

# Humanitarian Intervention: Evolving Norms, Fragmenting Consensus

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### Recommended Citation

Rosa Brooks, *Humanitarian Intervention: Evolving Norms, Fragmenting Consensus*, 29 Md. J. Int'l L. 161 (2014).  
Available at: <http://digitalcommons.law.umaryland.edu/mjil/vol29/iss1/8>

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## Humanitarian Intervention: Evolving Norms, Fragmenting Consensus

ROSA BROOKS<sup>†</sup>

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### INTRODUCTION

Thank you very much. It's terrific to be here, and thanks to all of you who have worked so hard to make this event come about.

In many ways, all of the speakers here today are telling different versions of the same story—we're all trying to describe the same set of phenomena as we contemplate the ways in which norms about humanitarian intervention have both evolved and been challenged over the last 20 or so years.

Most of you here today have taken international law, and as you know, every introductory international law course talks about the sources of international law. Specifically, you spend some time talking about customary international law, or CIL. Again, as you know, to determine the contours of customary international law, we normally look both to state practice and to "opinio juris": that is, the degree to which states are acting in a certain way out of a sense of legal obligation, rather than out of mere habit or convenience.<sup>1</sup>

Traditionally, the evolution of customary international law was understood as a gradual process: in some idealized model, we might see first a few states, and then a few more, implicitly agreeing to follow a practice, and then we would gradually begin to see additional states doing the same thing.<sup>2</sup> We would also gradually

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1. DAN KUWALI, *THE RESPONSIBILITY TO PROTECT: IMPLEMENTATION OF ARTICLE 4(h) INTERVENTION* 24 (2011).

2. See Josef L. Kunz, *The Nature of Customary International Law*, 47 AM. J. INT'L L. 662, 665–67 (1953) (discussing the development of international law and the competing elements of "usage" (patterned actions) and *opinio juris*).

accumulate evidence that these various states are engaging in this practice because they consider themselves legally bound to do so. Then, over time, we'll see more and more states following suit both in word and deed, until at some point we can say with a great deal of confidence that such and such has evolved into a binding norm of customary international law.

That's the idealized process through which norms of customary international law develop. In real life, of course, it's rarely so neat and tidy. In fact, much of the time, the evolution of customary international law looks less like a gradual, trouble-free emergence of consensus than a continual process of contestation—a continual process of resistance and conflict between states, if you will. By “conflict” I don't necessarily mean armed force, but rather diplomatic conflict of all sorts: dueling demarches, dueling public statements, and so on.

Norms relating to humanitarian intervention offer a typical example. We are in a period in which we are seeing a norm relating to humanitarian intervention struggling to emerge, if you will, but that process of norm emergence is not a smooth one, has not been a smooth one, and is unlikely to be a smooth one in the future. Indeed, when we think about norms related to humanitarian intervention or the Responsibility to Protect, if anything what we have seen has been a process of reaction, counter-reaction, counter-counter-reaction and counter-counter-counter-reaction. We are still going through that cycle.

I'll talk a little bit later about how and where this process might end, but for now, let me say a little bit more about that cycle of reaction and counter-reaction. Let me start by offering an extremely abbreviated history of the last two decades of debate about humanitarian intervention.

Start in the 1990s. The beginning of the 1990s marked the end of the Cold War, and around the world, political leaders, activists, and scholars struggled to predict how the Security Council's role might change with the Cold War deadlock finally broken.<sup>3</sup> With the

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3. For example, some scholars worried that the unrestrained, interpretive power of the Security Council would be used by the Permanent Five members to determine when and how to intervene at their discretion, rather than when it was needed. *See, e.g.,* Richard B. Lillich, *The Role of the UN Security Council in*

omnipresent Cold War threat of a nuclear conflict between the Soviet Union and the United States finally over, the threat of proxy conflicts between states aligned with one or the other superpowers also appeared to come to an end.<sup>4</sup>

But even as the threat of inter-state conflict appeared to recede when the Cold War ended, the world began to experience what looked like a resurgence of messy internal conflicts within states, exemplified by the ethnic conflicts Rwanda and Bosnia.<sup>5</sup> During the 1994 Rwandan genocide, the international community stood by while nearly a million people were slaughtered in a matter of a few short months.<sup>6</sup> In Bosnia the situation was not *quite* as shameful for the international community, which did ultimately act—with Security Council approval—to end the conflict, but most critics felt that the international community did too little, too late.<sup>7</sup> The conflict in the Balkans brought concentration camps back to Europe for the first time since World War II.<sup>8</sup> The conflict also brought massacres back to Europe: during the Srebrenica massacre in 1995, for instance, an estimated 8,000 unarmed civilians were slaughtered over a few short days.<sup>9</sup>

