
ARTICLES

LESSONS FOR INTERNATIONAL LAW FROM THE ARAB SPRING

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Not all that begins in hope ends in happiness. In Egypt, the exuberance of Tahrir Square has given way to frustration over the resilience of the security state;¹ in Libya, the anti-Qaddafi movement has fractured along tribal and factional lines;² in Syria, as of this

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1. See, e.g., Sarah Topol, *The Opposition in Egypt Splinters and Sputters*, N.Y. TIMES LATITUDE BLOG (June 8, 2012, 9:02 AM), <http://latitude.blogs.nytimes.com/2012/06/08/the-opposition-in-egypt-splinters-and-sputters> (describing the Egyptian opposition as fragmented in their efforts to unite around a presidential candidate and stating that the opposition’s failure to do so has inhibited their ability to rebuild the Egyptian government).

2. See, e.g., David D. Kirkpatrick, *Libya Postpones National Election Until July, as Preparations Lag*, N.Y. TIMES, June 11, 2012, http://www.nytimes.com/2012/06/11/world/africa/libya-to-delay-national-election.html?_r=1&partner=rss&emc=rss (noting that hostility toward the interim authorities has caused elections to be postponed, that there are disagreements over the distribution of delegates, and

writing, calls for reform continue to be met with gunfire from government forces.³ Throughout the Middle East—from Egypt, Libya, and Syria to Yemen, Tunisia, Bahrain, and elsewhere—the heady excitement of 2010 has given way to a more sober awareness that enduring political change may take years, if not generations.⁴ The Arab Spring brought both progress and turmoil, and its long-term impact remains uncertain.

For international law, the import of the Arab Spring is similarly ambiguous. On the one hand, as Juan Mendez and others have argued,⁵ the Arab Spring can be viewed as the world's first true human rights revolution: the young protesters of the Arab street spoke the language of democracy and human rights, and the international community responded in the same lexicon, with references to human rights law and international criminal law, and referrals to the institutions that help sustain them (such as the UN Human Rights Council and the International Criminal Court (“ICC”)).⁶ Many human rights advocates rejoiced when the UN

that local militia have detained staff members of the International Criminal Court, stifling efforts to bring Qaddafi to court).

3. See, e.g., Neil MacFarquhar, *Syrian Forces Shell Cities as Opposition Picks Leader*, N.Y. TIMES, June 10, 2012, <http://www.nytimes.com/2012/06/11/world/middleeast/syrian-forces-shell-cities-as-opposition-picks-leader.html>.

4. See, e.g., Michael Slackman, *Bullets Stall Youthful Push for Arab Spring*, N.Y. TIMES, Mar. 17, 2011, <http://www.nytimes.com/2011/03/18/world/middleeast/18youth.html?pagewanted=all> (recounting how young people have used social media to organize revolutions in the Arab Spring, and noting that the youth who once led the peaceful protests now must often focus on defending themselves and the movement from aggressors); see also Interview by Marc Hall with Pilar Morales, Head of Strategic Planning & Res. Mobilization, Council of Europe (Sept. 7, 2012), available at <http://www.euractiv.com/global-europe/council-europe-advisor-political-interview-514700> (explaining that the Council of Europe understands that the Arab Spring, and specifically in the southern Mediterranean, will take years to be fully realized).

5. Juan Mendez, Professor, Am. Univ., Remarks at the American University International Law Review Symposium: The Impact of the Arab Spring Throughout the Middle East & Northern Africa (Feb. 14, 2012); see also Diane Orentlicher, Professor, Am. Univ., Remarks at the American University International Law Review Symposium: The Impact of the Arab Spring Throughout the Middle East & Northern Africa (Feb. 14, 2012).

6. See Press Release, General Assembly, General Assembly Suspends Libya from Human Rights Council; Hopes of Libyan People ‘Must Not be Dashed’ Assembly President Says, As Secretary-General Voices ‘Grave Concern’ at Ongoing Violence Against Civilians, para. 3, U.N. Press Release GA/11050 (Mar. 1, 2011) (“The world has spoken with one voice: we demand an immediate end to

Security Council referred the situation in Libya to the ICC and when the Libya intervention was justified in terms of the international “responsibility to protect” (“R2P”).⁷ To the optimist, these developments reflect the renewed vitality of international legal institutions and will further speed the development of human rights–related international legal norms.

