrounding the legal formulation and practical application of this important political liberty can be reduced to the following conflict: on the one hand, assemblies are able to contribute to fortifying and maintaining democracy only when they are also, or primarily, staged against the interests of State power holders (who altogether too often identify themselves with 'the State'); on the other hand, effective exercise of critically oriented freedom of assembly is dependent on the State's protection.").

90. See Murray et al., *supra* note 34 (adding that the international community argued that security forces should be compelled to preserve the safety of protestors from attempts to attack them or disperse the demonstration or transform it from being peaceful).

*Article 21 of the ICCPR*

Egypt was still bound by its international obligations under the ICCPR between July and August 2013 for the following three reasons: (1) Egypt's obligations under the ICCPR were not suspended (unlike its African Union membership);<sup>91</sup> (2) the Egyptian military had not declared a state of emergency until August 14, 2013;<sup>92</sup> and (3) even countries experiencing democratic transitional turmoil are bound by their international obligations.<sup>93</sup>

*a. Egypt Had Legitimate National Security Interests in Restricting Freedom of Assembly*

Indeed, the Egyptian military and interim government did have national security and public order imperatives in suppressing the pro-Morsi protests following the President's ouster on July 3, 2013. However, the precedent set by *Kim* would suggest that, like South Korea during its period of transition from authoritarianism to democracy in the late 1980s, Egypt's transitional status does not relieve it of its international legal obligations.<sup>94</sup> This requirement is especially true considering the significance of article 21 in the context of democracies and democratizing societies.<sup>95</sup> Furthermore, *Kim* established that a demonstration's danger to national security and public order is more narrowly defined than merely relying on what the state decides is a national security interest.<sup>96</sup> Restrictions on

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91. See discussion *supra* Part III.A.1 (showing that Egypt's membership to the ICCPR was not suspended).

92. See discussion *supra* Part III.A.1 (arguing that at least until Egypt declared a state of emergency, it was bound by the ICCPR).

93. See discussion *supra* Part III.A.1 (comparing the situation in South Korea in the 1980s to Egypt in 2013 and finding that given the strong similarities between the situations, and given that the HRC found that South Korea was still bound under ICCPR article 21, Egypt is still similarly bound to protect the right to peaceful assembly).

94. See discussion *supra* Part II.C.2 (discussing the HRC's holding that South Korea's external security threat from and volatile relationship with North Korea did not justify the charges brought against Kim).

95. See discussion *supra* Part II.B.2 (stressing the unique language in article 21 as compared with other articles in the ICCPR).

96. See discussion *supra* Part II.C.2 (acknowledging that while *Kim* was uniquely brought forward as a freedom of expression case, the facts were much more in line with a freedom of assembly violation, the HRC's holding on what

the right to freedom of assembly in interests of national security are limited to serious cases of political or military threat to the country as a whole.<sup>97</sup>

Regardless of the Egyptian military's reasons for restricting demonstrations, its excessive use of force in quashing a number of the peaceful post-July 2013 protests violates article 21.<sup>98</sup> Egypt's use of force was excessive because reports clearly indicate that the military opened fire on peaceful sit-ins and unarmed protestors.<sup>99</sup> Therefore, there are several strong instances of the military's actions following suspension of the Constitution violating article 21 of the ICCPR.<sup>100</sup>

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national security interests justify a suppression of a democratic right is indicative of a more narrow definition of actions that are truly dangerous to the security of the state).

97. Nowak, *supra* note 7, at 491 (arguing that, in accordance with articles 12, 13, 14, 19, and 22, only situations that threaten the whole nation, such as "a demonstration calling for violent overthrow of the government in an atmosphere of political unrest or disseminating propaganda for war . . . may be prohibited by criminal law and broken up").

98. *See id.* at 491 (clarifying that forceful breaking up of an assembly may be considered only when "all milder means have failed"); *see also* Murray, *supra* note 34 (reporting on the events and aftermath of the Egyptian military's declaration of emergency on the night August 14, 2013, and specifically focusing on suggestions that protesters in Cairo and Port Said had breached the curfew, Egypt's vice-president, Mohamed El-Baradei resignation in protest against the crackdown with first seeking peaceful options for ending the political crisis, as well as reports of dozens of bodies from witnesses at Rabaa al-Adawiya, photographs showing more than 40 dead laid out on the ground and reports of snipers firing on crowds of people despite the interior ministry denial of the live rounds).