The glaring inadequacy of the international community's response to the crises in Rwanda and Bosnia led to a good deal of hand-wringing, and an understandable and appropriate sense of

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*Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World*, 3 TUL. J. INT'L & COMP. L. 1, 12–13 (1994).

4. Francis M. Deng, *The Global Challenge of Internal Displacement*, 5 WASH. U. J.L. & POL'Y 141, 154 (2001).

5. See generally CAROL MCQUEEN, HUMANITARIAN INTERVENTION AND SAFETY ZONES: IRAQ, BOSNIA AND RWANDA 51–122 (2005) (providing background on the conflicts in Bosnia and Rwanda and evaluating the international response to these events).

6. See *id.* at 96–122 (evaluating the lack of an international response to the conflict in Rwanda); see also JOSHUA J. KASSNER, RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION 1–4 (2013) (providing background information on the Rwandan genocide).

7. See generally Amy Lou King, *Bosnia-Herzegovina—Vance-Owen Agenda for Peaceful Settlement: Did the U.N. do Too Little, Too Late, to Support this Endeavor?* 23 GA. J. INT'L & COMP. L. 347 (1993) (criticizing U.N. action in Bosnia).

8. See generally Alan C. Laifer, *Never Again? The “Concentration Camps” in Bosnia-Herzegovina: A Legal Analysis of Human Rights Abuses*, 2 NEW EUR. L. REV. 159 (1994) (describing both the events of the Bosnia-Herzegovina conflict and the presence of concentration camps in the region).

9. *Timeline: Siege of Srebrenica*, BBC (June 9, 2005), <http://news.bbc.co.uk/2/hi/675945.stm>.

guilt.<sup>10</sup> The general sense was that the international community—led by the UN Security Council—should have done more, or at least should have done *something*, or really *anything* in the case of Rwanda.<sup>11</sup> Political leaders, the media and advocacy groups all asked: Can it possibly be the case that it's acceptable, legally or morally, for the world to stand by idly while mass atrocities are committed? In particular, when mass atrocities are committed against a population by its *own* government?

We come next to the Kosovo crisis in 1998 and 1999. This has already been the subject of much discussion today, so I won't go into detail. As evidence mounted of a renewed ethnic cleansing campaign in Kosovo, it became clear that the Security Council would not authorize the use of military force to end Serbian ethnic cleansing activities.<sup>12</sup> As you know, this was due to veto threats from China and Russia, which were driven in part because of broad concerns about shoring up norms of sovereign non-intervention, and—on Russia's end—by the historical alliances between Russian and the Serbian authorities.<sup>13</sup> This time, however, the rest of the international community was unwilling to let Security Council inaction be the end of the story. Despite the lack of Security Council authorization—and anxious not to see another Rwanda or Bosnia—the NATO states

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10. See Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in MY NEIGHBOR, MY ENEMY 49, 51–57 (Eric Stover & Harvey M. Weinstein eds. 2004) (outlining the problems with the International Criminal Tribunal for Rwanda, as well as the inadequacy of the international community's response).

11. The UN Secretary General commissioned a reporting body to assess the UN response to the Rwandan genocide and compile a list of suggestions for how the UN should respond to genocides in the future. Rep. of the Indep. Inquiry into the Actions of the UN During the 1994 Genocide in Rwanda, 53–54, U.N. Doc. S/1999/1257 (Dec. 15, 1999).

12. Despite recognizing the continuing deterioration of the humanitarian situation in Kosovo, the United Nations maintained a hands-off approach to the conflict; as such, the Security Council continued to reaffirm its position that the conflict should be settled peacefully pursuant to the provisions of UN Security Council Resolutions 1160 and 1199. See S.C. Res. 1203, U.N. Doc. S/RES/1203 (Oct. 24, 1998).