On the other hand, the Arab Spring demonstrated equally the limits and dangers of these same institutions and norms. At the outset, it’s probably worth noting the early irrelevance of international law and institutions to the Arab Spring. For most of the last few decades, international law and institutions did little or nothing to improve conditions in the Arab World. Indeed, the repressive regimes of the Middle East were always asterisks to the global trend toward democratization; even as autocratic regimes in Latin America, Russia, and Eastern Europe tumbled, oil-rich Arab political leaders clung to power, with little protest from the United States or other powerful nations. As long as the oil flowed, few wealthy states were inclined to push too hard for reform. It’s unsurprising, then, that change ultimately came from within, not from without. The starring roles in the Arab Spring have been played not by international actors but by the citizens of the Arab World themselves—by street vendors, students, tech entrepreneurs, and other ordinary people. International institutions—and certainly powerful nations such as the United States—have been followers, not leaders.

When changing facts on the ground meant that the Security Council and its five permanent members could no longer ignore the Arab Spring, their response was equivocal. The Council referred Libya to the International Criminal Court⁸ but provided no additional resources to assist the already-overwhelmed prosecutor with his

the violence against civilians and full respect for their fundamental human rights, including those of peaceful assembly and free speech”); *see also* Andrew Porter, *Arab Spring Will Add to Extremism if We Do Not Help, Says David Cameron*, TELEGRAPH (May 27, 2011), <http://www.telegraph.co.uk/news/politics/david-cameron/8539420/Arab-Spring-will-add-to-extremism-if-we-do-not-help-says-David-Cameron.html> (advocating that extremism and mass immigration will prevail if protestors are not supported in their quest for democracy).

7. S.C. Res. 1970, U.N. Doc. S/RES/1970 (2011) (Feb. 26, 2011); S.C. Res. 1973, ¶ 4, U.N. Doc. S/RES/1973 (2011) (Mar. 17, 2011).

8. S.C. Res. 1970 (2011), *supra* note 7, ¶ 4.

investigations, making effective ICC action difficult. Blessed by the Security Council, NATO intervened militarily in Libya to protect the civilian population from predation by Qaddafi's forces,⁹ but the international community showed little interest in providing substantial financial or governance assistance to the Libyan opposition once Qaddafi was overthrown.¹⁰

The Security Council has shown even less interest in using military force to protect civilians in Bahrain or Syria: in Bahrain, U.S. security considerations militate against anything that could threaten the Bahrain-based headquarters of the Navy's Fifth Fleet,¹¹ while in Syria, Russian opposition and U.S. concerns about military overextension have so far squelched serious discussion of using force to protect Syrian civilians.¹² As the R2P in Libya morphed from civilian protection to regime change—and as political considerations appeared to trump humanitarian considerations in Bahrain, Syria, and elsewhere—early claims about the triumphant operationalization of the R2P began to ring hollow.¹³

9. S.C. Res. 1973 (2011), *supra* note 7.

10. See *Gaddafi's Regime Looks Like a Beacon of Light Compared to the Current Gov't*, RT (Oct. 8, 2012), <http://rt.com/news/bani-walid-gaddafi-libya-944/> (criticizing the United Nations for failing to assist the residents of Bani Walid under siege and for its inability to create a legitimate post-Gaddafi government); see also Marie-Louise Gumuchian, *Shattered Gaddafi Town Says Forgotten in New Libya*, REUTERS, Feb. 29, 2012, available at <http://af.reuters.com/article/worldNews/idAF TRE81S0 TN20120229> (discussing the challenges the Libyan city of Sirte has undergone since revolution and reporting that the town has not received any official support to rebuild its city other than humanitarian aid).

11. See Ali Al-Ahmed, *Limited Options for the U.S.*, N.Y. TIMES ROOM FOR DEBATE BLOG (May 30, 2012, 1:36 PM), <http://www.nytimes.com/roomfordebate/2012/05/29/nudging-bahrain-without-pushing-it-away/limited-options-for-the-us-in-bahrain> (stating that the United States has not attempted to bring Bahrain before the UN Security Council, supports Bahrain's monarchy, and has not pressed for sanctions against Bahrain for its human rights violations).

12. See Patrick Wintour & Ewen MacAskill, *Obama Fails to Secure Support from Putin on Solution to Syria Crisis*, GUARDIAN (June 18, 2012), <http://www.guardian.co.uk/world/2012/jun/18/obama-support-putin-syria-g20> (noting that Russia is reluctant to break its alliance with Syria and describing disagreement between U.S. President Obama and Russian President Putin regarding supporting a regime change in Syria).

