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Strange Bedfellows

The Convergence of Sovereignty-Limiting Doctrines in Counterterrorist and Human Rights Discourse

Rosa Brooks

It is hard to imagine two groups with less in common than national security hawks and human rights activists. They represent different cultures with different views on the use of force, the role of rights, and the constraining power of international law. Yet despite their differences, the two groups seem to be converging on an understanding of state sovereignty as limited and subject to de facto waiver—an understanding that appears to legitimize military interventions even in the absence of state consent and Security Council authorization.

This convergence is reached via different routes in each community: for the national security community, counterterrorism provides the sovereignty-limiting logic, while for the human rights and humanitarian law communities, it is the prevention of atrocities that leads to sovereignty-limiting doctrines.

The convergence is surprising. The human rights and humanitarian law communities and the national security community have historically differed in their views of the centrality of national interests versus the centrality of inter-

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national institutions, laws, and norms. They have also held different views on the legitimacy and desirability of the use of armed force to solve problems. The national security community tends to view international law as a political constraint, but not a significant legal constraint, and sees the use (or at least the credible threat) of force as an essential means of protecting national interests and promoting global security. The human rights and humanitarian law communities come from a different tradition, tending to regard the narrow protection of national interests as inimical to the establishment of a strong and normatively legitimate international system, one that protects rights through law, rather than force. In this tradition, the use of force is viewed as an occasionally unavoidable necessity that should be tightly controlled by international law.

Despite these differences, as the human rights and humanitarian law communities grapple with the problem of atrocity prevention, and the national security community grapples with the challenges posed by transnational terrorism, the two have arrived at strikingly similar legal theories about sovereignty, intervention, and the use of force. Specifically, both the human rights and humanitarian law and the counter-terrorism/national security law discourses have come to rely increasingly on the view that sovereignty is less a right but a privilege—a privilege that is effectively waived by states that fail to fulfill their sovereign responsibilities, and when waived, entitles other states to lawfully use military force on the territory of the “waiving” state.

This convergence of sovereignty-

limiting doctrines is partial and uneasy, but to the extent that it further opens the door to the use of force on the territories of non-consenting states, it poses significant challenges—both to the stability of the always-shaky international order, and to the convictions and traditions of the human rights and humanitarian communities.

In this essay, I want to trace how this convergence has come about in two very different discourse communities, and point out some of the unintended consequences and unresolved problems that result.

Sovereignty-Limiting Doctrines in the Human Rights and Humanitarian Law Communities.

Start with human rights and humanitarian law discourse. It has become a truism to proclaim that Westphalian sovereignty is on its deathbed, weakened first by the UN Charter and the emergence of human rights law, and now virtually eviscerated by globalization. For the human rights community, the big story is about the decline of the state as the primary subject of international law. Over a period of less than a hundred years, international law has ceased to be solely a matter of the rights and duties of states vis-à-vis other states—individuals also have entered the international law picture. The UN Charter spoke of fundamental human rights, and these were soon elaborated in numerous UN resolutions and international human rights treaties. Increasingly, states have begun to accept that human rights law limits their internal sovereignty: after the Holocaust, few were willing to advance the position that states could do what-

ever they wished inside their own borders. What is more, international law began to give states obligations to act to prevent human rights abuses inside the territory of other states: under the Genocide Convention, for instance, states “undertake to prevent and to punish” genocide.¹

By the mid-1990s, a range of increasingly robust sovereignty-limiting institutions and efforts were emerging as a result of the human rights revolution. Some were judicial, such as the international criminal tribunals for Yugoslavia and Rwanda and the International Criminal Court. Others were political: the wars in the former Yugoslavia and the Rwandan genocide led to a growing international willingness to view humanitarian intervention as legitimate, at least under limited circumstances. In the former Yugoslavia, NATO’s intervention—though half-hearted and belated—occurred with UN Security Council blessing.²