13. Draft Special Rep. of the NATO Civilian Affairs Committee, *Kosovo as a Precedent: Towards a Reform of the Security Council?*, NATO Doc. AS244CC-E ¶ 23, (Sept. 16, 1999); see also *Russia Condemns NATO at UN*, BBC (Mar. 25, 1999), news.bbc.co.uk/2/hi/europe/303127.stm.

decided to take matters into their own hands by launching air strikes against Serbian forces.<sup>14</sup>

It's worth noting, however, that neither NATO nor the United States, which led the NATO operation, attempted to put forward a formal legal justification for military intervention in Kosovo.<sup>15</sup> The United States and other NATO powers offered policy and humanitarian justifications for the use of force, but in the United States, there was a deliberate decision at the State Department Legal Adviser's Office to refrain from proffering a legal justification.<sup>16</sup>

Why this silence on the legal underpinnings of the Kosovo intervention? In part, U.S. and NATO lawyers were unsure if other states would accept any legal justification they might put forward, and in part, they were afraid that other states *would* accept their logic. That is, they didn't want to put forward a legal theory that would be roundly repudiated by numerous other states because that would be embarrassing and would retard the development of any new norm permitting humanitarian intervention—but they were equally uneasy about the longer-term implications of creating a new norm *permitting* humanitarian interventions. No one had fully thought through the long-term repercussions of such a new norm, so at least with regard to the law, the NATO powers decided that discretion might well be the better part of valor.<sup>17</sup> In effect, they opted to leave the Kosovo intervention in the realm of the extralegal and let history be the judge.

History in fact judged the Kosovo intervention fairly kindly.<sup>18</sup> Though the Security Council had not authorized the military

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14. See generally *NATO's Role in Relation to the Conflict in Kosovo*, NATO, <http://www.nato.int/kosovo/history.htm> (last updated July 15, 1999) (providing the history of NATO's involvement in the Kosovo conflict). Operation Allied Force began on March 23, 1999 and lasted until July 10, 1999. *Id.*

15. See RAMESH THAKUR, *THE RESPONSIBILITY TO PROTECT: NORMS, LAWS AND THE USE OF FORCE IN INTERNATIONAL POLITICS* 48 (2011) ("The Clinton administration defended NATO operations, their huge costs, and the even larger costs of the subsequent reconstruction of Kosovo, on the argument that something had to be done to oppose totalitarian leaders and stop ethnic cleansing and oppression.").

16. *Id.*

17. See Adam Roberts, *NATO's 'Humanitarian War' Over Kosovo*, 41 *SURVIVAL* 102, 120 (1999) ("[M]ost states in the international community are nervous about justifying in advance a type of operation which might further increase the power of major powers, and might be used against them.").

18. See THAKUR, *supra* note 15, at 58–59 ("Critics of the Kosovo war must concede the many positive accomplishments. Almost a million of Kosovo's displaced inhabitants returned to their homeland. Milosevic was thrown out of

intervention to start with, it gave what amounted to a retroactive blessing by authorizing NATO troops to reestablish security in Kosovo, in close coordination with the UN mission in Kosovo.<sup>19</sup> Thus, the whole affair worked out pretty well, from a U.S. and NATO perspective. While a question mark hovered over the issue of legality, the issue of legitimacy seemed to have been satisfactorily addressed.

This, of course, can be seen as a normal part of the process through which new norms of customary international law are created. Some States act in a certain way; other States follow suit, praise the action, or at least refrain from criticism; influential States, such as those on the Security Council, appear to accept the legitimacy of the acts, and so on. While the States that formed the NATO coalition in Kosovo did not articulate the norm of humanitarian intervention in legal terms, one could presume that this would eventually come.<sup>20</sup>

But as I noted earlier, it's rarely so simple or linear; rather than a steady building of consensus, the evolution of customary international law is often characterized by contestation and cycles of action, reaction, counter-action and counter-reaction.

Shortly after the Kosovo intervention, Kofi Annan, then the UN Secretary General, gave a now famous speech.<sup>21</sup> In his speech, he articulated the dilemma confronting the international community after Bosnia, Rwanda, and Kosovo.<sup>22</sup> On the one hand, he argued, it seems crystal clear—both morally speaking and from the perspective of global stability perspective—that states with the ability to do something should not merely stand by while mass slaughter takes place.<sup>23</sup> How could such inaction possibly be consistent with the

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Kosovo . . . The credibility of NATO was preserved; the transformation of its role from collective defence of members against attack from the outside, into the more diffused role of peace-enforcement throughout Europe, was validated; and Washington remains firmly anchored to Europe.”).