13. Compare Romesh Ratnesar, *Libya: The Case for U.S. Intervention*, TIME (Mar. 7, 2011), <http://www.time.com/time/nation/article/0,8599,2057470,00.html> (arguing that using the R2P principle can strategically benefit the United States because it shows support for democratic movements in Muslim countries while allowing the United States to limit its involvement), with Michelle Nichols, *U.N.*

Nonetheless, the international legal response to the Arab Spring may prove more portentous in the long run than in the short run. True, R2P may have been operationalized only in an equivocal manner, but the fact that it was invoked at all may reflect a substantial shift in the international consensus on sovereignty, intervention, and the use of force. This is particularly true when one considers that the emergence and operationalization of R2P,¹⁴ with its sovereignty-limiting logic, has been paralleled by similar shifts in security-based assertions about sovereignty and the use of force.

As I will explain, evolving ideas about sovereignty—coming from both the humanitarian discourse and the counterterrorism discourse—suggest a shift away from traditional assumptions about the right of a sovereign state to be free of external interference in its internal affairs, and toward more permissive norms relating to interventions and the use of force. This trend is exacerbated by significant improvements in surveillance and weapons-delivery technologies—specifically, through the use of unmanned aerial vehicles (“UAVs”), more commonly known as “drones.” These technological changes, in combination with changes in international norms relating to sovereignty and the use of force, may serve to reduce the political and economic costs of military interventions for powerful states. By so doing, they profoundly challenge the collective security structure created by the UN Charter and call into question international law’s ability to meaningfully constrain the use of force at all.

Chief Says Security Council Paralysis Harming Syrian People, REUTERS (Sept. 5, 2012) (discussing that, while there have been successes in the context of R2P, “these efforts will not avert the worst if they are not accompanied by action by influential Governments to find a political solution. The Council’s paralysis does the Syrian people harm. It also damages its own credibility and weakens a concept that was adopted with such hope and expectations”).

14. See generally 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–40, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (declaring that each state must protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and that the “international community” may intervene when a state fails to do so); U.N. Secretary-General, *Implementing the Responsibility to Protect*, U.N. Doc. A/63/677 (Jan. 12, 2009) [hereinafter *Implementing the Responsibility to Protect*] (outlining the processes and procedures for R2P intervention as a three-pillar strategy).

I. CHANGES IN NORMATIVE UNDERSTANDINGS OF SOVEREIGNTY

Let me take a step back and say more about recent shifts in normative conceptions of sovereignty—shifts in which the emergence of the R2P construct plays a significant role. The last two decades have seen a dramatic shift away from traditional, Westphalian 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.¹⁵ In this vision of sovereignty, sovereignty is less a right inherent in all states than a privilege that must be earned through good behavior. A state is required to execute certain responsibilities.¹⁶ If it fails to do so, external actors have a right—perhaps an obligation—to step in themselves to ensure proper execution of its responsibilities.

In the human rights community, this vision of sovereignty is often couched in terms of atrocity prevention and R2P. As noted, this vision came to the fore during the Arab Spring in reaction to the actions of Moamar Qaddafi. But during the years immediately preceding the Arab Spring, parallel versions of this argument also emerged from within the national security community. Here, the argument has generally been couched in terms of state duties to prevent the export of terrorism, and while it originated during the Bush Administration, it has been elaborated most explicitly by

15. See generally U.N. Secretary-General, *A More Secure World: Our Shared Responsibility: Rep. of the High-level Panel on Threats, Challenges and Change*, 2004; David Aronofsky, *The International Legal Responsibility to Protect Against Genocide, War Crimes and Crimes Against Humanity: Why National Sovereignty Does Not Preclude Its Exercise*, 13 ILSA J. INT'L & COMP. L. 317 (2007); Catherine Powell, *Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT'L L. 298 (2012).

16. G.A. Res. 60/1, *supra* note 14, ¶ 138 (requiring states to prevent and protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity “through appropriate and necessary means”); *Implementing the Responsibility to Protect*, *supra* note 14, ¶¶ 13–27 (describing states’ responsibility to foster respect among disparate groups, protect human rights, become parties to relevant international agreements, assist the International Criminal Court in apprehending individuals within their states, prevent massive crimes, regularly assess their internal mechanisms, and encourage individual responsibility).

members of the Obama Administration in 2011 and 2012.¹⁷ Even as drone strikes in Libya helped operationalize R2P, drone strikes in Yemen, Pakistan, and elsewhere have begun to operationalize a counterterrorism-driven shift in conceptions of sovereignty.

