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INTRODUCTION

In her recent *New York Times* column, Gail Collins addressed Republican criticism of President Obama's approach to foreign policy:

> Mitt [Romney] told a conservative radio host [Hugh Hewitt] this week that the President is weak because of "his fundamental disbelief in American exceptionalism." This is part of a widespread Republican theory that simply believing that our country is a great and unique nation is not good enough unless you also run around the world publicly pointing out to our allies that we are way, way better than they are.[1]

Ms. Collins goes on to refer sarcastically to Mr. Romney's criticism of President Obama's "nuanced" diplomacy given that most diplomatic exchanges require at least a nuanced approach.

While President Obama was almost certainly not even thinking about Mr. Romney's remarks, I thought that the President responded rather well to this criticism in his speech at the National Defense University concerning, among other matters, the United States' role in Libya.[2] Whatever one might say about the merits of the decision concerning Libya, the President set out

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This Essay is based on the author's remarks at the symposium on "Challenges to International Law, Challenges from International Law: New Realities and the Global Order," held at the St. John's University School of Law, April 1, 2011.

[1] Gail Collins, Op-Ed., *What's in a Nickname?*, N.Y. TIMES, March 26, 2011, at A21. The comment by Mr. Romney to Mr. Hewitt was: "I think it's fair to ask, you know, what is it that explains the absence of any discernible foreign policy from the president of the United States? And I believe that it flows from his fundamental disbelief in American exceptionalism. In the President's world, all nations have common interests, the lines between good and evil are blurred, America's history merits apology. And without a compass to guide him in our increasingly turbulent world, he's tentative, indecisive, timid and nuanced."

[2] *See* Remarks by the President in Address to the Nation on Libya, DAILY COMP. PRESS DOCS, 2011 DCPD No. 00206 (Mar. 28, 2011), http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya.

a useful framework for the range of American responses to calls for United States intervention. He discussed those cases where, as he submitted was the situation in Libya, the safety of our country is not at risk but "our interests and values are."[3] He calls these threats to "our common humanity and our common security" and makes clear that they can arise from natural or man-made disasters.[4] The President added, "In such cases, we should not be afraid to act – but the burden of action should not be America's alone."[5] He continued,

> Real leadership creates the conditions and coalitions for others to step up as well; to work with allies and partners so that they bear their share of the burden and pay their share of the costs; and to see that the principles of justice and human dignity are upheld by all.[6]

This unintentional point and counterpoint between the President and Mr. Romney, which likely foreshadows the 2012 campaign regardless of who might be the Republican candidate, highlights what has been said during this conference. I listened to the discussions of international economic regulation and thought it was a very good panel. I was reminded of an excellent book that is not referenced sufficiently by the late Abram Chayes and his wife Antonia Handler Chayes titled *The New Sovereignty: Compliance with International Regulatory Agreements*.[7] If you have not looked at this book, you should because it develops a theme with which I strongly identify. Abe and Toni Chayes demonstrate that there is a great deal that we take for granted in the way the global economic system works. Further, the system works because we are participating with others in regimes that regulate, that control and that govern. The two professors elaborate upon a long list of such regimes in the book and illustrate their point well. They reinforce what the President said in his speech on Libya.

We have not always been immediately successful in our attempts to lead on issues in the international regulatory field. I think of the Foreign Corrupt Practices Act.[8] When we enacted that legislation in the 1970s, we were regarded by most of our allies as not only naive but unrealistic.[9] As one

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[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995).

[8] Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, et seq. (2011).

[9] *See* Steven R. Salbu, *Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act*, 54 WASH. & LEE L. REV. 229, 238, 261 (1997) (explaining that it is unrealistic to expect the world to embrace this "hard-line legislation," and that

client put it to me, although his words may have been a little more carefully chosen, "How can you expect this stuff to stop and how can we compete without doing it?" Today we have the United Nations Convention on Corruption that the U.N. General Assembly approved in October 2003,[10] and other nations have begun to adopt laws that parallel our own.[11] Further, Transparency International has become a global organization sponsored by civil society that promotes anti-corruption policies and legislation.[12] In short, sometimes American exceptionalism leads to our getting ahead of ourselves, but we do it in ways and for reasons that are good. At the end of the day if our ideas are right and well-articulated, other nations will come along and see that we were on the right track.

