

**CONSTITUTIONS AND CONTROL OF THE MILITARY: CAN  
THE EXPERIENCE OF THE AMERICAS ASSIST THE  
MIDDLE EAST?**

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*To demilitarize the country means to make a profound decision. It is not enough to change the name of the armed forces. It is necessary to change the minds of those people who only yesterday wore a military uniform. It is necessary to have the courage to ban the army as a permanent institution, and to say yes to a future when arms are no longer needed, when the force of reason prevails over any reason to use force.*

–Oscar Arias Sanchez<sup>1</sup>

On February 16, 2012, the Willamette Law Review and the Willamette Journal of International Law and Dispute Resolution conducted a symposium with two panels; one panel addressed constitutions in the “Middle East” and the other addressed constitutions in “Latin America.” While this might suggest two quite disparate discussions, the presentations illustrated general and recurring issues common to considerations of constitutionalism in both regions. This Article discusses one issue—constitutional mechanisms to control the military in a democracy—where the Latin American experience with constitutionalism may give relevant guidance to present efforts by reformers in the Middle East to transition to successful democratic governance. How may constitutions provide for appropriate national defense while ensuring that neither the actions of military institutions themselves, nor the misuse of those institutions by the executive, embroil the nation in unneeded, costly, and destructive foreign engagements. And, of particular relevance to these regions, how may constitutions provide

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1. Oscar Arias Sanchez, *Panama, Without an Army*, N.Y. TIMES, Jan. 9, 1990, at A23.

for national defense while guarding against either the military or the executive supplanting the nation's own democratic governance and, in the worst incidents, committing major human rights abuses?

Two recent developments in the Middle East are of particular interest in the context of the Latin American experience with constitutions and the military. One is the United States' insistence that a peace plan between Palestine and Israel should result in a non-militarized Palestinian State. The second is the growing realization that the Arab Spring movement in Egypt, which brought about the removal of President Mubarak, has not removed the entrenched military power that fortified his decidedly undemocratic regime.

### I. A NON-MILITARIZED PALESTINIAN STATE

On May 19, 2011, President Obama gave a major policy address at the State Department outlining United States policy in response to the "extraordinary change taking place in the Middle East and North Africa."<sup>2</sup> He included remarks directed to the Palestinian-Israeli conflict and a hoped for peaceful resolution of the conflict. The President stated:

[A] lasting peace will involve two states for two peoples: Israel as a Jewish state and the homeland for the Jewish people, and the state of Palestine as the homeland for the Palestinian people, each state enjoying *self-determination*, mutual recognition, and peace. . . .

. . . The Palestinian people must have the right to govern themselves, and reach their full potential, in a *sovereign* and contiguous state.

As for security, *every state has the right to self-defense*, and Israel must be able to defend itself—by itself—against any threat. . . . The full and phased withdrawal of Israeli military forces should be coordinated with the assumption of Palestinian security responsibility *in a sovereign, non-militarized state*.<sup>3</sup>

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2. Barack Obama, Remarks by the President on the Middle East and North Africa (May 19, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa> (last visited August 29, 2012).

3. *Id.* (emphasis added).

The President's statement of policy included an apparent contradiction. If the Palestinian State is to be a fully sovereign state, to enjoy self-determination, and to possess, with every other state, the right to self-defense, what right does the United States, Israel, or anyone else have to insist that the Palestinian State be non-militarized? This same contradiction has long been present in proposals to resolve the Palestinian-Israeli conflict as, for example, in the unofficial proposals negotiated between a cabinet minister of the Palestinian National Authority and former Israeli officials in Geneva, Switzerland in 2003.<sup>4</sup> Second, as a political matter, the United States' policy further weakens its ability to appear to be a fair broker in the peace process when its position conforms so exactly to Israeli demands.<sup>5</sup> Nevertheless, political necessity may require that Palestinians accept a non-militarized status in return for achieving independent statehood.

Palestinians might seriously consider voluntarily adopting, for their own sound policy reasons, a non-militarized status. By looking to constitutional experiences in Latin America, the Palestinian leadership might conclude, in their constitutional deliberations, that abolition of the military in their constitution would be beneficial. Forsaking their insistence on a military would permit them to devote more resources to economic development and, in large part, would externalize much of the cost of protecting their independence from external threat to explicit or implicit international or regional guarantors. Most importantly, while the Palestinian state would need effective police and internal security services, forsaking a military would eliminate an institution which in both the Middle East and Latin America has frequently turned inward to influence, usurp, or

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4. Zaha Hassan, *The Palestinian Constitution and the Geneva Accord: The Prospects for Palestinian Constitutionalism*, 16 FLA. J. INT'L L. 897, 898-99, 915-16 (2004). In discussing the Geneva proposals, Ms. Hassan observes:

Although the Accord does state, in line with the draft constitution's provision that Palestine is a sovereign state, that each party recognizes the "sovereignty, territorial integrity and political independence" of the other, the substantive provisions in the Accord do not bear this out. The Accord provisions requiring indefinite stationing of multinational and international forces in Palestine; joint Israeli and Palestinian border patrol on all Palestinian borders; a demilitarized state of Palestine; the location of Israeli military installations in Palestine; and the use of Palestinian airspace for military exercises, all of which may not be amended without Israel's consent, militate against a finding that Palestine will be a sovereign state.

*Id.* at 921.

5. See Jared Wessel, *The Demilitarization of Palestine: Lessons from the Japanese Experience*, 11 U.C. DAVIS J. INT'L L. & POL'Y 259, 260-62 (2005).

undermine the power of democratic governments.