19. *NATO's Role in Relation to the Conflict in Kosovo*, *supra* note 14.

20. See Roberts, *supra* note 17, at 102–03 (noting one possible legal justification for NATO's involvement in Kosovo and stating that “there are some crimes so extreme that a state responsible for them, despite the principle of sovereignty, may properly be the subject of military intervention”).

21. Press Release, General Assembly, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release GA/9596 (Sept. 20, 1999) [hereinafter Kofi Annan speech].

22. *Id.*

23. *Id.*

norms that led to the creation of the UN Charter in the first place?<sup>24</sup> Remember, the UN Charter emerged out of war, and if it was motivated most centrally by the desire to prevent such horrific inter-state conflict from recurring, it was also motivated by revulsion against the Holocaust, revulsion against genocide, revulsion against means and methods of warfare that killed civilians as much as combatants, and a commitment to human dignity and human rights.<sup>25</sup>

On the other hand, Annan highlighted the dangers of permitting states to intervene militarily in other states without Security Council authorization.<sup>26</sup> If doing nothing in the face of genocide offended one key principle on which the UN Charter was premised, allowing the unilateral use of force offended the other key principle: the conviction that if states could decide for themselves when it's acceptable to use force inside other states (for reasons other than pressing self-defense), we face a renewed risk of inter-state conflict.<sup>27</sup>

The norm of sovereign non-intervention forms a crucial part of the UN Charter's collective security structure, which prohibits the use of force except when authorized by the Security Council.<sup>28</sup> But once you accept that *sometimes* it's acceptable for one state to use armed force inside the borders of another sovereign state for "humanitarian" purposes, how do you prevent states from using humanitarian claims as a pretext for interventions motivated by ideology or the desire for domination, territory, or economic gain? Once you take the Security Council out of the picture, what actor can evaluate claims of

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24. *See id.* ("The inability of the international community in the case of Kosovo to reconcile these two equally compelling interests—universal legitimacy and effectiveness in defence of human rights—can only be viewed as a tragedy.").

25. *Id.*

26. *Id.* (suggesting that the humanitarian response must be applied fairly and consistently regardless of region, that intervention must be treated as a last resort, that the international community must redefine the meaning of a "national interest," and that the Security Council must be capable of responding to the conflict before a decision to intervene via a military engagement can be made).

27. *See id.* ("The choice, as I said during the Kosovo conflict, must not be between Council unity and inaction in the face of genocide—as in the case of Rwanda, on the one hand; and Council division, and regional action, as in the case of Kosovo, on the other. In both cases, the Member States of the United Nations should have been able to find common ground in upholding the principles of the Charter, and acting in defence of our common humanity.").

28. *Id.* ("The Charter requires the Council to be the defender of the common interest, and unless it is seen to be so—in an era of human rights, interdependence, and globalization—there is a danger that others could seek to take its place.").

humanitarian crisis and decide which interventions would be justified, and which would be pretextual?

Since then, the international community has continued to struggle with the challenge posed by humanitarian intervention. In September 1999, for instance, the Security Council passed Resolution 1265 on the protection of civilians in times of armed conflict.<sup>29</sup> This was significant, in the sense that it was the first time that the Security Council explicitly declared that it saw itself not only as the guarantor of peace between states, but as a guarantor of civilian protection even in times of *internal* armed conflicts.<sup>30</sup> In Resolution 1265, the Council “[e]xpress[ed] its willingness to respond to situations of armed conflict where civilians are being targeted or humanitarian assistance to civilians is being deliberately obstructed, including through the consideration of appropriate measures at the Council’s disposal in accordance with the Charter of the United Nations.”<sup>31</sup> That may sound anodyne, but in the language of the United Nations, it was a huge shift: it brought matters once considered “internal” to member states into the Security Council’s declared ambit, and the reference to “appropriate measures” was understood by all to signal a willingness on the part of the Council to authorize the use of armed force, if needed, for humanitarian protection purposes.<sup>32</sup>

Meanwhile, efforts continued to find a way out of the dilemma articulated by Kofi Annan in 1999. Most notably, the International Commission on Intervention and State Sovereignty (ICISS) was established.<sup>33</sup> ICISS consisted of noted scholars, diplomats, and former high-level officials, and in November of 2001, ICISS

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29. S.C. Res. 1265, U.N. Doc. S/RES/1265 (Sept. 17, 1999).