While I am not an expert in the field of human rights, the discussion of free speech today makes me think of an area that is not on the front pages but on which I have done a fair amount of work. I refer to a series of American cases that have refused to enforce judgments from other countries that offend our notions of free speech.[13] In response to this concern, we now have the Libel Terrorism Act in New York[14] and a Federal Libel Terrorism Act.[15] We also had a good deal of debate within the American Law Institute about when the United States should refuse to enforce a

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violations are inevitable because of these unrealistic expectations); *see also* Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 678–79 (2000) (stating that the Foreign Corrupt Practices Act has been considered ineffective because it is naïve to address corruption through legislation if the corruption is rooted in institutional foundations).

[10] *See* United Nations Office on Drugs and Crime, United Nations Convention Against Corruption, Background of the United Nations Convention Against Corruption (Dec. 4, 2008), http://www.unodc.org/unodc/en/treaties/CAC/index.html.

[11] *See* Corruption of Foreign Public Officials Act, 1998 S.C., ch. 34 (Can.); *see also* Bribery Act, 2010, c. 23 (Eng.).

[12] *See* Transparency International, About Us, http://www.transparency.org/about_us (last visited Feb. 15, 2012) (describing that Transparency International is an anti-corruption NGO).

[13] *See* Telnikoff v. Matusevitch, 702 A.2d 230, 250–51 (Md. 1997) (finding that English libel judgment would be repugnant to the public policy of Maryland because the principles governing defamation actions under English law were so contrary to Maryland defamation law and to the policy of freedom of the press); *see also* Bachchan v. India Abroad Publ'ns Inc., 585 N.Y.S.2d 661, 664 (Sup. Ct. 1992) (denying the enforcement of a British libel judgment under New York law because the judgment was not issued with the protections for free speech required by the U.S. and New York Constitutions); *see also* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1189 (N.D. Cal. 2001) (holding unenforceable a French judgment requiring a service provider to remove Nazi-related items from its website), *rev'd on other grounds*, 433 F.3d 1199 (9th Cir. 2006) (en banc).

[14] N.Y. C.P.L.R. 302(d), 5304(b)(8) (McKinney 2009).

[15] Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), 28 U.S.C. §§ 4101–4105 (2010).

judgment that infringes free speech protected under our Constitution.[16] There seems to be little dispute about refusing to enforce when an American citizen or resident or someone publishing in this country is the defendant. That is generally the focus of the libel terrorism legislation. But what happens when two non-U.S. parties have a dispute abroad about a published account and the libel judgment is based on concepts of free speech that do not comport with our Constitutional norms? Many of us believe that the United States should also refuse to enforce those judgments as well, and there are court decisions that lean in that direction.[17] So, we do see the exceptional notions of free speech, embodied in our Constitution, having an influence over a subject that we do not think about in that context, namely judgments enforcement, and reacting to the rulings of courts enforcing the laws of other nations.

I find myself in a rather curious position when I turn to the issues relating to the use of force that have arisen during today's discussion. On the one hand, we meet while the United States is playing an active role to support the rebel anti-Gaddafi forces in Libya.[18] At this time – and even in

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[16] *See* Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 IND. L.J. 635, 635, 644 (2000) (discussing the project undertaken by the American Law Institute to draft a federal statute concerning the recognition and enforcement of foreign country judgments, including whether to enforce a judgment that infringes on free speech that is protected under the U.S. Constitution); *see also* Rochelle Dreyfuss, *The ALI Principles on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT'L L. 819, 826–27 (2005) (establishing that the ALI principles on transnational intellectual property disputes set out rules on when, and on what terms, judgments based on these bases of jurisdiction should be enforced).

[17] *See* Sarl Louis Feraud Int'l v. Viewfinder, Inc., 406 F. Supp. 2d 274, 285 (S.D.N.Y. 2005) (holding unenforceable as contrary to the First Amendment a French damage judgment based on photographs posted on the Internet and freely accessible to American viewers); *see also* Motré D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1245 (2007) (arguing that the state action doctrine precludes enforcement of some foreign libel judgments); *see also* Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—our Borders*, 85 NOTRE DAME L. REV. 1543, 1586 (2010) (claiming that U.S. courts have generally refused to enforce foreign libel judgments because they are contrary to the First Amendment and to public policy).