## II. EGYPT: MUBARAK GOES, DOES THE MILITARY STAY?

The second recent development in the Middle East in which past Latin American experience may be informative is the realization that the removal of a particular President, in this case Hosni Mubarak in Egypt, does not mean that an entrenched military with an independent source of financial support can easily be returned to civilian democratic control—the problem is clear. Two commentators recently observed:

One year after the revolution that ousted President Hosni Mubarak, the Egyptian military is closing down civil society organizations and trying to manipulate the constitution-writing process to serve its narrow interests. . . . Alarming, Egypt's army is seeking even greater influence than what Pakistan's top brass now enjoys: an explicit political role, and freedom from civilian oversight enshrined in law.<sup>6</sup>

The Egyptian military is deeply involved in the Egyptian economy. Since the late 1970's, the military has been active in undertaking economic development projects and in running enterprises in the mainstream Egyptian economy.<sup>7</sup> A recent newspaper report observes:

At the heart of the gathering dispute in Egypt is an existential crisis for a military regime that is protective of its expansive political and economic privileges. The military has significant control over the economy, overseeing more than a third of Egypt's industrial production, according to some estimates.<sup>8</sup>

The military's direct role in the economy gives it an independent source of support that immunizes it, in part, from legislative efforts to

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6. Michele Dunne & Shuja Nawaz, *Can Egypt Avoid Pakistan's Fate?*, N.Y. TIMES (Feb. 4, 2012), <http://www.nytimes.com/2012/02/04/opinion/can-egypt-avoid-pakistans-fate.html?adxnll=1&ref=hosnimubarak&adxnllx=1332638670-VM+TTIKDySJZ5sDZW7g0Bg>.

7. HELEN CHAPIN METZ, *EGYPT: A COUNTRY STUDY* 293, 304–05, 325, 327–28 (5th ed. 1991).

8. Matt Bradley, *Egypt's Brotherhood Eyes Presidency: Islamist Group's Political Thrust Risks Confrontation with Military Leaders*, WALL ST. J., Mar. 28, 2012, at A7.

limit its role by reducing military spending.<sup>9</sup> In a recent book review in the *Washington Post*, “The military, not Mubarak, was Egyptians’ real enemy,” Lee Smith wrote:

One of the revolutionaries’ most famous chants was that the army and the people went hand in hand. However, events over the past year have shown that Egypt’s beloved army is interested in one thing only – maintaining the formidable economic interests that make it the most powerful and therefore the most corrupt institution in a country where *wasta* (connections) and *baksheesh* (bribery) have made corruption systemic for centuries . . . [T]he army’s priority is not to obtain American cash but simply to stay in power.<sup>10</sup>

Reportedly, the military is exerting pressure as a new constitution is currently being drafted to limit civilian review of the military budget.<sup>11</sup>

Again, the experience of Latin American may be instructive. There too, in some countries the military has acquired extensive business holdings and taken actions to serve its own institutional and economic interests at the cost of democracy.<sup>12</sup> Latin American constitutionalists have taken various approaches to attempt to control military intervention in democracy, including abolishing the military force altogether.<sup>13</sup> Before considering these Latin American developments, however, it is helpful to briefly review the experience of the United States in limiting the role of the military in the development of the U.S. Constitution.

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9. *Id.*

10. Lee Smith, *The military, not Mubarak, was Egyptians’ real enemy*, WASH. POST, (Feb. 3, 2012), [http://www.washingtonpost.com/entertainment/books/the-military-not-mubarak-was-egyptians-real-enemy/2012/01/25/gIQANHUcnQ\\_story.html](http://www.washingtonpost.com/entertainment/books/the-military-not-mubarak-was-egyptians-real-enemy/2012/01/25/gIQANHUcnQ_story.html).

11. Carol Giacomo, *Despite the Army’s Obstruction, Egyptians Work to Build a Democracy*, N.Y. TIMES, (Mar. 9, 2012), <http://www.nytimes.com/2012/03/10/opinion/despite-the-armys-obstruction-egyptians-work-to-build-a-democracy.html?scp=7&sq=Egypt%20and%20Military&st=cse>.

12. See ANITA ISAACS, *MILITARY RULE AND TRANSITION IN ECUADOR 1972–1992* 57–65, 140–42 (1993). See generally J. SAMUEL FITCH, *THE ARMED FORCES AND DEMOCRACY IN LATIN AMERICA* (1998).

13. See *infra* text accompanying notes 55–57 and 80–83.

### III. CONTROL OF THE MILITARY IN THE AMERICAS

#### A. *Early Concerns in the United States of America*

In the Americas, we have long struggled with the issue of democratic control of the military. For example, the United States founded its own assertion of independence, in part, on such concerns—our Declaration of Independence lists the following among the grievances against the King of Great Britain to justify our revolution:

He has kept among us, in times of peace, Standing Armies without the consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.<sup>14</sup>

The Declaration of Independence also contained the related grievances:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:<sup>15</sup>

We can easily recognize these same concerns in the contemporary phrases “civilian control of the military” and “accountability for human rights abuses.”

The Articles of Confederation, the United States’ first effort at a governing constitutional document, devoted a substantial proportion of its text to the control of the military.<sup>16</sup> The States were prohibited from keeping vessels of war or a body of forces, other than “a well-regulated and disciplined militia,” except as in those numbers deemed necessary by the confederation’s Congress.<sup>17</sup> The States were prohibited from engaging in “any war without the consent of the United States in Congress assembled” unless there was an actual

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14. THE DECLARATION OF INDEPENDENCE paras. 13 & 14 (U.S. 1776).

15. *Id.* at paras. 16 & 17.

16. ARTICLES OF CONFEDERATION of 1781, art. III, VI–IX.

17. *Id.* at art. VI.

enemy attack or a threatened Indian invasion.<sup>18</sup> The first sentence of Article IX, listing the powers of the Confederation's Congress, reiterated that "[t]he United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war," providing again an exception for actual enemy attack of a State or threatened Indian invasion.<sup>19</sup> Further, the same Article prohibited the United States from engaging in war unless a supermajority of nine out of the thirteen States agreed.<sup>20</sup> The same supermajority vote requirement applied to authorizing the number of naval vessels, the number of land or sea forces to be raised, and the appointment of the commander in chief of the army or navy.<sup>21</sup> The Articles of Confederation reflect a strong desire to prevent the individual States from involving the United States in war by their unilateral action, to maintain State militias while controlling their ability to develop into full-time standing state military forces, and to require extraordinary consensus before the Congress could prepare for or engage in warfare.