A. THE RESPONSIBILITY TO PROTECT

Since World War II, international law has struggled to address the tensions between Westphalian sovereignty, human rights, and increased globalization. The UN Charter reflects these tensions; even as it introduces the notion of universal human rights and empowers the Security Council to use force in the name of international peace and security, it emphasizes that, aside from such enforcement actions, the United Nations is not to “intervene in matters which are essentially within the domestic jurisdiction of any state.”¹⁸ For decades, states wishing to fend off inquiries into their human rights practices used the principle of sovereign non-intervention as a shield, asserting that such inquiries represent unwarranted interference in their domestic affairs.¹⁹

By the beginning of the 1990s, this position had become more difficult to maintain, as the rising number of multilateral human rights treaties began to “internationalize” previously domestic matters. (In international trade and economics, multinational treaty regimes similarly internationalized large swathes of economic policy.) In the 1990s, ethnic cleansing, torture, massacres, and genocide in the Balkans and Rwanda further eroded international support for traditional principles of sovereign non-interference. By the late 1990s, debates about the legality and morality of “humanitarian intervention” had taken center stage in international law reviews and in international fora such as the UN.

17. See Steven R. Weisman, *Bush Defends His Goal of Spreading Democracy to the Mideast*, N.Y. TIMES (Jan. 27, 2006), http://www.nytimes.com/2006/01/27/politics/27diplo.html?_r=0&pagewanted=print; see also Hillary Rodham Clinton, Secretary of State, Remarks at the Munich Security Conference Plenary Session (Feb. 5, 2011), available at <http://www.state.gov/secretary/rm/2011/02/156044.htm>.

18. U.N. Charter art. 2, para. 7.

19. Consider China’s attitude toward Western criticism of its human rights practices. See, e.g., Chris Buckley, *China Tells U.S. to Quit as Human Rights Judge*, REUTERS, Apr. 10, 2011, available at <http://www.reuters.com/article/2011/04/10/us-china-usa-rights-idUSTRE7382EH20110410>.

By the beginning of the twenty-first century, the 1990s' debates over humanitarian intervention had shifted into a discussion of the so-called R2P, a doctrine initially developed by the International Commission on Intervention and State Sovereignty ("ICISS"). ICISS—initially an initiative of the Canadian government—was tasked with reflecting on a decade of atrocities and the varying international response to genocide and ethnic cleansing.²⁰ (In Bosnia, a NATO-led military intervention was authorized by the UN Security Council; in Rwanda, the international community stood idly by as close to a million people were slaughtered; in Kosovo, NATO intervened to prevent ethnic cleansing without Security Council authorization, and the intervention was generally viewed as appropriate, even if arguably illegal.)

ICISS sought to come to terms with this ambiguous legacy by offering a quite different vision of sovereignty from that taken for granted prior to World War II. In a 2011 report, ICISS asserted that "State sovereignty implies responsibility . . . [w]here 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."²¹

ICISS took pains to observe that the responsibility to protect might involve the use of many measures short of military force, from humanitarian aid to economic sanctions. The use of force to protect populations should be a last resort, emphasized the ICISS report, and any R2P-based military interventions *should* be authorized by the Security Council.²² But it's important to emphasize that in the aftermath of Rwanda and Kosovo, 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-

20. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 81 (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (explaining that the Commission was formed to build consensus among the international community to address massive human rights violations).

21. *Id.* at XI.

22. *Id.* at XII.

regional organizations under Chapter VIII of the Charter, subject to their seeking subsequent authorization.²³

“Subsequent authorization” is hardly a Charter-based procedure, but here ICISS appears to have been recalling NATO’s intervention during the 1999 Kosovo crisis. After all, noted the ICISS report, if the Security Council “fails to discharge its responsibility to protect in conscience-shocking situations crying out for action . . . concerned states may not rule out other means to meet the gravity and urgency of that situation”²⁴ In Kosovo, concerned states did not rule out such “other means.”

In relatively short order, the R2P concept gained substantial traction throughout the international community. It was referenced in the 2005 UN World Summit Outcome Document and embraced by senior U.S. officials.²⁵ Its first serious trial run came in early 2011, when the Arab Spring hit Libya—and Moamar Qaddafi predictably responded to protests and a nascent insurgency with threats of indiscriminate force. His forces, he promised, would go “door to door,” executing the “cockroaches,” while his son Saif accused the protestors of “trying to imitate what is happening in Tunisia and Egypt.”²⁶ Meanwhile, news outlets reported that Libyan government forces were using fighter jets to strafe crowds of civilian protestors.²⁷

23. *See id.* at XIII.

24. *Id.*

25. *See* G.A. Res. 60/1, *supra* note 14, ¶¶ 138–39 (stating that each individual state and the international community have the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity).