99. David Kirkpatrick, *Hundreds Die as Egyptian Forces Attack Islamist Protestors*, N.Y. TIMES (Aug. 14, 2013), [http://www.nytimes.com/2013/08/15/world/middleeast/egypt.html?\\_r=0](http://www.nytimes.com/2013/08/15/world/middleeast/egypt.html?_r=0) (reporting that the ferocity of the military's response to pro-Morsi assemblies "far exceeded the Interior Ministry's promises of a gradual and measured dispersal," which would have served as Egypt's milder means of breaking up assemblies as preferred in ICCPR language).

100. *See International Community Urges Respect Rule of Law and Human Rights*, *supra* note 76 (citing Human Rights Comm. Gen. Comm. 29, States of Emergency, art. 4, para. 2, Aug. 2, 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11) (explaining that "[a]bsent the necessary declaration of a qualifying public emergency, Egypt is obligated to respect and ensure all the rights enshrined in the ICCPR," and noting that the UN High Commissioner for Human Rights has requested "military and law enforcement officials to show utmost restraint and make sure that they comply at all times with international human rights obligations



3. *Egypt's Transitional Status Falls Within a Gap in International Law's Application of the ICCPR's Article 21*

The Egyptian military stated that it was acting in an effort to avoid civil conflict<sup>101</sup> and in some instances protestors escalated the demonstrations and disrupted public order, justifying a proportional use of force by the military.<sup>102</sup> The military's actions were also vindicated because of the gap in international law with regard to transitional societies. Although *Kim* sets a precedent, there are many differences between Egypt's post-Arab Spring democratic transition and South Korea's political situation during *Kim*.<sup>103</sup> The context of governmental transitions brought on by the Arab Spring, the mobilizing forces of globalization, social media, and empowerment of non-state actors makes for a vastly different case for maintaining public order and national security in Egypt.<sup>104</sup>

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and international standards on policing, including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”).

101. See Lally Weymouth, *Rare Interview with Egyptian Gen. Abdel Fatah al-Sissi*, WASH. POST (Aug. 3, 2013), [http://www.washingtonpost.com/world/middle\\_east/rare-interview-with-egyptian-gen-abdel-fatah-al-sissi/2013/08/03/a77eb37c-fbc4-11e2-a369-d1954abcb7e3\\_story.html](http://www.washingtonpost.com/world/middle_east/rare-interview-with-egyptian-gen-abdel-fatah-al-sissi/2013/08/03/a77eb37c-fbc4-11e2-a369-d1954abcb7e3_story.html) (quoting the head of the Egyptian military General Abdel Fatah al-Sissi as taking action to prevent civil war and had done so with a mandate from the people of Egypt).

102. See *Egyptians Rally in Huge Numbers as Violence Escalates*, VOICE OF AM. (July 26, 2013), <http://www.voanews.com/content/egypts-morsi-detained-on-charges-of-conspiring-with-hamas/1710421.html> (reporting that videos showed Muslim Brotherhood supporters firing at other demonstrators who support the military's actions and the interim government, and creating clashes that potentially rise to the level of permissible military interference under the ICCPR).

103. See Cohen, *supra* note 81, at 436 (distinguishing China's potential modernization to meet international legal standards from South Korea's exceptionally smooth transition into democracy after “rapid social, economic, and educational progress” paved the way for political circumstances to lead to a democratic legal system).

104. Without the tools of instant communication outside control of the state, the ability of the citizens to build and organize a revolution grew much more rapidly in Egypt than it did in South Korea. See L. Gordon Crovitz, *Egypt's Revolution by Social Media: Facebook and Twitter let the people keep ahead of the regime*, WALL ST. J. (Feb. 14, 2011), <http://online.wsj.com/news/articles/SB10001424052748703786804576137980252177072> (highlighting the significance of social media in Egypt's quick political transition out of authoritarianism as well as Egypt's poverty, education, and political realities).