The Constitution of the United States of America created a more complete and powerful federal government than had existed under the Articles of Confederation. In doing so, the founders, while not abandoning all concern for limiting State military actions,<sup>22</sup> concentrated on the possible abuse of power by the Federal Government. With regard to the military and the authority to use military power, the drafters of the Constitution used the techniques to separate and balance powers, and control the appropriation of funds in an attempt to control the use of the military.<sup>23</sup> The powers to declare

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18. *Id.*

19. *Id.* at art. IX.

20. *Id.*

21. *Id.*

22. U.S. CONST. art. I, § 10 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). *Cf.* U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.").

23. See Lori Fishler Damrosch, *War and Responsibility: A Symposium on Congress, the President, and the Authority to Initiate Hostilities*, 50 U. MIAMI L. REV. 181, 198 (1995) ("The framers' choices made for the Constitution of 1787 reflect their convictions that no one person, or body of persons, should have sole responsibility for deciding to go to war; that the person who would be crowned with the laurel of victory has the greatest temptation toward war and therefore should be denied the decision-making prerogative; that those who hold the purse strings should determine at the outset whether to incur the costs of conflict; and that the war power should rest with the most representative organ.").

war, to raise and support armies and provide and maintain a navy, to make rules to govern the land and naval forces, to call forth the militia and to organize, arm, and discipline it is given to the Congress.<sup>24</sup> The Constitution, on the other hand, gives the power to be Commander-in-Chief of the military forces to the unitary power of the President.<sup>25</sup> Most significantly, the authority of the Congress to control the use of the military by controlling funding is enforced by Article I, Section 9. It provides, in part:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.<sup>26</sup>

The power of the purse has proven to be one of the most important constitutional elements supporting Congressional efforts to counterbalance the President's role as Commander-in-Chief and to prevent military interference in domestic affairs.<sup>27</sup>

Maintaining civilian control of the source of the funding for the military is a clear problem in Latin America where militaries are engaged in extensive commercial and other economic activities which give them an independent source of funding and political power, contributing to their ability to interfere in democratic governance. In Ecuador, for example, the military benefits from the exploitation of the country's oil resources and engages in many economic activities including manufacturing, banking, and commercial airlines.<sup>28</sup> A similar pattern of substantial direct, independent military involvement in the economic activity of the country exists in Honduras.<sup>29</sup> In the Middle East, Egypt faces a similar circumstance.<sup>30</sup>

In its history, the United States has established a strong, constitutionally-enforced tradition of respect for civilian control of the

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24. U.S. CONST. art. I, § 8.

25. *Id.* at art. II, § 2, cl. 1.

26. *Id.* at art. I, § 9, cl. 7.

27. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY AND THE POWER OF THE PURSE 148-57, 171-81 (1994). *See also* HAROLD HUNGUO KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN CONTRA AFFAIR 52-53 (1990).

28. DENNIS HANRATTY, ECUADOR: A COUNTRY STUDY 208, 213-14, 224 (3d ed. 1991).

29. HONDURAS: A COUNTRY STUDY 234-35 (Tim L. Merrill ed., 3d ed. 1995).

30. *See supra* text accompanying notes 7-11.



military in our domestic politics.<sup>31</sup> This tradition exists both in the political culture and in our military institutions themselves. In sharp contrast to the constitutional history of many countries, both in Latin American and in the Middle East, the United States has suffered no military *coups d'état*. In fact, it has been quite the opposite—United States history is overflowing with examples of bitter disputes over whether the President's use of force outside of our territory is authorized by the Constitution.<sup>32</sup> Examples of presidential use of military force abroad where there has been no formal declaration of war by the Congress have been both common and controversial.<sup>33</sup> The controversy over United States involvement in Vietnam was particularly intense and led to passage of the War Powers Resolution—an effort to give legislative structure to the constitutional relationship between Congress and the President in employing military force.<sup>34</sup>

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31. See *Laird v. Tatum*, 408 U.S. 1, 15–16 (1972), where Chief Justice Burger, although finding that the plaintiffs lacked standing, stated:

The concerns of the Executive and Legislative Branches in response to disclosure of the Army surveillance activities—and indeed the claims alleged in the complaint—reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military. Those prohibitions are not directly presented by this case, but their philosophical underpinnings explain our traditional insistence on limitations on military operations in peacetime. Indeed, when presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in this Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

See also, e.g., W. Kent Davis, *Swords into Plowshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61 (1998); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962).

32. In 1986, Professor Eugene Rostow reported that, although Congress had made only five formal declarations of war, United States' military force "has been used abroad more than two hundred times since 1789." Eugene V. Rostow, "Once More unto the Breach:" *The War Powers Resolution Revisited*, 21 VAL. U. L. REV. 1, 5 (1986).

33. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS (1976); HENRY BARTHOLOMEW COX, WAR FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: 1829–1901 (1984); W. Taylor Reveley III, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 Va. L. Rev. 1243, 1257–65 (1969).

34. War Powers Resolution, 50 U.S.C. §§ 1541–1548 (1994); Koh, *supra* note 27. The United States Presidents' bold assertions of constitutional power to use force without Congressional authorization have had major consequences both in Latin America and in the Middle East. STEVEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE

*B. One Constitutional Response to Military Coups: The Cases of Argentina and Honduras*

In Latin America, in contrast to the United States, the primary threat to democratic control has not been by uncontrolled executive use of military force externally. Rather, the major abuse has been the intervention of the military internally to influence or overthrow democratically elected civilian governments. Argentina is one such example. Throughout its history, there have been incidents of military involvement in, or tolerance of, corrupt electoral practices.<sup>35</sup> Moreover, there have been repeated military seizures of power and periods of military rule.<sup>36</sup> In particular, in the 1970's, as Professor Miller has described:

[T]he Army embarked on a war against the left that focused not only on the armed guerrillas, but after a military coup on March 24, 1976, on anyone associated with the political left. The result was a degree of repression previously unknown in Argentina, with between 10,000 and 30,000 "disappeared" persons who were kidnapped and murdered by the Armed Forces, and thousands more illegally detained or forced into exile.<sup>37</sup>

Civilian government was restored in the early 1980's after the military government was discredited by its disastrous involvement in the Falklands–Malvinas War.<sup>38</sup> Efforts to reform Argentine politics and government structures to prevent military coups in the future eventually led to an altered and expanded Constitution in 1994.