Even in the post-Cold War world and when faced with the most egregious of circumstances, however, the Security Council could not necessarily be relied upon to authorize humanitarian interventions. During the Rwandan genocide, the looming threat of vetoes helped preclude meaningful Security Council action, and the same was true during the Kosovo crisis. In Kosovo, though, when ethnic cleansing seemed imminent, the NATO states opted for military intervention even in the absence of Security Council authorization. NATO’s justification was fundamentally extralegal in nature: it rested, in effect, on a claim of moral necessity.³

The intervention likely saved thousands of lives, and was given a form

of post hoc validation in subsequent Security Council resolutions.⁴ Still, the legal and moral dilemma was acute. In a 1999 speech, then-UN Secretary-General Kofi Annan spelled it out:

State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalization and international cooperation. States are now widely understood to be instruments at the service of their peoples, and not vice versa...When we read the [UN] Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them. The genocide in Rwanda showed us how terrible the consequences of inaction can be... But this year’s conflict in Kosovo raised equally important questions...⁵

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). 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.⁶

ICISS was careful to note that military force should be a last resort, and that any 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, if the Council “fails to discharge its responsibility to protect in conscience-shocking situations crying out for action,” warned ICISS, “concerned states may not rule out other means to meet the gravity and urgency of that situation...”⁷

Within a decade, both the United States and the UN had offered R2P at least a lukewarm embrace. In 2011, the Security Council referenced R2P in Resolution 1973, which authorized the use of force to protect civilians in Libya, and in Resolution 1975, authorizing the use of force in Cote d’Ivoire.⁸ For the human rights and humanitarian law communities, the trend towards sovereignty-limiting doctrines premised on human rights had reached its apotheosis. Though R2P’s implied willingness to dispense with Security Council authorization has not been put to the test, it is difficult to doubt that if another Kosovo-like situation arose, concerned states might well take matters into their own hands.⁹

Back to the National Security Community.

Turning back now to the national security community, we see a parallel trend. Only two months before ICISS issued its initial report on R2P, 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 in Article 51 of the UN Charter. Standard interpretations of the right to self-defense included the right to use force to prevent an “imminent” attack, but the idea of imminence was construed narrowly.¹⁰

UN Charter provisions on the use of force rest firmly on traditional understandings of sovereignty: as long as a state refrained in its external actions from threatening other states, the use of force inside the territory of a non-consenting sovereign state would be unlawful.¹¹ If a state chose to develop or harbor terrorists, this was its own business; unless terrorists carried out attacks beyond its borders, no other state had a legal basis to use force inside the “harboring” state.

Though this principle was sometimes more honored in the breach, it remained relatively unquestioned by states until the 9/11 attacks. But 9/11 made glaringly apparent a trend that had been underway for decades: glo-

balization—and accompanying changes in transportation, communication and weapons technologies—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. Within the national security community, counterterrorism concerns sparked the rapid emergence of both 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

second strand of counterterrorism-based arguments justifying the use of force does, however, reflect a deep shift in understandings.

The argument comes into sharpest focus when we 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 we are not at war, at times without the consent of the affected state. In October 2008, for instance, U.S. troops in Iraq crossed the Syrian and attacked targets inside Syria.¹³ The United States has also attacked targets inside Pakistan, Yemen, and Somalia. In some cases,

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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.¹² The logic underlying the Bush argument was straight forward. In the age of ballistic missiles and nuclear, chemical, and biological threats, states may only have a moment’s notice before an imminent attack. Surely the framers of the UN Charter would not have required states to wait for an “armed 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

the affected states have consented to the United States’ use of force. In other cases, their consent is, at best, questionable.¹⁴

While the United States has been reluctant to offer much detail or legal justification for these actions, the logic used appears structurally identical to that embraced by the human rights and humanitarian law communities: 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 ter-

rorists—other states are entitled to use force within its borders if doing so is necessary to protect themselves or uphold global security.¹⁵ As President Obama’s chief counterterrorism advisor John Brennan stated in a 2011 speech, “We reserve the right to take unilateral action if or when other governments are unwilling or unable to take the necessary actions themselves.”¹⁶

A Strange Convergence. The human rights and national security discourses appear to have converged on structurally parallel sovereignty-limiting theories—though neither community is entirely comfortable with the logical implications taken for granted by the other community.

notion that states have a responsibility to protect the populations of other states from atrocities. The emerging R2P doctrine has largely been greeted in national security law quarters as irrelevant or pernicious, likely to draw the United States into diversionary foreign entanglements at the expense of protecting our core national security interests.