There are other international legal principles that govern a state's transitional period. In looking closer at the legal implications of a state's transition, the law of succession of states governs this period in Egypt's history. Succession of states law stems from the international relations theory concerning the recognition and acceptance of newly created sovereign states.<sup>105</sup> Though its roots stem farther back, the U.N. General Assembly codified the concept in 1978 through the U.N. Conference on Succession of States in Respect of Treaties.<sup>106</sup> However, as the succession of states theory was born out of a context of colonialism and "newly independent" states,<sup>107</sup> it is not particularly applicable to previously existing states that have merely experienced a transition in regimes or governments.<sup>108</sup>

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105. Konrad G. Buhler, *State Succession and Membership in International Organizations*, LEGAL ASPECTS OF INTERNATIONAL ORGANIZATIONS, Vol. 38, 164, (Martinus Nijhoff).

106. Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488, pmbl. (stating that "the present convention applies to the effects of succession of States in respect to treaties between States").

107. *Id.* at 1499.

108. In addition to state succession, two other international legal principles govern transitional states. First, transitional justice deals with state's emerging from serious conflict and prescribes methods for addressing past abuses. See Louis Bickford, *Transitional Justice*, in ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY 1045, 1045 (Dinah L. Shelton ed., 2004) (defining transitional justice as "a field of activity and inquiry focused on how societies address legacies of past human rights abuses, mass atrocity, or other forms of severe social trauma, including genocide or civil war, in order to build a more democratic, just or peaceful future"). While there are elements of transitional justice that could and do apply to post-Arab Spring transitional societies, with regard to specific countries such as Egypt, that did not experience serious civil conflict or war at the inception of their transition (unlike Syria or Libya), this is not particularly pertinent. For countries like Egypt, and South Korea in the late 1980s, the focus on a possible violation of article 21 of the ICCPR is not so much toward the previous regime's accountability but rather the current and perhaps ever-changing regime's accountability. Second, in further looking at conflict zones that are going through transition, reconstruction in transition often relies on what the United Nations refers to as Disarmament, Demobilization, and Reintegration ("DDR") efforts. See Shana Tabak, *False Dichotomies of Transitional Justice: Gender, Conflict and Combatants in Columbia*, 44 N.Y.U. J. INTL. L. & POL. 104, 108 (2011) (distinguishing DDR as separate from transitional justice in that it is concerned primarily with former combatants and security alone "whereas transitional justice incorporates a wider spectrum of individuals, may take years to implement after conflict, and is concerned with accountability, truth-seeking and redress for past

Therefore, post-Arab Spring states such as Egypt suffer from a Goldilocks complex: the East Asian transitional period serves as too mild a model, as there was not the same rapid turning of events in South Korea during the late 1980s. Governments experiencing newly independent succession, transitional justice, or Disarmament, Demobilization, and Reintegration-relevant turmoil, are dealing with more fundamental state-formation issues.<sup>109</sup> International law fails to provide an option that is somewhere in between.

Nonetheless, while it is unclear that the ICCPR should govern such a transitional period, if it did apply, then it is clear that Egypt has repeatedly violated article 21 of the ICCPR in its post-Arab Spring transitional period.<sup>110</sup> It is indisputable that Egypt violated article 21 by first, stipulating law that was counter to the ICCPR's intentions in restrictions to freedom of assembly, and second, by quashing peaceful protests during and after President Morsi's ouster and suspension of the constitution. In the first instance, it is clear that the government under the leadership of President Morsi and the Muslim Brotherhood was attempting to limit Egyptians' right to freedom of assembly out of a primary concern for the state's interests.<sup>111</sup> Indeed, prohibiting demonstrations or making them logistically impossible violates article 21 of the ICCPR.<sup>112</sup>

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wrongs"). However, since DDR is primarily concerned with combatants and security imperatives, this theory again falls short of addressing the issues of something like a right to freedom of assembly within a more stable and controlled transitional society where the government is organically moving from authoritarianism to democracy.

109. See generally Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1990).

110. See Kirkpatrick, *supra* note 99 (reporting on brutal tactics used by military to quash pro-Morsi protests); Sarah Leah Whitson, *Letter to Egyptian Justice Minister on Demonstration Law*, HUM. RTS. WATCH (Feb. 25, 2013), <https://www.hrw.org/news/2013/02/25/letter-egyptian-justice-minister-demonstrations-law>.