[18] *See* Mark Hosenball, *Exclusive: Obama Authorizes Secret Help for Libya Rebels*, REUTERS, Mar. 30, 2011, http://www.reuters.com/article/2011/03/30/us-libya-usa-order-idUSTRE72T6H220110330 (declaring that President Barack Obama authorized covert U.S. government support for opponents of Libyan leader Muammar Gaddafi); *see also* AFP, *US Launches Anti-Gaddafi Africa Offensive*, SYDNEY MORNING HERALD, Aug. 10, 2011, *available at* http://news.smh.com.au/breaking-news-world/us-launches-antigaddafi-africa-offensive-20110810-1impz.html (claiming that while the U.S. engaged in air strikes against Libya, American diplomats visited several African countries to support ousting

the late summer of 2011 when these remarks are being polished – we are unsure how the Libyan civil war – let's call it what it is – will end.

At the same time, for the past several months my law firm has, as a matter of public record been pro-bono counsel to President Alassane Ouattara in Côte d'Ivoire. I have been part of a team that has been working on this assignment to cause former President Gbagbo to leave the Presidential Palace and turn over power to the candidate who won the election. Without any use of outside force, we see that the world community's support of President Ouattara has led to a successful outcome.[19] In this situation the international community acted most effectively through regional organizations including the Organization of African Union and the Economic Community of West African States (ECOWAS) in defense of the properly elected president.[20] Over time the international community persuaded some reluctant states that they were on the wrong side of history if they continued to support a president who had lost an election.

Unfortunately, the successful outcome for President Ouattara did not occur without some internal strife. As many as 3,000 citizens were killed in the course of the fighting that led to President Ouattara's final success and perhaps as many one million citizens were displaced.[21] Indeed, when he met with President Ouattara in Washington in July 2011, President Obama referred to this loss of life and called for steps toward reconciliation.[22] He said that those responsible for atrocities should be held accountable. [23]

To be clear, our law firm was not responsible for President Ouattara's rightful assumption of office in Côte d'Ivoire. Our limited role was to help

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Libyan leader Muammar Gaddafi).

[19] *See* CNN Wire Staff, *Ivory Coast President Urges Calm After Gbagbo is Arrested*, CNN, Apr. 11, 2011, http://edition.cnn.com/2011/WORLD/africa/04/11/ivory.coast.crisis/?hpt=T2 (noting that the United Nation was not involved in extracting former President Laurent Gbagbo from his power, and that U.S. President Barack Obama and Secretary of State Hilary Clinton supported President Alassane Outtara); *see also World Leaders Back Ouattara as Ivory Coast Poll Winner*, BBC, Dec. 4, 2010, http://edition.cnn.com/2011/WORLD/africa/04/11/ivory.coast.crisis/?hpt=T2 (maintaining that Alassane Outtara is recognized internationally as President of the Ivory Coast).

[20] *See Ivory Coast: Laurent Gbagbo maintains Ouattara Blockage*, BBC, Jan. 5, 2011, http://www.bbc.co.uk/news/world-africa-12120149 (asserting the Economic Community of West African States (ECOWAS) has threatened to force out former President Laurent Gbagbo from his power if mediation efforts fail).

[21] *See Ivory Coast: Laurent Gbagbo Standoff*, GUARDIAN, Apr. 11, 2011, http://www.guardian.co.uk/world/blog/2011/apr/06/ivory-coast-laurent-gbagbo-live/.

[22] *See* Adam Nossiter, *In West Africa, Some Heroes of the Ballot Box Have a Tenuous Grip on Power*, N.Y. TIMES, Jul. 30, 2011, at A8 (noting that President Obama hosted a meeting in Washington with "four recently elected West African presidents in support for the continent's nascent democracies").

