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Be Careful What You Wish For: Changing Doctrines, Changing Technologies and the Lower Cost of War

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***Be Careful What You Wish For:
 Changing Doctrines, Changing Technologies
 and the Lower Cost of War***

The collective security structure created by the U.N. Charter is becoming shakier than ever, and two recent trends pose particular challenges to Charter rules on the use of force. The first trend involves a normative shift in understandings of state sovereignty, and the second trend involves improvements in technology -- specifically, the rapid evolution of unmanned aerial vehicles, precision weapons, and surveillance technologies. Each trend on its own raises difficult issues. Together, they further call into question international law's ability to meaningfully constrain the use of force by states.

1. Changes in normative understandings of sovereignty

The last two decades have seen a dramatic shift away from traditional ideas about state sovereignty. Increasingly, both legal scholars and national and international-level advocates and political decision-makers have articulated an understanding of state sovereignty as limited and subject to what amounts to de facto waiver. In this vision of sovereignty, a state is required to execute certain responsibilities. If it fails to do so, external actors have a right and/or an obligation to step in themselves to ensure proper execution of these responsibilities.

Versions of these arguments have emerged recently in two very different discourse communities. One is the human rights community, in which this vision of sovereignty is often couched in terms of atrocity prevention and the Responsibility to Protect. Parallel versions of this argument have also emerged from within the national security community.

Here, the argument is generally couched in terms of state duties to prevent the export of terrorism.

The Responsibility to Protect

Start with the Responsibility to Protect. By the beginning of the twenty-first century, the 1990s' debates over humanitarian intervention had morphed into discussion of the "Responsibility to Protect" (R2P, a doctrine initially developed by the International Commission on Intervention and State Sovereignty (ICISS). In a 2001 report, ICISS offered a starkly different understanding of sovereignty than that taken for granted prior to World War II:

State sovereignty implies responsibility...Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, *the principle of non-intervention yields to the international responsibility to protect*.¹

ICISS was careful to note that the use of military force to protect populations should be a last resort, and that any R2P-based military interventions *should* be authorized by the Security Council. But ICISS was unwilling to view Security Council authorization as an absolute requirement:

“If the Security Council rejects a proposal [to intervene to protect a population] or fails to deal with it in a reasonable time, alternative options...[include] action within area of jurisdiction by regional or sub-regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization.”

After all, warned ICISS, if the Council “fails to discharge its responsibility to protect in conscience-shocking situations crying out for

¹“The Responsibility to Protect,” December 2001 Report of the International Commission on Intervention and State Sovereignty, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, emphasis added.

action... concerned states may not rule out other means to meet the gravity and urgency of that situation...”²

Within a decade, the R2P concept had gained substantial traction throughout the international community. It was referenced in the 2005 UN World Summit Outcome Document, and in 2011, the Security Council referenced R2P in Resolution 1973, which authorized the use of force to protect civilians in Libya, as well as Resolution 1975, authorizing the use of force in Cote D’Ivoire.³

While most post-ICISS elaborations of R2P have -- for obvious reasons -- tended to downplay the possibility of military interventions undertaken without Security Council authorization, the normative logic of R2P suggests that Security Council authorization should not be dispositive. As Anne Orford put it in her remarks, the R2P framework implies that the lawfulness of state authority is *dependent* on the capacity and will to protect populations from at least certain kinds of egregious harms. If sovereignty involves a responsibility to protect, and a state’s failure to protect its own population triggers a responsibility to protect in other states, this responsibility must logically exist whether or not a politicized and highly veto-prone body chooses to acknowledge it or authorize particular actions.

Counterterrorism and the “Unwilling or Unable” Test

We see strikingly similar logic at play in the counter-terrorism discourse, at least in the United States. Only two months before ICISS issued its initial report on the Responsibility to Protect, the terrorist attacks of September 2011 shook up traditional notions of sovereignty, self-defense, and armed conflict.