111. See New Egyptian Protest Law, *supra* note 11 (writing the rights groups' perspective that in addition to obligating "demonstration organi[z]ers to give an official notice to the authorities about the time, route and demands of any protest three days in advance," the protest law puts unrealistic restrictions by prohibiting the route of protests and demonstrations to go near government buildings which are ubiquitous in Egypt's major cities, especially Cairo).

112. Whitson, *supra* note 110 (arguing that Egypt has an obligation to confirm with the requirements of article 21 of the ICCPR by re-drafting the demonstration

Additionally, such abuse of the restriction clause goes against an important and unique element of the whole right in that it is counter to basic democratic principles, which Egypt has been trying to pursue and attain following the end of President Mubarak's reign.<sup>113</sup>

Furthermore, following President Morsi's ouster and the suspension of the Constitution, no amount of justifications can excuse the Egyptian military's gross response to peaceful pro-Morsi protests.<sup>114</sup> In the violence that erupted following what critics called a coup d'état by the Egyptian military, the violations of article 21 of the ICCPR are blatant, regardless of Egypt's transitional status.<sup>115</sup> The ICCPR does not explicitly allow room for transitional societies to ignore their international legal obligations either in its text or through interpretations by the HRC.<sup>116</sup>

#### IV. RECOMMENDATIONS

Egypt has not signed or ratified the Second Optional Protocol of the ICCPR, which gives the HRC jurisdiction over signatories of the ICCPR.<sup>117</sup> Therefore, methods of litigation and enforcement through the HRC, such as those in *Kim* and *Kivenmaa*, are not options

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law to include protections for civilians and de-criminalizing the right demonstrate).

113. See discussion *supra* Part III.B.1 (articulating that states may not impose undue restrictions on the right to freedom of assembly).

114. Though it is conceded that there were violent pro-Morsi protests as well, the protests that are at issue for the purposes of the ICCPR are the peaceful ones. See Liz Sly & Sharaf al-Hourani, *Egypt Authorizes Use of Live Ammunition Against Pro-Morsi Protesters*, WASH. POST (Aug. 15, 2013), [http://www.washingtonpost.com/world/scores-dead-in-egypt-after-security-forces-launch-assault-on-protesters-camp/2013/08/15/563c95a0-0575-11e3-a07f-49ddc7417125\\_story.html](http://www.washingtonpost.com/world/scores-dead-in-egypt-after-security-forces-launch-assault-on-protesters-camp/2013/08/15/563c95a0-0575-11e3-a07f-49ddc7417125_story.html).

115. See Murray, note 34 (reporting on the Egyptian military's excessive use of force).

116. See ICCPR, *supra* note 5, pmb.; H.R. Comm. Commc'n 574/1994, *supra* note 52, para. 12.4–12.6 (applying the same standard as other countries on South Korea regardless of its newly established democratic transition and in spite of the fact that “the particular situation in which the Republic of Korea finds itself has implications on public order in the country”).

117. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, Dec. 15, 1989, 1642 U.N.T.S. 414, 414 (creating the HRC which has jurisdiction over state parties to the ICCPR and allows individuals to bring complaints of violations to the Committee).

moving forward in Egypt's case.<sup>118</sup>

A. EGYPT SHOULD SIGN THE SECOND OPTIONAL PROTOCOL OF  
THE ICCPR

First, this comment recommends that Egypt sign the Second Optional Protocol, as other countries have done, to ensure that there are adjudication methods for the principles that Egypt signed on to when it ratified the ICCPR. If Egypt were to sign on to the Second Optional Protocol then it would send a clear message of its commitment to human rights and democratic principles in the transitional period after President Mubarak's thirty-year authoritarian rule.<sup>119</sup> This would benefit Egypt both in the short and long term as it builds its influence in the global arena,<sup>120</sup> in addition to providing Egyptian rights groups with a forum for adjudicating violations to the ICCPR's article 21 and other articles.

B. FUTURE ITERATIONS OF EGYPT'S CONSTITUTION AND PROTEST  
LAWS SHOULD MODIFY THE PREVIOUS PROTEST LAWS UNDER THE  
2012 CONSTITUTION BY REMOVING EXCESSIVE RESTRICTIONS ON  
THE RIGHT TO PROTEST THROUGH A PROHIBITIVE NOTIFICATION  
REQUIREMENT

Until Egypt signs the Second Optional Protocol, the international community must rely on alternative methods to hold Egypt

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118. See H.R. Comm. Commc'n 574/1994, *supra* note 52, para. 3.3 (holding that by becoming a state party to the Second Optional Protocol, Korea "has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy"); see also H.R. Comm. Commc'n 412/1990, *supra* note 45, para. 9.1 (using similar language as *Kim* to establish jurisdiction over the case).