Meanwhile, those in the human rights community are even more suspicious of the hard security discourse, often finding the actions it enables repugnant. To many in the human rights and humanitarian legal communities, drone strikes and other uses of force outside of “hot” battlefields are seen as little more than extra-territory-

The human rights and national security discourses appear to have converged on structurally parallel sovereignty-limiting theories.

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 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 duties faces the prospect that other states will intervene in its “internal” affairs without its consent.¹⁷

There is a substantial irony here: human rights advocates and counterterrorism hawks make strange bedfellows. The “hard security” community, historically realist in its orientation, tends to be uncomfortable with the

rial, extrajudicial executions—a flagrant violation of international human rights and rule of law principles.

Yet the logic of each sovereignty-limiting theory is virtually identical, and each theory serves to legitimize the other, though neither the human rights community nor the national security community tends to want fully to acknowledge this.

Whether the potential use of force is justified on counterterrorism grounds or on humanitarian and human rights grounds, the potential for a slippery slope is apparent. Those who would justify either human rights-based interventions or counterterrorism-based interventions should face precisely the

same set of questions: 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? And which actors get to use force? A single state acting unilaterally? Regional organizations? Coalitions of the willing?

If each state claims the right to judge for itself when force can be used inside the borders of another state, the world may become an even more frightening and unstable place, given the continued weakness of most existing international institutions. Indeed, we risk a return to the Hobbesian international order the UN Charter was designed to eliminate.

This should trouble us—and it may be particularly troubling for those in the human rights community. After all, it is the human rights community that has traditionally been most concerned with the integrity and normative value of international law and institutions. Those in the national security community may be inclined to take a less apocalyptic view on the theory that the Hobbesian world order has been with us all along.

Yet, these sovereignty-limiting theories emerge for compelling reasons, and reflect 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 dangerous terrorist groups operating inside their borders—and in an age in which technologies, money, people and materiel can cross borders rapidly and easily, it seems unreasonable to expect other

states, if threatened, to stand idly by. The clock cannot be turned back.

What is to be done? The dilemmas created by current sovereignty-limiting doctrines are clear. It is less clear, however, what our response should be. Two possible approaches exist.

First, of course, we might view this as a call to get serious about addressing the international rule of law problems created by current sovereignty-limiting doctrines, and begin the long, difficult project of developing alternate forms of restraint and accountability. We might focus, for instance, on trying to create a more responsive and representative Security Council, one less likely to be paralyzed by ideology and less vulnerable to charges of partiality and self-interest.

Alternatively, we might seek to create or adapt international judicial institutions to serve as a check on uses of force: we might develop an international legal or normative framework requiring states that wish to use force for humanitarian or counterterrorism reasons to seek prior (or retroactive) approval from some relatively “objective” international judicial or quasi-judicial body.

None of these projects would be straightforward; each might be seen as facing barriers so high as to be virtually insurmountable. If the various institutional and legal “fixes” we might envision are unrealistic in the near term, is there any responsible way forward?

The overall thrust of this essay has been to call for intellectual honesty about the logical implications of emerging sovereignty-limiting doctrines. But, perhaps, this is one of those areas where

discretion—even disingenuousness—is the better part of valor, or at least the better part of preserving stability.

Stephen Krasner makes a variant of this argument in some of his recent work. Krasner famously dubbed sovereignty “organized hypocrisy,” noting that while the notion of “sovereignty” has long been associated with clear legal criteria and rules, states have, for just as long, routinely ignored those rules when it suited them to do so.¹⁸ To Krasner, this organized hypocrisy is nonetheless functional—or at least more functional than any available alternative.