30. *Id.* ¶ 10.

31. *Id.*

32. Carol Weil, *The Protection-Neutrality Dilemma in Humanitarian Emergencies: Why the Need for Military Intervention?*, INT’L MIGRATION REV. 79, 86–87 (2001).

33. INT’L COMM’N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT VII (Dec. 2001) [*hereinafter* ICISS REPORT]; THAKUR, *supra* note 15, at 75 (“Under the impact of contrasting experiences in Rwanda and Kosovo, Secretary-General Kofi Annan challenged member states to come up with a new consensus on the competing visions of national and popular sovereignty. Responding to the challenge, Canadian Foreign Minister Lloyd Axworthy set up the ICISS to wrestle with the whole gamut of difficult and complex issues involved in the debate.”).

published a report called “The Responsibility to Protect.”<sup>34</sup> In this report, ICISS did something smart, novel and in many ways extraordinarily appealing. In effect, the ICISS report sought to get out of the supposed dilemma between the moral pull of humanitarian intervention and the moral pull of sovereignty by simply redefining the terms of the discussion.<sup>35</sup>

In particular, ICISS sought to redefine sovereignty itself: to ICISS, sovereignty is not something that states possess simply by virtue of being states. ICISS took the view that sovereignty is a matter of responsibilities as much as rights, and the most fundamental responsibility of a sovereign State is the protection of its own population.<sup>36</sup> The right to be free of external intervention—long considered a fundamental attribute of Westphalian sovereignty—is, to ISICC, *contingent* upon a state’s ongoing ability to protect its own population.<sup>37</sup> A state that cannot (or will not) protect its population loses, to that same extent, the sovereign privilege on non-intervention.<sup>38</sup>

ICISS went a step further, arguing that if a state doesn’t fulfill its responsibility to protect its own population, the international community has the responsibility to step in and do something if a state fails to fulfill its responsibility.<sup>39</sup> That external intervention can

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34. ICISS REPORT, *supra* note 33.

35. *See id.* at 17 (noting the evolution the “right to intervene” concept and redefining it as “the responsibility to protect”). The ICCIS defined the responsibility to protect in terms of three inherent concepts: 1) evaluation of the issues from the point of view of those in need of support; 2) acknowledgment that the primary responsibility to protect rests with the state concerned, and that other states may intervene only when the state itself is unwilling or unable to fulfill this responsibility or is the perpetrator; and 3) the responsibility to protect includes the responsibility to prevent, to react, and to rebuild. *Id.*

36. *See id.* at 13 (stating that acceptance into the UN re-characterizes the idea of sovereignty into one where the state becomes responsible for its citizens and their welfare, including both the state’s own citizens and those in the international community).

37. *Id.* at 17 (“The Commission believes that responsibility to protect resides first and foremost with the state whose people are directly affected. This fact reflects not only international law and the modern state system, but also the practical realities of who is best placed to make a positive difference.”).

38. *Id.*

39. *See* THAKUR, *supra* note 15, at 79 (“But if [the state] should default, a residual, fallback responsibility also lies with the broader community of states. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure and the government in question is unwilling

take many, many forms, of course, and ICISS was quick to note that most manifestations of the international community's responsibility to protect would and should not be military in nature.<sup>40</sup> They could be economic interventions (sanctions, foreign aid); they could be diplomatic efforts; they could involve various forms of technical assistance, and so on.<sup>41</sup> But as a last resort—and subject to the standard just war principles of right intention, reasonable prospects of success, etc.—the international community could turn to armed intervention if needed to protect civilian populations.<sup>42</sup>

Two things are worth noting here. One, note how neatly ICISS avoided the dilemma articulated by Kofi Annan in 1999: Annan articulated a conflict between norms of sovereignty and norms of humanitarianism;<sup>43</sup> ICISS simply redefined sovereignty to avoid the conflict altogether. To ICISS, sovereignty does not stand *opposed* to humanitarian intervention; on the contrary, the most fundamental responsibilities of sovereignty revolve around humanitarian protection considerations.<sup>44</sup>

Second, it's important to note that ICISS saw the Security Council as an important but not utterly essential arbiter. While the 2001 ICISS report stated clearly that it was the Security Council that should evaluate whether a military intervention was justified by a state's failure to protect its population, the report also warned that in particularly compelling and egregious situations, states might well be justified in bypassing a paralyzed Security Council.<sup>45</sup>

Normatively, this makes sense: if the legitimacy of states themselves rests upon their individual and collective ability to protect the human beings who populate them, then surely the legitimacy of a group of states—the Security Council for instance—also similarly rests on that ability to protect human beings from egregious and

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or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.”).