The Argentine Constitution of 1994 contains one new article of particular interest to control of the military. A new chapter in the

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FROM HAWAII TO IRAQ 64–70, 88–89, 219–38 (2006).

35. Jonathan M. Miller, *The Argentine Republic: Introductory Note Constitutional History and Political Background*, THE CONSTITUTIONS OF THE COUNTRIES OF THE WORLD, <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID=%7BBDA336A4-B58B-4D89-AD1B-E5F0EDE01619%7D>.

36. *Id.*

37. *Id.*

38. *Id.* See also Lori Fisler Damrosch, *Use of Force and Constitutionalism*, 36 COLUM. J. TRANSNAT'L L. 449, 465–68 (1997). Recently the Government of Argentina ordered the declassification and release of its own exhaustive internal study of the causes of the Falklands/Malvinas War. Associated Press, *Argentina: Report on 1982 War With Britain Is Declassified*, N.Y. TIMES, (Mar. 24, 2012), <http://www.nytimes.com/2012/03/24/world/americas/argentina-report-on-1982-war-with-britain-is-declassified.html?ref=americas>.

Constitution on “New Rights and Guarantees” contains Article 36, which states in part:

This Constitution shall remain in force even if its observance is interrupted by acts of force against the institutional order and the democratic system. Such acts shall be irrevocably void.

Their authors shall be subject to the sanction provided in Article 29, forever disqualified from holding public office and excluded from the benefits of pardon and commutation of sentences.

Also suffering the same sanctions shall be those who, as a consequence of these acts, usurp the functions reserved to the authorities of this Constitution or those of the Provinces, and shall answer civilly and criminally for their acts. The aforementioned actions are not subject to the statute of limitations.

All citizens have the right of resistance against those who execute the forcible acts stated in this article.<sup>39</sup>

With this Article, the Constitution announces in advance that the a coup will not change the true legal order and that those persons who participate in the forceful interruption of the democratic process, or serve in any de facto government that results, will be subject to lawful resistance and to criminal prosecution when democratic government

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39. CONSTITUCIÓN NACIONAL art. 36 (Arg.). Article 36 also seeks to address the problem of corruption. It continues:

Likewise, he who commits a serious fraudulent crime against the State that leads to his enrichment shall have acted against the democratic system [and] is thereafter disqualified from holding public office or employment for the period of time that the laws specify. Congress shall pass a law concerning public ethics in the exercise of public functions.

*Id.* See Néstor Pedro Sagüés, *An Introduction and Commentary to the Reform of the Argentine National Constitution*, 28 U. MIAMI INTER-AM. L. REV. 41, 66 (1996). Article 29 prohibits the Congress or Provisional Legislatures, on pain of punishment for treason, from devolving power to dictatorial government. It states:

Congress may not confer on the National Executive, nor Provincial Legislatures on the Provincial Governors, extraordinary powers, or the whole of the public authority, nor grant them acts of submission or supremacy whereby the lives, the honor or the property of Argentines will be at the mercy of governments or any person whatsoever. Acts of this nature shall be utterly void, and shall render those who formulate, consent to or sign them liable to be called to account and punished as infamous traitors to the country.

CONSTITUCIÓN NACIONAL art. 29 (Arg.).

is restored.<sup>40</sup>

Argentina is not the only Latin American country to try such an approach. Honduras is another country with a long history of military disruption and usurpation of civilian governments.<sup>41</sup> Honduras also tries to dissuade potential coups leaders and participants with a constitutional provision asserting that the Constitution remains binding in the face of a coup. A chapter of the Constitution titled “The inviolability of the Constitution” contains Article 375, which states:

This Constitution does not cease to be in effect nor does it cease to be in force by act of force or when it is allegedly repealed or amended by any means or procedure other than that which it itself provides. In these cases, every citizen, whether or not invested with authority, has the duty to cooperate in maintaining or reestablishing its effectiveness.

Persons responsible for the events specified in the first part of the foregoing paragraph, as well as the principal functionaries of governments that may subsequently be organized, shall be tried in accordance with this Constitution and the laws issued in conformity therewith, if they have not assisted in immediately reestablishing the rule of this Constitution and the authorities constituted in accordance therewith. The Congress may, by a vote of an absolute majority of its members, decree the forfeiture of all or part of the property of those persons and of others who have enriched themselves by supplanting the sovereignty of the people or by usurping the public powers, to compensate the Republic for any losses incurred on account of them.<sup>42</sup>

How are these Latin American experiments relevant to the Middle East? It would be naive to suggest, for example, that Egypt will draft a new constitution to do away with the army and become a non-militarized state.<sup>43</sup> Yet Egyptian and other Middle Eastern constitution drafters might well consider provisions like those in the Constitutions of Argentina and Honduras in their constitutional

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40. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 864 (2003).

41. HONDURAS: A COUNTRY STUDY, *supra* note 29, at 35–39, 42–55, 211–16.

42. CONSTITUCIÓN DE LA REPÚBLICA HONDURAS, 1982, art. 375.

43. *See* Bradley, *supra* note 8.

reforms. It may help, and can hardly hurt, to state at the fundamental constitutional level that military interference with the established legal order and democratic system will not be tolerated.