119. See GOLDSMITH & POSNER, *supra* note 39, at 131 (explaining why ratification of human rights treaties is especially important for a state transitioning from authoritarianism to democracy in that not doing so "sends an unambiguous and believable signal that it is not committed to human rights, and thus (perhaps) is not deserving of collateral benefits that might flow to a human rights-respecting state, such as recognition and trade").

120. *Id.* (noting that the non-ratification is often "viewed as evidence of unreliability on the issue.").

accountable for its violations of article 21. Regarding the pre-July 2013 suspension of the Constitution, President Morsi and the Muslim Brotherhood will likely not be held accountable internationally and domestically for the laws that were passed limiting the right to protest beyond their removal from power by the military.<sup>121</sup> However, the analysis used to indicate their impingement on the right to protest is useful for future leaders who attempt to implement a notification requirement or some other pre-demonstration restriction.<sup>122</sup> Currently, Egypt is in the process of determining who is to lead its future government and a committee has been put in place to rewrite the entire Constitution.<sup>123</sup> Regarding future versions of the protest law, this comment recommends that Egypt strike a better balance between maintaining order and allowing for freedom of assembly.

It is necessary for any democratic or democratizing society to maintain this balance by keeping the contours of its notification requirement but removing its excessively restrictive qualities.<sup>124</sup> This balance can be achieved by lowering the amount of time required by the notification requirement from three days to something closer to Finland's six-hour requirement that the HRC considered.<sup>125</sup> Furthermore, the previous protest law required that demonstrations

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121. See, e.g., Amro Hassad, *Egypt's Morsi Stands Trial on Charges of Espionage and Terrorism*, L.A. TIMES (Feb. 16, 2014), <http://articles.latimes.com/2014/feb/16/world/la-fg-wn-morsi-trial-20140216> (listing the charges that Morsi is facing: Espionage, terrorism, and disclosing military secrets to a foreign state, and not mentioning the protest law).

122. See discussion *supra* Part III.B.1 (comparing Egypt's restrictive protest law with that of Finland's as considered by the HRC in *Kivenmaa*).

123. See Fady Ashraf, *Constituent Assembly to Write New Constitution Mousa*, DAILY NEWS EGYPT (Oct. 2, 2013), <http://www.dailynewsegypt.com/2013/10/02/constituent-assembly-to-write-new-constitution-moussa/> (reporting that a committee originally tasked with amending the Constitution chose to write a new Constitution because of the magnitude of changes originally proposed).

124. Compare H.R. Comm. Commc'n 412/1990, *supra* note 45, para. 9.2 (concluding that a six hour prior notification requirement may be consistent with international legal right to freedom of assembly as enshrined within article 21 of the ICCPR), with New Egyptian Protest Law, *supra* note 11 (reporting in March 2013 on the protest law, which included a three day prior notice requirement as well as impracticable restrictions on the location of demonstrations).

125. H.R. Comm. Commc'n 412/1990, *supra* note 45, para. 9.2.

avoid government buildings, making them logistically impossible.<sup>126</sup> While security and public order are legitimate concerns for the government, this restriction of movement extends beyond the intent of article 21 of the ICCPR.<sup>127</sup> As previously mentioned, the right to protest imbues the state with a positive obligation.<sup>128</sup> Future iterations of the protest law should remove this excessive restriction on movement rather than making it logistically impossible for organizers of demonstrations to legally exercise their right to protest.

The next iteration of laws dealing with the right to protest seems more restrictive than those under President Morsi and the 2012 Constitution. In late November 2013 after authorities lifted the three-month state of emergency, Egypt's interim President, Adly Mansour, signed into law new rules regarding the right to protest.<sup>129</sup> Adding to the three-day notification requirement under the previous law before the July 2013 suspension of the Constitution, the most recent draft law allows the police to deny a public gathering of more than ten people without justification or a court order.<sup>130</sup> Though the country has seen near-daily protests since President Morsi's resignation and the state has a legitimate interest in maintaining order, it is clear that

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126. See New Egyptian Protest Law, *supra* note 11 (reporting on concerns of the Independent Association for Legal Support that the proposed demonstration law's requirement that protests remain at least 200 meters from state buildings made it nearly impossible for protesters to be sure that they are not violating the protest restrictions and giving ample opportunity for officials to prohibit a demonstration if they wanted).