Prior to 9/11, most states accepted (publicly, at least) the general international law principle that force could not be used inside the territory of a sovereign state unless the state at issue consented, the Security Council had authorized the use of force under Chapter VII of the UN Charter, or the use of force was in self-defense following an “armed attack” as delineated by Article 51 of the UN Charter. Standard interpretations of the right to self-

² Id., at XIII, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

³ S.C. Res 1973 (2011).

defense included the right to use force to prevent an “imminent” attack, but for the most part, states construed the idea of imminence relatively narrowly.⁴

But the 9/11 attacks made glaringly apparent the degree to which globalization and its drivers (changes in transportation, communication and weapons technologies, for instance) had democratized the means of mass destruction, reduced the salience of international borders, and accelerated the speed with which money and materiel could travel. Inevitably, these changes undermined the logic of sovereign non-intervention principles—and within the national security community, post-9/11 counterterrorism concerns sparked the rapid emergence of normative and legal arguments for expanding the basis for using force within the territory of other states.

There were generally two strands to these arguments. First, the traditional self-defense-based justification for using force was expanded, most strikingly in the Bush Administration’s embrace of so-called “preemptive” self-defense, which was used to justify the war in Iraq. The logic underlying the Bush argument was straightforward (though the facts, inconveniently, were not): in the age of ballistic missiles and nuclear, chemical, and biological threats, states may only have a moment’s notice (if any) before an imminent and devastating attack. Surely the framers of the UN Charter would not have required states to wait for such an attack to occur or be imminent, in the traditional sense, to lawfully use force in self-defense.

This extension of the principle of self-defense stretches traditional understandings of sovereignty—but the second strand of counterterrorism-based arguments justifying the use of force raises even more fundamental challenges.

Consider drone strikes and other cross-border uses of force outside of “hot” battlefields. Since 2011, the United States has repeatedly used force inside the borders of sovereign states with which it is not at war, at times without the consent of the affected state. In October 2008, for instance, US

⁴ See, e.g., John Bassett Moore, *The Caroline* (exchange of diplomatic notes between Great Britain and the United States, 1842), *Digest of International Law* (Washington, D.C.: Government Printing Office, 1906) 2: 409, 412.

troops in Iraq crossed the Syrian border and attacked targets inside Syria.⁵ The United States has also attacked targets inside Pakistan, Yemen and Somalia. In some cases, the affected states have consented to the United States' use of force. In other cases, their consent is, at best, questionable.⁶

While the United States has been reluctant to offer much detail or legal justification for these actions, the logic relied upon appears structurally identical to that embraced by proponents of the Responsibility to Protect: sovereignty implies responsibilities as well as rights; states must refrain from internal acts that threaten the citizens or basic security of other states, and must prevent non-state entities from engaging in such acts inside their borders. If a state fails to fulfill this responsibility—by, for instance, harboring terrorists—other states are entitled to use force within its borders if doing so is necessary to protect themselves or uphold global security.⁷ As President Obama's chief counterterrorism advisor John Brennan stated in a 2011 speech, “[The United States] reserve[s] the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”⁸

The Convergence of Sovereignty-Limiting Theories

The human rights and national security discourses appear to be converging on structurally parallel sovereignty-limiting theories, and each serves to legitimize and reinforce the other, though neither the human rights community nor the national security community is inclined to fully acknowledge this.

One might even say that the R2P coin ought logically to be seen as having two sides: On one side lies a state's duty to take action inside its own territory to protect its *own population* from violence and atrocities. On the

⁵ See, e.g., Council on Foreign Relations, “Cross-Border Attack on Syria Raises Iranian Eyebrows,” available at <http://www.cfr.org/iran/cross-border-attack-syria-raises-iranian-eyebrows/p17648>

⁶ One difficulty is raised by the fact that the affected state may agree in private to allow US strikes but object in public. This, and the secrecy surrounding most of these strikes, makes it difficult to fully evaluate the degree to which consent has been obtained.

⁷ See, e.g., UN Security Council in Resolution 1373, which notes that state must prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism. SC Res 1373 (2001).