*C. Non-Militarized States: The Cases of Costa Rica and Panama*

Another development Latin American constitutionalism may also be of relevance to the Middle East. As previously stated, President Obama and others are insisting that the Palestinian people accept the status of a sovereign yet non-militarized nation as part of a two-state solution to the Palestinian–Israeli conflict.<sup>44</sup> Any externally mandated non-militarized status on a Palestinian State as the price for its independence smacks of a victor’s imposition. There is precedent for such action, of course, in the very different circumstances of the end of World War II. Then the Allied Powers required a defeated Japan to accept a Constitution renouncing the use of military force.<sup>45</sup> The Palestinians, however, are not a defeated aggressor nation.<sup>46</sup> Any successful peace plan must come from their voluntary agreement. Lessons from Latin America suggest that Palestinian constitutionalists might find useful guidance toward adopting non-military status in the

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44. *See supra* text accompanying notes 2–4.

45. Article 9 of the Japanese Constitution is titled “Renunciation of War” and it states: Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.

In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

NIHONKOKU KENPO [CONSTITUTION] art.9 (Japan). General Douglas MacArthur played a substantial role in the drafting of the Japanese Constitution:

In Japan, constitution-making happened relatively quickly after the end of World War II, in large part because of pressure brought by General MacArthur, who advised the Japanese that in order to prevent the prosecution of the Emperor for war crimes, adoption of a liberal, democratic constitution that renounced rights of belligerency and abolished the sacred character of the Emperor’s position was essential, and quickly, to dissuade the Allies in the Far Eastern Commission (FEC) from seeking the Emperor’s trial for war crimes.

Vicki C. Jackson, *What’s in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249, 1263 (2008). *See also, e.g.*, Zachary Elkins, Tom Ginsburg & James Melton, *Baghdad, Tokyo, Kabul...: Constitution Making in Occupied States*, 49 WM. & MARY L. REV. 1139, 1159–64 (2008) (pointing out that internal Japanese forces also contributed to forming the 1946 Japanese Constitution).

46. Since the June 1967 War, in which Israel took charge of the West Bank, East Jerusalem, and the Gaza Strip, the United Nations has reiterated that a nation cannot acquire territory by war and that Israel must withdraw from the territories it occupied. S.C. Res. 242, preamble & art. 1, U.N. Doc. S/RES/242 (Nov. 22, 1967).

experiences of Costa Rica and Panama, two countries that have voluntarily abolished their militaries to their political and economic advantage.

### 1. *Costa Rica*

Costa Rica has a different history than much of Latin America. Its relative geographic isolation in colonial times did not encourage the development of large landholders who amassed great wealth.<sup>47</sup> Rather, it developed a somewhat more homogenous culture and economy.<sup>48</sup> Its people largely avoided major violence and no strong military tradition emerged.<sup>49</sup> In 1948, however, a brief civil war occurred after the Congress sought to annul the results of a Presidential election.<sup>50</sup> The Civil War lasted 44 days and claimed the lives of more than 2,000 people.<sup>51</sup> The Civil War was followed by a brief provisional government and the election of a constituent

47. LEONARD BIRD, *COSTA RICA: THE UNARMED DEMOCRACY* 24–28 (1984). This view may be overly simplistic:

The main characteristics of colonial Costa Rica—poverty, few precious metals, a small population, scarce Indian labor, remoteness from the Central American colonial capital in Guatemala—are repeatedly cited in traditional historical literature as giving rise to the democratic institutions and political culture of the postindependence period. . . .

This halcyon view of early Costa Rica is widely believed. . . . [H]owever, it is also quasi-mythical. Recent empirical research has increasingly called into question the premises of the traditional historiography and the cultural and historical stereotypes it has helped sustain. (*footnote omitted*)

Marc Edelman & Joanne Kenen, *The Origins of Costa Rican Exceptionalism—Colonial Period and the Nineteenth Century: Editors' Introduction*, in *THE COSTA RICA READER* 1, 2 (Marc Edelman & Joanne Kenen eds., 1989).

48. See Héctor Pérez Brignoli, *Reckoning with the Central American Past: Economic Growth and Political Regimes*, in *COSTA RICA READER* 35, 35–40 (Marc Edelman & Joanne Kenen eds., 1989). See also Oscar Arias Sánchez, *Let's Give Peace a Chance*, in *COSTA RICA READER* 368, 370–71 (Marc Edelman & Joanne Kenen eds., 1989).

49. BRUCE M. WILSON, *COSTA RICA: POLITICS, ECONOMICS, AND DEMOCRACY* 67 (1998). See generally, e.g., JOHN PATRICK BELL, *CRISIS IN COSTA RICA: THE 1948 REVOLUTION* 3–18 (1971) (providing a brief overview of the social, political, and economic development of Costa Rica until 1948); BIRD, *supra* note 47, at 12 (observing that “[o]nly three Presidents of Costa Rica, of a total of over 60, have been military men. . . .”). Nevertheless, Costa Rica was not wholly free of authoritarianism from the middle of the nineteenth century into the beginning of the twentieth century. José Luis Vega Carballo, *The Dynamics of Early Militarism*, in *COSTA RICA READER* 40, 40–49 (Marc Edelman & Joanne Kenen eds., 1989).

50. For a detailed description of the political circumstances leading to the civil war and its resolution, see BIRD, *supra* note 47, at 48–87.

51. CHARLES D. AMERINGER, *DEMOCRACY IN COSTA RICA* 32 (Robert Wesson ed., 1982).

assembly.<sup>52</sup> What emerged was the Constitution of 1949, still in force in Costa Rica today.<sup>53</sup>

Before the civil war, then-President Calderón Guardia fell into disfavor with many citizens who believed that he violated the nation's "tradition of opposition to a standing military force" because of actions taken during World War II when the United States had pressured Costa Rica to help defend the region.<sup>54</sup> The tradition of opposition to a standing army came to full fruition in the new Constitution when it abolished the army. As one commentator states:

The decision to do without a standing army had already been taken by the Governing Junta and was confirmed without greater discussion by the Constituent Assembly. It marked a break not only with the country's own past but also, even more importantly, with the prevailing tradition in much of the rest of the Continent where democratic politics had often been marred and interrupted by prolonged periods of military rule . . . In the light of the past 60 years of stable democratic development the experiment must be considered as an unqualified success. But the abolition of the armed forces has not only bolstered democratic stability at home; it has also enabled Costa Rica to play a crucial role in the attempts to restore peace in the region as a whole following the many bloody conflicts in neighboring countries [sic] the 1970's and 1980's.<sup>55</sup>

The Constitution of Costa Rica is direct. Article 12 states:

The Army as a permanent institution is abolished. There shall be the necessary police forces for surveillance and the preservation of the public order.