26. *See Libya Protests: Defiant Qaddafi Refuses to Quit*, BBC NEWS (Feb. 22, 2011), <http://www.bbc.co.uk/news/world-middle-east-12544624> (recounting Qaddafi’s first speech in response to protests, in which he referred to Chinese authorities’ crushing of protests in Tiananmen Square as an example of action necessary to preserve national unity); Vivienne Walt, *Libya: Qaddafi’s Son Warns Against Protests in TV Speech*, TIME (Feb. 21, 2011), <http://www.time.com/time/world/article/0,8599,2052842,00.html> (reporting that Saif al-Islam, Qaddafi’s heir apparent, made a speech in which he blamed a plot against Libya for the protests and scolded young people trying to imitate protestors in Tunisia and Egypt).

27. *See, e.g.*, David Kirkpatrick & Mona El-Naggar, *Qaddafi’s Grip Falters as His Forces Take on Protestors*, N.Y. TIMES, Feb. 21, 2011, <http://www.nytimes.com/2011/02/22/world/africa/22libya.html> (“Roving the streets in trucks, [Qaddafi’s forces] shot freely as planes dropped what witnesses described as ‘small bombs’ and helicopters fired on protesters.”).

As President Obama later put it, by attacking his own citizens, Qaddafi “lost the confidence of his people and the legitimacy to lead,” and the “responsibilities to defend the Libyan people” fell upon the international community.²⁸ The Security Council accepted the same logic, authorizing, in Resolution 1973, the use of force to protect civilians in Libya.²⁹

This was not the end of the story, of course. Although the Arab Spring gave rise to the first full-scale R2P-based international intervention in the affairs of a sovereign state, the doctrine (or “emerging international norm,” as U.S. Ambassador to the United Nations Susan Rice carefully phrased it)³⁰ was soon deployed again by the Security Council in Resolution 1975, authorizing the use of force in Cote D’Ivoire.³¹ R2P has also been invoked in the context of Syria to justify sanctions and other non-military actions.³²

Although (so far) there has been no international appetite for military intervention in Syria, it’s clear that that the R2P genie is out of the bottle: the world’s leading powers have declared, individually and through the Security Council, that sovereignty implies a legal duty to protect civilian populations, and that states that fail in this

28. Barack Obama, President, Address to the Nation on Libya (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya> (counting the international coalition to defend the Libyan people as including the United Kingdom, France, Denmark, Norway, Italy, Spain, Greece, Turkey, the United Arab Emirates, and Qatar).

29. See S.C. Res. 1973 (2011), *supra* note 7, ¶ 4 (authorizing Member States “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.”).

30. See Susan E. Rice, *Why Darfur Can’t Be Left to Africa*, WASH. POST (Aug. 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/05/AR2005080501988.html> (suggesting that the R2P doctrine be applied to genocide in Darfur).

31. See S.C. Res. 1975, U.N. Doc. S/RES/1975 (2011) (Mar. 30, 2011) (authorizing the United Nations Operations in Cote D’Ivoire “to use all necessary means to carry out its mandate to protect civilians under imminent threat of violence . . .”).

32. See, e.g., Bennett Ramberg, *Applying the Responsibility to Protect to Syria*, YALE GLOBAL ONLINE (Mar. 5, 2012), <http://www.yaleglobal.yale.edu/content/applying-responsibility-protect-syria> (proposing R2P actions that the international community may take in Syria, including amnesty to Syrian forces who defect, lobbying Russia and China to support R2P, and molding of the divided opposition forces into a united interim government).

duty can no longer assume a sovereign right to be free of outside interference, including the use of force.

To date, all uses of force in the name of R2P have had Security Council authorization. But 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 ICISS was right to conclude that Security Council authorization should not be dispositive.

Indeed, 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 of third-party states must logically exist whether or not a politicized and highly veto-prone body chooses to acknowledge it or authorize particular actions. By extension, if the responsibility to protect is based on universal values and shared humanity, rather than the technicalities of citizenship and borders, third-party states that shirk their own responsibilities to protect might themselves be viewed as losing legitimacy.