127. See *id.*; see also discussion *supra* Part II.B.2.

128. See Nowak, *supra* note 7, at 487–88 (clarifying that a positive duty may be fulfilled through a notification requirement to be utilized by the state in ensuring that demonstrations are protected against interference so they may exercise their right to freedom of assembly).

129. See Gregg Carlstrom, *Egypt Passes Law Restricting Public Protests*, AL JAZEERA (Nov. 25, 2013), <http://www.aljazeera.com/news/middleeast/2013/11/egypt-passes-law-restricting-public-protests-2013112413847867334.html>.

130. See Kristen Chick, *Twilight in Tahrir: Egypt Law Aims to Sharply Curb Protest*, CHRISTIAN SCI. MONITOR (Nov. 24, 2013), <http://www.csmonitor.com/World/Security-Watch/2013/1124/Twilight-in-Tahrir-Egypt-law-aims-to-sharply-curb-protest> (reporting that 20 Egyptian rights organizations issued a joint statement warning that the law “would serve as the legal basis for the re-establishment of the police state seen in Egypt prior to January 25, 2011, when numerous exceptional policies and laws had given free reign to the security apparatus to violate the rights and freedoms of citizens in the name of ‘countering terrorism’”).

these measures aim to stifle the Egyptian people's right to protest by providing officials more authority to deny and break up protests.<sup>131</sup> Many rights groups warn that these protest laws are reminiscent of Mubarak-era policies.<sup>132</sup> Egypt should not, therefore, allow these restrictions on the right to protest as it transitions into democracy.

## V. CONCLUSION

The democratic function is at the heart of article 21 of the ICCPR, the right to freedom of assembly. As post-Arab Spring societies, such as Egypt, continue through the challenges of the democratic process, the people's right to protest likewise continues to oscillate between a civil rights victory and state-interest limitations. Though it is not completely clear how an ICCPR article that relies so heavily on democratic principles applies to a society in the throes of achieving democracy, it is clear that Egypt's actions in its post-Arab Spring transitional period violated the ICCPR's article 21 in two general instances. First, through the implementation of a notification requirement that impinged on the people's right to freedom of assembly, and second, in the military's clampdown on demonstrations following the President's ouster and suspension of the Constitution in July 2013.

While Egypt cannot be held accountable for violations of article 21 of the ICCPR through a complaint submitted to the HRC, there are many alternatives to utilize international law relating to the right to protest as a tool to guide societies that are transitioning through the democratic process. Holding Egypt accountable by some means is of paramount importance in the context of the greater Middle East because of the significance of Egyptian politics as a model and

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131. See *Protest Law Bans Sit-ins, Allows Harsh Security Measures*, MADA MASR (Oct. 17, 2013), <http://www.madamasr.com/content/protest-law-bans-sit-ins-allows-harsh-security-measures> (reporting that security forces are required to disperse demonstrations that violate the detailed restrictions by firing water cannons, tear gas, beating protesters with batons and "if required for legitimate self-defense and protection of assets, more force would be authorized").

132. See, e.g., HUMAN RIGHTS WATCH, *WORLD REPORT 2013: EGYPT* (Jan. 2013), available at <http://www.hrw.org/world-report/2013/country-chapters/egypt> (noting the increase of laws that restrict freedom of expression from the Mubarak-era, as well as the continued application of "the repressive Mubarak-era law 84 on associations").



catalyst for other transitional societies, such as Tunisia<sup>133</sup> and beyond the post-Arab Spring context.

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133. See, e.g., *Tunisia's Tamarod Steps Up Campaign to Dissolve Parliament*, EGYPT INDEP. (July 14, 2013), <http://www.egyptindependent.com/news/tunisia-s-tamarod-steps-campaign-dissolve-parliament> (reporting on a copycat Tamarod (rebel) campaign gaining traction in Tunisia, and noting the “strong ties” between Egypt and Tunisia).