Military forces may only be organized under a continental agreement or for the national defense; in either case, they shall always be subordinate to civilian power: they may not deliberate

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52. *Id.* at 33.

53. *Id.*; Robert S. Barker, *Stability, Activism and Tradition: The Jurisprudence of Costa Rica's Constitutional Chamber*, 45 DUQ. L. REV. 523, 526 (2006).

54. BELL, *supra* note 49, at 109.

55. Rainer Grote, *The Republic of Costa Rica: Introductory Note*, THE CONSTITUTIONS OF THE COUNTRIES OF THE WORLD ONLINE, <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID=%7BBDA336A4-B58B-4D89-AD1B-E5F0EDE01619%7D>.

or make statements or representations individually or collectively.<sup>56</sup>

Costa Rica has not merely formally abolished its military. Its citizens and judicial institutions have actually sought to develop, preserve, and enforce a broader tradition of pacifism. Symposium participants Professor Robert Barker and Professor Bruce Wilson have described the extremely active judicial review of constitutionality applied by the Sala IV, the constitutional chamber of the Supreme Court of Costa Rica.<sup>57</sup> Professor Wilson observed that Sala IV has become:

[a] major actor in Costa Rican politics and one of the most influential and activist courts in Latin America. The constitutional amendment that created the court sparked a judicial revolution that shook the country's judicial system out of a 200-year slumber and has touched virtually every aspect of the country's social, economic, and political life.<sup>58</sup>

The Sala IV has shown little deference to either the executive or legislative branches of government and has remained steadfast in its exercise of judicial review. The Sala IV has taken the extraordinary step of finding justiciable claims asserted against the government alleging violation of Article 12.

In one lengthy decision, the court declared that statements by the Costa Rican President and Foreign Minister that endorsed the coalition of nations organized by the United States to support the invasion of Iraq had no legal effect. The Court recognized that Costa Rica, within its constitutional tradition, could praise the goal of returning respect for human rights to Iraq. But the Court concluded that Costa Rica could not constitutionally associate with the means—a military invasion. The Court stated:

[W]hat remains to be verified is whether this means is permissible in light of our constitutional order. On this point in particular, the

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56. COSTA RICA CONST. art. 12. See BIRD, *supra* note 47, at 120–27 (describing the Constituent Assembly's adoption of Article 12).

57. Barker, *supra* note 53; WILSON, *supra* note 49, at 154–56.

58. Bruce M. Wilson, *Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court*, in JUDICIALIZATION OF POLITICS IN LATIN AMERICA 47, 47 (Rachel Sieder et al. eds., 2005).



response of the Chamber is negative because of the following: the pacifist tradition that impregnates our constitutional order . . . has as one of its most important expressions the incorporation of Costa Rica in the International System of the United Nations; but precisely because of that tradition, such incorporation for our country goes beyond the mere association with a group of nations for the carrying out of established ends. Rather, in the Costa Rican case it is possible to affirm without doubt that the said adhesion responded and still responds to the conviction that it deals with a mechanism that is a substitute for recourse to force as an instrument of policy and of international relations on the part of our country, and for that reason the Chamber understands that it must be considered a limitation created in our order, applicable to the action of Costa Rican authorities, and that it manifests itself in a true restriction on the scope of action in matters of international relations, consisting in the impossibility of our government's associating its foreign policy with belligerent actions outside of or even parallel to the United Nations system—including of course simple “moral support”—as proper methods for the solution to conflicts.<sup>59</sup>

The Court ordered the government of Costa Rica to insist that the United States remove Costa Rica from a statement appearing on a White House website listing Costa Rica as a supporter of the invasion.<sup>60</sup> This decision was one of several claims brought to the *Sala IV* challenging the country's statement supporting United States policy in Iraq.<sup>61</sup>

This decision has been referred to in a number of other decisions where claims have been brought to enforce Costa Rica's pacifist traditions.<sup>62</sup> In one important case involving Article 12, the petitioner alleged that the President violated Article 12 by allowing members of the Public Security Forces to bear the Costa Rican flag in a parade in Spain celebrating the National Holiday of Spain in 2005.<sup>63</sup> The

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59. Sala Constitucional, Res. No. 2004-09992; Barker, *supra* note 53, at 546 (Robert S. Barker trans.).

60. Luis Fernando Solano Carrera, *Constitutional Justice and the Separation of Powers: The Case of Costa Rica*, 47 DUQ. L. REV. 871, 895–99 (Robert S. Barker trans., 2009) (discussing the Iraq decision and the political question doctrine).

61. Barker, *supra* note 53, at 545.

62. See, e.g., Sala Constitucional, Res. No. 2006-015245, available at <http://www.poder-judicial.go.cr/megaindex/votos/2006/06-15/06-015245.html>; Sala Constitucional, Res. No. 2007-09469.

63. Sala Constitucional, Res. No. 2007-09469.

decision again focused on the peaceful heritage of Costa Rica. The court stated that the president's actions were unconstitutional in allowing Costa Rican citizens to display themselves in "a parade with military characteristics in Spain, while carrying the national flag, . . . which represents among other things, Costa Rican civility and repudiation of the army as a permanent institution."<sup>64</sup> Like the Iraqi case, the Court forbade the Executive from sending delegations giving the impression that Costa Rica possesses a military, and ordered the President work diplomatically with Spain to remove references to Costa Rica's involvement in the celebration of a military event from the Spanish Royal House website.<sup>65</sup>

Sala IV has not always ruled in favor of challenges to government action brought under Article 12, however. One such case involved the constitutionality of the shipment of arms, tanks, and nuclear material through the country under the guise of the Treaty of Free Commerce between the Dominican Republic, Central America, and the United States. The Court cited the Iraqi case but found that shipment of weapons was, in fact, commerce, not military action.<sup>66</sup> Another instance involved whether the Legislature's project on the "Suppression of Maritime and Air Illicit Drug Trade of Narcotics and Psychotropic Substances in the Caribbean" violated Article 12 because it would involve the use of force outside of the country. The Court found that use of force to prevent drug trafficking falls within the police force's purpose of "conservation of the public order" under Article 12 and was not a violation of the principles of pacifism embodied in the Constitution.<sup>67</sup>

Finally, the Costa Rican government has used the Country's abolition of the military effectively to its advantage in its foreign relations. For example, the country has pointed out that, in contrast to many developing countries, it can devote a much higher percentage of its available resources to education, health, and other social services than can those countries with expensive military commitments.<sup>68</sup> In

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64. *Id.* (Lee Adams trans.).