To be clear, this is far from a universally accepted understanding of R2P. It is, however, an understanding of R2P that's "out there," available for use and deployment by states and other actors.³³ Will the United States or other states someday seek to justify a use of force on R2P grounds even if the Security Council doesn't authorize force? There's no way to know for sure, but I do not consider it implausible. After all, in 1999—before the advent of R2P—the United States, without Security Council blessing, intervened in

33. See Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 513–14 (2009), available at <http://www.ejil.org/pdfs/20/3/1849.pdf> (arguing that a state's sovereignty must be justified by its protection of basic human rights and that when a state grossly fails to fulfill these duties, its sovereignty is suspended, leaving the international community responsible to meet human needs); Gareth Evans, *The Responsibility to Protect: Rethinking Humanitarian Intervention*, 98 AM. SOC'Y INT'L L ANNUAL PROCEEDINGS 78, 82–83 (2004) (contending that the case for conceiving of sovereignty as responsibility is strengthened by the increasing impact of international human rights norms and the extension of the concept of security from the state to people).

Kosovo. Then, as now in Syria, the threat of a Russian veto torpedoed any hope of UN authorization, but NATO acted anyway. I find it hard to doubt that the United States and its NATO allies would do the same again in the name of R2P, should circumstances in Syria or elsewhere come to seem sufficiently urgent. For now, prudential considerations have militated against the use of force in Syria, but this may yet change.

B. COUNTERTERRORISM AND THE “UNWILLING OR UNABLE” TEST

The Arab Spring took the R2P genie out of its bottle, but as I noted earlier, R2P is not the only sovereignty-limiting “emerging norm” to have surfaced in recent years. Looking at the post-9/11 counter-terrorism discourse in the United States, we can see strikingly similar logic at play. (Indeed, the initial ICISS report on the Responsibility to Protect was thoroughly upstaged by history, coming only two months after the terrorist attacks of September 2011.) Even as the NATO intervention in Kosovo was causing international lawyers to reevaluate old ideas about sovereignty and humanitarian imperatives, the 9/11 attacks caused a similar reevaluation of old ideas about sovereignty and the use of force in defense of self or others.

The UN Charter laid out reasonably clear rules governing the use of force. Under the collective security regime created by the Charter, force was not to be used inside the territory of a sovereign state unless the state at issue consented, the Security Council 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. Traditional interpretations of the right to self-defense enshrined in the Charter included the right of a state to use force to prevent an “imminent” attack, but for the most part states construed the idea of imminence relatively narrowly—parallel, essentially, to the way most domestic jurisdictions understand self-defense and imminent threat.³⁴

The 9/11 attacks changed this. They laid bare the manner in which

34. See, e.g., John Bassett Moore, *Destruction of the “Caroline,”* in 2 DIG. INT'L L. 409, 412 (1906) (describing the exchange of diplomatic notes between Great Britain and the United States about whether the destruction of *The Caroline* by the British was a justified act of self-defense against piracy).

globalization and its drivers (changes in communication, transportation, and weapons technologies, for instance) had accelerated the movement of money and materiel and reduced the salience of international borders and state monopolies on the use of force. In an era in which threats emanating from one state's territory can migrate almost instantly to another state's territory, the logic of sovereign non-intervention principles loses force. Unsurprisingly, post-9/11 counterterrorism concerns triggered the rapid emergence of normative and legal arguments for expanding the basis for using force within the territory of other states.

Within the national security community, there were generally two strands to these arguments. First, in the Bush Administration's embrace of so-called "preemptive" self-defense, the traditional Charter-based justification for using force in self-defense was expanded and used to justify the war in Iraq. The logic underlying the Bush argument was straightforward (though the facts, inconveniently, were less so): 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.³⁵ 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 and restrictive sense before they could lawfully use force in self-defense—even if that meant using force inside another sovereign state's territory!

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 to old notions of sovereignty.

Consider drone strikes and other cross-border uses of force outside of so-called "hot" battlefields (e.g., outside places such as

35. See THE PRESIDENT OF THE UNITED STATES, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 15 (2002), *available at* <http://www.state.gov/documents/organization/63562.pdf> ("We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.").

Afghanistan and Iraq, where U.S. ground troops have been engaged). Since 2011, the United States has repeatedly used force inside the borders of sovereign states with which it is not in an armed conflict, at times without the consent of the affected state. In October 2008, for instance, U.S. troops in Iraq crossed over into Syria and attacked targets within Syria's borders.³⁶ The United States has also attacked targets inside Pakistan, Yemen, Somalia, and perhaps Mali and the Philippines.³⁷ In some cases, the affected states—all, not coincidentally, with substantial Arab or Muslim populations—have consented to the United States' use of force.³⁸ In other cases, their consent is, at best, questionable.³⁹

36. See *CROSS-BORDER ATTACK ON SYRIA RAISES IRANIAN EYEBROWS*, COUNCIL ON FOREIGN RELATIONS (OCT. 30, 2008), [HTTP://WWW.CFR.ORG/IRAN/CROSS-BORDER-ATTACK-SYRIA-RAISES-IRANIAN-EYEBROWS/P17648](http://www.cfr.org/iran/cross-border-attack-syria-raises-iranian-eyebrows/p17648).