[23] *Id.*

with the legal issues, to explain why Mr. Ouattara, a distinguished former IMF senior executive, was elected by a 10 percent margin in an election that had been negotiated as to its procedures for five years.[24] The only reason President Gbagbo would not leave office was because he did not like the electoral results.[25] The former president acted extra-legally by having a constitutional commission act without authority to throw out 600,000 votes which became the margin of his victory.[26] With some encouragement, all the major international banks closed down their affiliates in the country.[27] Cocoa exports started to stop.[28] President Ouattara issued a decree warning third-country nationals or companies that they could not extinguish debts owed to the government, like taxes or other export fees, by paying Gbagbo's unelected officials.[29] We became involved in that because it seemed to us that nothing disciplines the mind as general counsel as much as the notion that his or her company may have to pay taxes or other governmental fees twice. In short, we played a supporting role for a worthy

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[24] *See* Scott Baldauf, *Ivory Coast Violence Escalates as Mediation Efforts Stall*, CHRISTIAN SCIENCE MONITOR, Feb. 28, 2011, *available at*, http://www.csmonitor.com /World/Africa/2011/0228/Ivory-Coast-violence-escalates-as-mediation-efforts-stall; *see also* Adam Nossiter, *Outcome Uncertain in Ivory Coast Election*, N.Y. TIMES, Dec. 1, 2010, at A11, *available at* http://www.nytimes.com/2010/12/02/world/africa/02 ivory.html.

[25] *See* Kurtis Lee, *Democracy Threatened by Election Stand-off in Ivory Coast*, PBS NEWS HOUR EXTRA, Jan. 4, 2010, http://www.pbs.org/newshour/extra/features/world/jan-june11/ivorycoast_1-04.html.

[26] S*ee Official: AU backs Ouatarra as Ivory Coast Leader*, USA TODAY, Mar. 10, 2011, http://www.usatoday.com /news/world/2011-03-10-au-ivory-coast_N.htm.

[27] *See Ivory Coast Crisis Intensifies as Largest Bank Shuts its Doors*, THE GUARDIAN, Feb. 17, 2011, http://www.guardian.co.uk/world/2011/feb/17/ivory-coast-banks-shut-gbagbo-protest; *see also* Marco Chown Oved, *Ivory Coast's Gbagbo Seizes 4 International Banks*, ASSOCIATED PRESS, Feb. 18, 2011, http://abcnews.go.com/Business /wireStory? id=12950365.

[28] *See Call for Cocoa Export Ban in Ivory Coast*, EURO NEWS, Jan 24, 2011, *available at* http://www.euronews.net/2011/01/24/call-for-cocoa-export-ban-in-ivory-coast/ (stating that Ouattara implemented a cocoa ban to place pressure on current President Gbagbo); *see also Cocoa Price Climbs After Ouattara Calls for Export Ban*, RADIO FRANCE INTERNATIONALE, Jan 24, 2011, http://www.english.rfi.fr/africa/20110124-cocoa-price-climbs-after-ouattara-calls-export-ban (explaining that the cocoa ban resulted in rising cocoa prices).

[29] *See* Pauline Bax & Olivier Monnier, *Ivory Coast's Ouattara Calls for Halt of Tax Payments During Bank Closure*, BLOOMBERG, Jan 31, 2011, http://www.bloomberg.com/ news/2011-01-31/ivory-coast-s-ouattara-calls-for-halt-of-tax-payments-during-bank-closure. html (indicating that Ouattara told citizens to stop paying their taxes); *see also* Tim Cocks, *Ivory Coast Cocoa Ban Stays Until March 31: Ouattara*, REUTERS AFRICA, Mar. 15, 2011, http://af.reuters.com/article/topNews/idAFJOE72E01G20110315 (explaining that Ouattra warned exporters that they face sanctions when he comes to power if they cooperate with Gbagbo's government by continuing to pay taxes).

client.