In a 2010 essay on “The Durability of Organized Hypocrisy,” Krasner argues that this remains true today.¹⁹ He grants that emerging normative or legal doctrines will continue to challenge and delegitimize traditional notions of sovereignty, and significant “shocks”—such as “the possibility of mega-terrorist attacks”—might lead to radical

change: “Governments in advanced countries would begin to reconfigure their bureaucratic structures to... [reflect] new rules and principles about responsibilities for territories or functions beyond national borders.”

But, argues Krasner, “Such fundamental challenges to the existing sovereignty regime are not to be welcomed. Any new set of principles...would be contested. External actors, even if their claims were legitimated...would not find it easy to exercise the authority they had asserted...there are no formulaic solutions.” Krasner concludes, “Sovereignty has worked very imperfectly but it has still worked better than any other structure that decision-makers have been able to envision.”²⁰

In other words: in the end, perhaps, when it comes to teasing out the implications of emerging sovereignty-limiting doctrines, organized hypocrisy is the best we can do.

NOTES

1 Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, Internet, <http://www.un.org/millennium/law/iv-1.htm>.

2 Under SC Res. 813 (1993), for instance, UN member states were authorized to use force to enforce the no-fly zone in the Balkans; SC Res 1031 (1995) authorized NATO to establish the multinational protection force (IFOR) in Bosnia-Herzegovina.

3 The Kosovo air campaign was arguably illegal under international law, since intervening states could offer neither plausible self-defense arguments nor Security Council authorization. See, e.g., Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (New York: Cambridge University Press, 2002) 174–191; see also Bruno Simma, “NATO, the UN and the Use of Force: Legal Aspects,” *European Journal of International Law* 10, no. 10 (1999): 1, 22.

4 See, e.g., SC Res. 1244 (1999), which “welcom[ed]” the agreement NATO and the Federal Republic of Yugoslavia had reached to end the

conflict, “decide[d]” to deploy international civil and security personnel under UN auspices, and “authorize[d] Member States and relevant international organizations to establish the international security presence in Kosovo.”

5 Kofi A. Annan, “Two Concepts of Sovereignty,” *The Economist* 18 September 1999, <http://www.un.org/news/ocsg/stories/kaecon.html>.

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

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

8 S.C. Res 1973 (2011).

9 As of this writing, it remains possible (though unlikely) that events in Syria will pose such a challenge.

10 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.

11 See, e.g., Case Concerning Military and Paramilitary Activities in and against Nicaragua; *Nicaragua v United States*, 1986 ICJ Rep. 14 (1986), 25 ILM 1023.

12 If the post-war evidence had validated pre-war assertions that Saddam Hussein possessed weapons of mass destruction and planned imminently to use them against the United States, few would have questioned the lawfulness of US military action to prevent such an imminent attack. As President Bush famously commented: "Facing clear evidence of peril, we cannot wait for the final proof – the smoking gun – that could come in the form of a mushroom cloud." George W. Bush, "Remarks on Iraq" (Cincinnati Union Terminal, Cincinnati, OH, 7 October 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021007-8.html>.

13 The cross-border raid reportedly killed several people, including an Iraqi suspected of being an al-Qaeda operative. See, e.g., Nicholas Blandford, "What's Behind the US Military Raid on Syria?" *Time Magazine*, 27 October 2008, <http://www.time.com/time/world/article/0,8599,1854169,00.html>; 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>

14 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.

15 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).

16 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>

17 From a strictly legal perspective, the security case is arguably stronger than the humanitarian case, since it is bound up with the right to self-defense, which predates and is reflected in the UN charter.

18 Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999).

19 Stephen D. Krasner, "The Durability of Organized Hypocrisy," in *Sovereignty in Fragments: The Past, Present and Future of a Concept*, ed. Hent Kalmo, Quintin Skinner (New York: Cambridge University Press, 2010).

20 Ibid.