37. See *Osama bin Laden Killed in Pakistan*, AL JAZEERA (May 2, 2011), <http://www.aljazeera.com/news/americas/2011/05/2011522132275789.html>; Charlie Savage, *Relatives Sue U.S. Officials over U.S. Citizens Killed by Drone Strikes in Yemen*, N.Y. TIMES, July 18, 2012, <http://www.nytimes.com/2012/07/19/world/middleeast/us-officials-sued-over-citizens-killed-in-yemen.html>; *Deaths in US Drone Strikes in Somalia*, AL JAZEERA (Feb. 25, 2012), <http://www.aljazeera.com/news/africa/2012/02/201222505924775127.html>; see also Afua Hirsch, *Islamist Rebels Vow Assault on Malian Capital if International Forces Attack*, GUARDIAN (Oct. 29, 2012), <http://www.guardian.co.uk/world/2012/oct/29/mali-africa> (reporting that the United States' combating Al Qaeda in the Islamic Maghreb is a source of controversy in Mali and that surveillance drones are currently operating in the country); Alexis Romero, *AFP Denies US Drone Attack in Phl*, PHILIPPINE STAR (July 10, 2012), <http://www.philstar.com/headlines/2012/07/10/826274/afp-denies-us-drone-attack-phl> (relaying that the armed forces of the Philippines deny allowing the United States to attack Indonesian terrorist Umar Patek in their territory and that, under Philippine law, the activity of U.S. soldiers is limited to information sharing and training).

38. See e.g., Greg Miller, *In Interview, Yemeni President Acknowledges Approving U.S. Drone Strikes*, WASH. POST (Sept. 29, 2012), http://www.washingtonpost.com/world/national-security/yemeni-president-acknowledges-approving-us-drone-strikes/2012/09/29/09bec2ae-0a56-11e2-afff-d6c7f20a83bf_story.html?hpid=z1.

39. One difficulty is raised by the fact that the affected state may agree in private to allow U.S. 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. See, e.g., Adam Entous et al., *US Unease over Drone Strikes: Obama Administration Charts Delicate Legal Path Defending Controversial Weapons*, WALL ST. J. (Sept. 26, 2012), <http://online.wsj.com/article/SB10000872396390444100404577641520858011452.html> (reporting that, although Pakistan publicly opposes UAV strikes within its territory, the U.S. government infers Pakistan's tacit consent to strikes when Pakistan's intelligence

The United States has offered only the most minimal legal justification for these actions (even the existence of a CIA drone program remains classified), but the logic relied upon appears structurally identical to that embraced by proponents of the R2P: sovereign rights are accompanied by responsibilities; states must refrain from internal activities that threaten the citizens or basic security of other states, and must prevent non-state actors from engaging in such activities inside their borders. Thus, if a state supports or tolerates terrorists within its borders, it is failing to uphold its sovereign responsibilities, and other states are entitled to use force within its borders if doing so is necessary to protect themselves or uphold global security.⁴⁰

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."⁴¹ Attorney General Eric Holder put forward a similar view in a March 2012 speech: "Our government has both a responsibility and a right to protect this nation and its people."⁴² And while "[i]nternational legal principles, including respect for another nation's sovereignty, constrain our ability to act unilaterally. . . . the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved – or after a determination that the nation [in which terrorists are present] is unable or unwilling to deal effectively with a threat to the United States."⁴³

Although neither Brennan nor Holder acknowledges it, this view

service is informed of and does not respond to U.S. plans).

40. See, e.g., S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001) (Sept. 28, 2001) (noting that states must prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism).

41. John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, *Strengthening Our Security by Adhering to Our Values and Laws* (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>.

42. Eric Holder, Att'y General, *Address at Northwestern University School of Law* (Mar. 5, 2012), available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html>.

43. *Id.*

effectively makes a mockery of traditional claims about sovereign non-intervention. After all, the notion that force can be used inside a sovereign state if the state either consents or is viewed (by a third-party state!) as “unwilling or unable” to “take the necessary actions” is entirely circular. If a state consents, the use of force by a third-party state—the United States—is legally acceptable; if a state does not consent, however, in a situation in which the United States regards force as necessary, then—by definition—that state is “unwilling or unable” in the eyes of the United States, and force is also then legally acceptable. It’s difficult to see much left of the idea of sovereign non-intervention here.