⁸ John O. Brennan, “Strengthening Our Security by Adhering to our Values and Laws” (Remarks by John Brennan, Harvard Law School, Cambridge, MA, 16 September 2011), <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>

other side lies a state's duty to take action inside its own territory to protect *other states' populations* from violence. Either way, a state that fails in these protective duties faces the prospect that other states will intervene in its "internal" affairs without its consent, and quite possibly without the Security Council's consent.

To be clear, my purpose here is descriptive rather than prescriptive. I do not assert that any of this is either wise or particularly close to being settled law. R2P's scope, meaning and legal status remain controversial, and the US legal defense of recent drone strikes and other cross-border uses of force is even more so. Nonetheless, each of these normative frameworks is articulated with increasing frequency, each is couched in legal terms, and each offers the raw materials from which states and other actors can construct legally plausible arguments.

In and of themselves, these arguments raise obvious and glaring issues for those concerned with the international rule of law. Whether a potential use of force is justified on counterterrorism grounds or on humanitarian and human rights grounds, the slippery slope is apparent. Who gets to judge when a state should be deemed to have "waived" its sovereignty and abrogated its responsibilities? Who gets to decide when a use of force inside the border of a non-consenting state is lawful? How much force is acceptable? And which actors get to use force? A single state acting unilaterally? Regional organizations? Coalitions of the willing?

If each state begins to claim the right to judge for itself when force can be used inside the borders of another state, the world will become an even more frightening and unstable place, given the continued weakness of most existing international institutions.

2. Changing Technologies

The rapid evolution of these sovereignty-limiting doctrines has been paralleled by a similarly rapid evolution in technologies that collectively make cross-border uses of force less costly. Surveillance technologies have improved dramatically in the last two decades, enabling powerful states to more effectively and accurately determine the location, numbers and motivations of actors they deem to pose security threats. Weapons

technologies and delivery systems have also improved, enabling greater precision in targetting and less collateral damage. And the development of increasingly sophisticated unmanned aerial vehicles (UAVs) not only assists with intelligence-gathering and precision-targetting, but eliminates any immediate risk to the military or intelligence personnel who control them.

Taken together, these technological changes reduce the risks and costs of using force inside the borders of other sovereign states. Unmanned aerial vehicles in particular have become a game-changer for the United States: they're substantially cheaper to make and maintain than manned aircraft; they can spend much more "time on target," which increases the likelihood that a given strike will hit its only its intended target (rather than nearby civilians, for instance), and their use poses no risk to their operators, who remain safely far from the strike zone.

Compared to the methods available even fifteen years ago, today's surveillance and weapons technologies permit states to use force at lower cost in both monetary and human terms. When targets are limited and well-defined, states no longer need to risk the lives of ground troops or human pilots to strike targets, and can feel more confident that there will be no significant civilian deaths (thus reducing the odds of international condemnation). Strikes become more "surgical." And this seems likely to produce changes in state behavior: if states perceive the costs of using force to be lower, their willingness to use force will be higher.

3. When legal and technological trends intersect

The collective security structures created by the UN Charter have always been shaky. Since its inception, the Charter's rules on the use of force have been stretched and strained. Nonetheless, states have hesitated to pose direct challenges to the Charter framework, and it has so far maintained a fragile integrity.

This may be in the process of changing. When sovereignty-limiting theories such as R2P and the "unwilling or unable" counterterrorism framework are available to states, the perceived reputational costs of using force inside the borders of other sovereign states will go down. Combine these normative and doctrinal developments with technological changes that

reduce the financial and human cost of using of force inside other states borders, and the threshold for using force will get lower still.

Proponents of R2P and counter-terrorism based sovereignty-limiting theories need to acknowledge that both directly challenge the UN Charter's collective security framework. This may not be a bad thing: the world we live in has changed substantially since 1945, both in terms of widely shared normative assumptions and in terms of technology and risk.

But if the Charter system is being tacitly jettisoned, the least we can do is acknowledge it, and begin the difficult project of developing new rules and institutions to preserve peace in this new era. If we don't, we risk a return to the Hobbesian international order the Charter was designed to eliminate.