65. *Id.*

66. Sala Constitucional, Res. No. 2007-09469.

67. Sala Constitucional, Res. No. 2009-018940.

68. For example, in addressing the United States Congress in 1987, Costa Rican President Oscar Arias stated:

I belong to a small country that was not afraid to abolish its army in order to increase its strength. In my homeland you will not find a single tank, a single artillery piece, a single warship, or a single military helicopter. In Costa Rica we

1978, the Costa Rican representative addressed the United Nations General Assembly:

I represent a very special nation and people that 30 years ago decided to entrust its internal security to a constitutional regime and its external defence to international order and solidarity, totally eliminating their small military forces by a constitutional prohibition and leaving in place, with no attempt at subterfuge, a small Civil Guard for the protection of the citizens. That Civil Guard today consists of less than one policeman for each 1,000 inhabitants – which may not really be enough – and its total cost, including men, equipment and materials, for a country of almost 2,5 million people represents less than 1 per cent of the public budget or less than 1.5 thousandth of the national product and less than \$2 annually per person. Compare that to what is occurring in many parts of the under-developed world, where military budgets absorb up to six times the total for all the other public services.<sup>69</sup>

## 2. Panama

Panama, Costa Rica's neighbor to the south, has a distinctly different history of relations with the military, yet it too has decided to eliminate its military forces. Since early Spanish colonial days, the Isthmus of Panama has had enormous geopolitical importance as a transit route between the Caribbean and the Pacific. In the early 19th century after independence from Spain, the region became part of Columbia. With both European Powers and the United States contesting for influence and the opportunity to build a canal across

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are not afraid of freedom. We love democracy and respect the law. Our democracy has been in place for one hundred years; it is one of the oldest in Latin America and one of the oldest in the world. Development and peace with our neighbors are our highest goals.

We have made considerable progress in education, health, and nutrition. In all of these areas our levels are comparable to the best in Latin America. Although we are poor, we have so far been able to reach satisfactory social goals. This is largely because we have no arms expenditures and because the imbedded practice of democracy drives us to meet the needs of the people. Almost forty years ago we abolished our army. Today we threaten no one, neither our own people nor our neighbors. Such threats are absent not because we lack tanks, but because there are few of us who are hungry, illiterate, or unemployed.

Arias Sánchez, *supra* note 48, at 370.

69. *Address delivered to the United Nations Tenth Special Session of the General Assembly, 1978, by Mr. Piza-Escalante, of Costa Rica* (translation from Spanish) in BIRD, *supra* note 47, at 201–02 (Appendix IV).

the isthmus, the United States encouraged an insurgency and then quickly recognized the independence of the revolutionary group as the new independent nation of Panama.<sup>70</sup> What followed was a period in which the United States exercised great authority over Panama.

From 1903 to 1936, Panama was a virtual protectorate of the United States. Article II of the Hay-Bunau-Varilla Treaty gave the United States rights as if it were the sovereign government. By Article XXIII, the United States could employ force for the protection and defense of the Panama Railroad and Canal. Article 136 of Panama's 1904 constitution stipulated that the government of the United States guaranteed the independence and sovereignty of Panama, and could intervene anywhere in the country to restore public peace and constitutional order.<sup>71</sup>

The United States often took advantage of this authorization to intervene militarily, doing so twelve times in the twenty-one years between 1906 and 1928.<sup>72</sup> During this period, the United States insisted that Panama itself have only a weak police force.<sup>73</sup> In the 1930's, the U.S. began to strengthen the National Police and, when the U.S. gave up its right to intervene by treaty in 1936, that force became responsible for both internal and external security.<sup>74</sup> With the onset of the Cold War in the 1950's, the United States supported the conversion of the National Police into a more militarized National Guard.<sup>75</sup> Then, "[t]he United States, after initial reluctance, actively supported and aided the military government installed in 1968 by General Omar Torrijos."<sup>76</sup> General Torrijos died in a plane crash in 1981 and was replaced by Manuel Noriega, a former head of military

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70. KINZER, *supra* note 34, at 60–62; IVAN MUSICANT, *THE BANANA WARS: A HISTORY OF UNITED STATES MILITARY INTERVENTION IN LATIN AMERICA FROM THE SPANISH-AMERICAN WAR TO THE INVASION OF PANAMA* 122–36 (1990).

71. GEORGE PRIESTLEY, *MILITARY GOVERNMENT AND POPULAR PARTICIPATION IN PANAMA: THE TORRIJOS REGIME 1968–1975*, 11 (1986) (footnote omitted).

72. *Id.*

73. Orlando J. Perez, *Introduction: U.S.-Panamanian Relations in Historical Perspective*, in *POST INVASION PANAMA: THE CHALLENGES OF DEMOCRATIZATION IN THE NEW WORLD ORDER* 1, 3 (Orlando J. Perez ed., 2000).

74. *Id.* at 4.