Michael Mattler made an extremely important point about how much more difficult it is sometimes for the United States to participate in global regimes and international treaties. He used the example of land mines. It is well to recall that sometimes we make matters harder for ourselves. I have recently been involved in cluster munitions, which, in brief, are perfectly legitimate weapon if properly deployed. If you want to stop tanks in Korea, and if you wanted to stop the tanks from the Soviet Union crossing from Eastern Europe, when the Soviet Union was still operational, you needed cluster munitions. Then the question becomes which cluster munitions are acceptable and which are not, and how should they be used? That gets very complicated. The interesting point is that the United States was in negotiations over these questions in Geneva in an effort to draft a protocol to the 1989 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed To Be Excessively Injurious or To Have Indiscriminate Effects.[30] There came a time when the U.N. member states thought that it was taking too much time to agree on such a protocol and that prospects for resolving the hardest issues were not good. As a result, the government of Norway convened a separate diplomatic conference in Oslo to reach agreement for a distinct Convention on Cluster Munitions of May 2008, which now has 59 ratifications and 50 signatories.[31]

The United States – i.e., the State Department of George W. Bush – decided not to participate in the Oslo negotiations that led to the Cluster Munitions Convention.[32] This meant that not only was American expertise not reflected in the Convention, but it had had other serious consequences as well. For example, provisions were written into the Oslo Convention that, when fully understood, are intended to prejudice American manufacturers of cluster munitions and to advantage European

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[30] *See* The United Nations Office at Geneva, The United Nations in the Heart of Europe: Disarmament, Dec. 21, 2001, http://www.unog.ch/80256EE600585943/%28httpPages% 29/4F0DEF093B4860B4C1257180004B1B30 (describing the provisions of the convention on certain conventional weapons).

[31] *See The Convention on Cluster Munitions*, CONVENTION ON CLUSTER MUNITIONS: TO END THE HARM CAUSED BY CLUSTER MUNITIONS, http://www.clusterconvention.org/ (last visited Nov. 6, 2011) (exploring the Convention on Cluster Munitions, which was created to minimize the use of injurious weapons).

[32] *See* David Houska, *Cluster Munitions at a Glance*, ARMS CONTROL ASSOCIATION, http://www.armscontrol.org/factsheets/clusterataglance (mentioning that the United States has not come to a conclusion as to where their Cluster Munitions negotiations will lead); *see also The Oslo Process*, LANDMINE ACTION: CONTROLLING THE TECHNOLOGY OF VIOLENCE, http://landmineaction.org/issues/page.asp?PLID=1012&page ID=1038 (last visited Nov. 6, 2011) (noting the nations that signed the Convention in Oslo).

manufacturers.[33] This experience again illustrates that, for the United States, engagement in international negotiations is sometime difficult and even unpleasant, but often the only course of action that will ultimately serve United States interests.

I had wanted to provide yet a different illustration concerning the difficulty because of federal-state issues of formulating implementing legislation for the Hague Convention on Choice of Court Agreements. Unfortunately, there was not time to do so during the Symposium. Suffice to say for this record that the Supreme Court's decision concerning self-executing treaties in *Medellín v. Texas*[34] and the growing states' rights perspective in our political life[35] mean that implementing international agreements will become increasingly difficult in the years ahead. As a result, the United States and its delegations to preparatory sessions and diplomatic conferences on new treaties concerning almost any subject will need to consider the internal implementation issue from the outset – not after the agreement is completed.

Finally, the various meanings of exceptionalism can include unilateralism, which generally does not work for the United States when there are viable and potentially successful alternatives. It almost always fails in the international regulatory area. I speak as one who was heavily involved in litigation over the Soviet pipeline, and who has spent over 30 years advising major U.S. and overseas companies with U.S. export controls and economic sanctions. In the regulatory world, especially on subjects such as export controls and economic sanctions, the United States is generally much better off working out something with our allies that will be generally accepted even if the agreed regime is initially less forceful than what we would have liked. That is one of the most important lessons from our experience with sanctions against Iran and with those against terrorists and terrorist organizations.

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[33] *See* M. Codner and E. Quintana, *Beyond the Convention: The Cluster Munitions Debate*, 155 RUSI J. 56, 58 (2010).

[34] 552 U.S. 491 (2008).

[35] *See* ASSESSING THE GEORGE W. BUSH PRESIDENCY 71 (Andrew Wroe & Jon Herbert eds., 2009) (noting that the Bush administration continued to defend states' rights); *see also* WILLIAM EARL MAXWELL ET AL., TEXAS POLITICS TODAY 66 (2010) (showing the influence that Medellin v. Texas had on increasing states' rights).