C. THE CONVERGENCE OF SOVEREIGNTY-LIMITING THEORIES

Against a backdrop of turmoil in the Arab World, the human rights and national security discourses appear to be converging on structurally parallel sovereignty-limiting theories. Each has the effect of legitimizing and reinforcing the other, though neither the human rights community nor the national security community is inclined to acknowledge this.

I believe the R2P coin ought logically 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 (this is the R2P beloved by the human rights community). On the other side lies a state’s duty to take action inside its own territory to protect *other states’ populations* from violence (this version of R2P remains submerged, but it’s the version embraced by many in the counterterrorism community, though they would never use the term R2P). On either side of the coin, a state that fails in its 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 close to being settled law. R2P’s scope, meaning, and legal status remain controversial, and the U.S. 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. Whether the trend I have noted here is to be welcomed or condemned is beyond the scope of this article. But the existence of the trend is increasingly incontrovertible.

II. CHANGING TECHNOLOGIES

As noted earlier, the rapid evolution of these sovereignty-limiting doctrines has been paralleled (and perhaps enabled) 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—or the actors engaged in atrocities against civilians. Weapons technologies and delivery systems have also improved, enabling greater precision in targeting and less collateral damage. And the development of increasingly sophisticated UAVs not only assists with intelligence gathering and precision targeting, 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 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.⁴⁴

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 they can feel

44. See generally Bradley J. Strawser, *Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles*, 9 J. MIL. ETHICS 342 (2010) (advocating an ethical duty to employ UAVs when military action is justified because UAVs are cost effective, are accurate in discriminating between combatant and noncombatant, and eliminate risks to operators).

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.

III. WHEN LEGAL AND TECHNOLOGICAL TRENDS INTERSECT: IMPLICATIONS

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.

None of this was caused by the Arab Spring, but these changes have played out primarily against its backdrop. The Libya intervention became the proving ground for R2P, and the U.S.-NATO intervention was enabled not only by the existence of this permissive doctrine, but also by the relatively new ability to employ UAVs for precision airstrikes. Had the United States and NATO been forced to rely solely on traditional air power—with its need for vulnerable human targets and its trade-offs between ensuring the safety of flight crews and flying low enough for accurate target identification—it is possible the Libya intervention might never have occurred. The availability of UAVs—which were relied upon heavily during the Libya intervention—enabled the Obama Administration to launch a relatively cheap and “risk-free” war, easily bypassing domestic legal strictures such as the War Powers Act (with no troops on the ground and no “fighting,” the Administration could plausibly claim that the War Powers Act did not apply).⁴⁵

45. See Nick Hopkins, *British Pilots Flew Armed US Drones in Libya, MoD Reveals*, GUARDIAN (July 26, 2012), <http://www.guardian.co.uk/world/2012/jul/26/british-pilots-drones-libya> (reporting that, between April and October 2011, NATO and the United States conducted 145 UAV strikes in Libya); see also Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 15, 2011, http://www.nytimes.com/2011/06/16/us/politics/16powers.html?_r=0 (describing U.S. President Obama’s position that the

Similarly, the Arab and Muslim World has also been the proving ground for counterterrorism-based sovereignty-limiting theories. Here too, the presence both of enabling legal discourses and technologies rendering the use of force safe and economical has led to an increase in the use of force. The growing acceptance of sovereignty-limiting doctrines has muted international legal criticism of U.S. drone strikes, while the availability of UAVs has tempted the United States to go after an ever-expanding list of targets, from Yemen and Pakistan to Somalia.

The emergence of sovereignty-limiting doctrines and more permissive theories about the use of force reflects changed facts on the ground. Sometimes states engage in such egregious atrocities against their own populations that morality, if not law, appears to demand a response. Sometimes states will be unwilling or unable to take action against terrorist groups operating inside their borders, even when those groups pose a grave threat to the populations of other states. In an age in which technologies, money, people, and materiel can cross borders rapidly and easily, it seems unreasonable to expect those states that are threatened to stand idly by—particularly when new weapons technologies appear to enable swift, controlled, and effective responses.

The clock can't be turned back—yet these linked normative and technological developments 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.

Whether the international legal community will get serious about the difficult project of developing alternate forms of restraint and accountability remains to be seen. But in decades to come, when we look back upon the recent turbulence in the Arab World, we may recall it less for the political changes it brought about within Arab states than for the changes in normative conceptions of sovereignty and the use of force that accompanied it.