75. *Id.*

76. *Id.* For a detailed analysis of the Torrijos regime, see PRIESTLEY, *supra* note 711. See also Ronald D. Sylvia & Constantine P. Danopoulos, *Civil-Military Relations in a Civilianized State: Panama*, 33 J. POL. & MIL. SOC. 81, 83–86 (2005).

intelligence and occasional CIA informant.<sup>77</sup> The United States tolerated Noriega's undemocratic actions and involvement in the illicit drug trade while he was complicit in the U.S.-instigated Contra insurgency in Nicaragua.<sup>78</sup> The United States ended its support when Noriega's behavior became erratic and his drug dealing activities more apparent. After nonviolent methods failed to force him from power, the United States invaded Panama in December, 1989, arrested Noriega, and shipped him to Miami to stand trial.<sup>79</sup> "The U.S. intervention removed Noriega from power and re-established constitutional order by restoring the winner of the May election, Guillermo Endara, to the office of President."<sup>80</sup> Since 1994, Panama has selected democratic governments through free elections.<sup>81</sup>

The post-Noriega period brought substantial constitutional reform in Panama. After an initial unsuccessful effort, the military was eliminated.

In 1991, a number of constitutional reforms, including demilitarization and the strengthening of the legislature vis-à-vis the President, were put forward by the legislature. However, they did not obtain the required majority in a referendum in 1992 in which 68 percent (68%) of the electorate chose to abstain from voting. Important objectives of the demilitarization reform had already been implemented by presidential decree, however. The Panama Defense Forces were renamed the Panamanian Public Forces (*Fuerza Pública Panameña*) and its ranks reduced from 15,000 to 12,000. A number of senior officers were purged through a combination of voluntary and mandatory retirements . . . .

A second round of constitutional reforms in 1994 was more successful. This time the reforms were adopted in a purely parliamentary procedure, *i.e.* by two consecutive Assemblies

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77. Noriega's rise and fall is traced in KINZER, *supra* note 34, at 239–59.

78. Perez, *supra* note 73, at 6; Sylvia & Danopoulos, *supra* note 76, at 84 ("The Panamanian military ingratiated itself to U.S. policy makers by assisting the Central Intelligence Agency with its anti-Communist campaigns in the region.").

79. Perez, *supra* note 73, at 6–7; Sylvia & Danopoulos, *supra* note 76, at 86–88; MUSICANT, *supra* note 70, at 390–417.

80. Rainer Grote, *The Republic of Panama: Introductory Note*, THE CONSTITUTIONS OF THE COUNTRIES OF THE WORLD ONLINE, <http://www.oceanalaw.com/gateway/gateway.asp?ID=31&SessionID={76AA55FA-B4BD-43C4-AAC6-403C39EB0D95}>.

81. Perez, *supra* note 73, at 7; Sylvia & Danopoulos, *supra* note 76, at 90–94.

adopting identical amendment proposals . . . Legislative Act No. 2 of August 23, 1994 modified the Preamble to the Constitution by dropping any reference to the principles of the Panamanian Revolution contained in the original text, and abolished a standing military in Panama.<sup>82</sup>

A new provision, Article 310, eliminates the military:

The Republic of Panama shall not have an Army.

All Panamanians are required to take arms to defend the national independence and the territorial integrity of the State.

For the preservation of public order, the protection of life, honor and property of those who live under the jurisdiction of the State and for the prevention of punishable acts, the Law shall organize the necessary police services, with authority and separate roster.

In the face of external aggression and by authority of the Law, special police services may be organized temporarily for the protection of the frontiers and jurisdictional spaces of the Republic.

The President of the Republic is the Chief of all services established in the present Title; and they, as authority agents shall be subordinated to civil power; therefore, they shall obey the orders issued by the national, provincial or municipal authorities in the exercise of their legal functions.<sup>83</sup>

The constitutional amendments of 1994 added two additional, related provisions. The first established that the police forces in Panama must not engage in political activity.<sup>84</sup> The second prohibited private possession of military arms and provided that the importation, manufacture, and use of non-military weapons could be controlled by

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82. Grote, *supra* note 81.

83. PANAMA CONST. art. 310.

84. "The police services are not deliberative and their members may not make statements or political declarations in an individual or collective manner. Neither may they intervene in party political activities, except to cast a vote. Violation of the present provision, shall be penalized with immediate removal from office, besides the penalties established by Law." PANAMA CONST. art. 311.

law.<sup>85</sup>

What is the relevance of the Costa Rican and Panamanian experience as non-militarized states to the Middle East? As with the example of constitutional provisions preemptively de-legitimizing military seizures of power discussed above,<sup>86</sup> it is unlikely that Egypt will abolish its army in any new constitution. Those drafting a constitution for a new State of Palestine, however, may find the non-militarized status of Costa Rica and Panama to be a most useful example.<sup>87</sup> While present Palestinian constitutional proposals contemplate a military establishment,<sup>88</sup> Palestinian drafters might well turn to the Latin American examples and choose to emulate their non-militarized status. The experiences of Costa Rica and Panama offer sound political and economic reasons for a Palestinian state to forswear a military—and to do so as its own independent and sovereign decision.

#### IV. CONCLUSION

The experience of several Latin American countries in developing constitutional provisions for controlling the military and preserving a democratic polity demonstrates a range of innovations. Argentina and Honduras, after experiencing not-infrequent military interruptions, have adopted constitutional provisions attempting to de-legitimate such actions anticipatorily. Costa Rica and Panama have taken a direct, more radical approach by voluntarily becoming non-militarized and utilizing the resources saved thereby for other state purposes. These constitutional approaches utilized in Latin America are not formulas for sure success for constitution makers in the Middle East.<sup>89</sup> Nevertheless, when viewed in light of the particular historical experience and current political circumstances of their own countries, the citizens of Egypt and of a Palestinian state may benefit from reflecting on these Latin American examples.

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85. “The Government alone may possess arms and implements of war. For their manufacture, importation and exportation, previous permission is required from the Executive Authority. Arms which are not considered as arms of war, and their importation, manufacture and use shall be defined and regulated by law.” PANAMA CONST. art. 312.

86. *See supra* text accompanying notes 35–43.

87. The history of constitutional frameworks for Palestine is surveyed in NATHAN J. BROWN, *THE PALESTINIAN REFORM AGENDA* 19–22 (2002).

88. Hassan, *supra* note 4, at 910–11.

89. *See* Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).