40. See ICISS REPORT, *supra* note 33, at 29 (“These coercive measures may include political, economic or judicial measures, and in extreme cases – but only extreme cases – they may also include military action.”).

41. *Id.* at 29–31 (outlining the Commission's stance on non-military interventions as part of the international responsibility to protect).

42. *Id.* at 31–32.

43. Kofi Annan Speech, *supra* note 21.

44. ICISS REPORT, *supra* note 33, at 13.

45. *Id.* at 54–55.

massive harm. By implication, if the Security Council is incapable of taking action to protect populations under threat, it is, to that same extent, delegitimized, and states opting to take matters into their own hands may do so.

The arguments made by ICISS were both novel and powerful,<sup>46</sup> but the ICISS report came at an inopportune moment for proponents of humanitarian intervention. The September 11 attacks preceded the release of the ICISS report by just two months, and the heated debates about humanitarian intervention that bedeviled the international community for the previous few years were instantly displaced by a new set of concerns about terrorism.<sup>47</sup> In this sense, the timing of the ICISS report could not have been worse.

That said, the events of 9/11—and the international community’s response—could also be viewed as offering further (albeit indirect) support for ICISS’s “responsibility to protect” theory and for its understanding of sovereignty. 9/11 illustrated the growing difficulty in defining the realm of activities that was purely “internal” to a state, versus the realm of issues that can be regarded as purely “external.” While ICISS articulated the responsibility to protect as triggered by a state’s sustained failure to protect its *own* population, 9/11 demonstrated the harms that could result if a state’s failure to control its “internal” affairs led to the “export” of harm to the populations of other states.<sup>48</sup> Consider Afghanistan, the Taliban, and Al Qaeda. The Afghan state was unable or unwilling to prevent its territory from being used to export massive harm to other populations outside of Afghanistan—in the form of the thousands of Americans and others injured or killed in the 9/11 attacks.<sup>49</sup>

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46. See THAKUR, *supra* note 15, at 85 (“At a seminar in New York on 15 February 2002, organized by the International Peace Academy, most Security Council members seemed supportive of the main thrust of the Report.”).

47. See Thomas G. Weiss, *R2P After 9/11 and the World Summit*, 24 WIS. INT’L L.J. 74, 747–48 (2006) (discussing the “more important preoccupations in the aftermath of 9/11”).

48. See Michael P. Scharf & Paul R. Williams, *Report of the Committee of Experts on Nation Rebuilding in Afghanistan*, 36 NEW ENG. L. REV. 709, 711 (2002) (“And in response to the September 11 attacks, most states have heightened concerns relating to the export of terrorism from Afghanistan.”).

49. See Robert I. Rotberg, *Failed States in a World of Terror*, FOREIGN AFF. 127, 128 (2002) (arguing that many failed states are incapable of effectively governing within their own borders, becoming a breeding ground for instability and a troubling situation for world order).

In certain senses, then, the immediate post 9/11 period was an opportune moment to advance a new theory of sovereignty. The ICISS emphasis on the responsibility of states to prevent harm to their *own* populations dovetailed nicely with the post-9/11 insistence—articulated both by the US and by the Security Council itself—that states had a responsibility to prevent the export of harm to the populations of *other* states (e.g., by harboring terrorists).

Indeed, as I have argued elsewhere,<sup>50</sup> many of the post 9/11 U.S. arguments for the use of force for counterterrorism purposes parallel Responsibility to Protect arguments. Both rest on a similar, though sometimes unarticulated, theory of sovereignty as being a matter more of privileges and responsibilities rather than rights, and as being “waivable” if a state fails to fulfill its responsibilities. In a superficial sense, “responsibility to protect” arguments for humanitarian intervention and arguments justifying the use of military force to fight terrorism might seem a world apart. On a deeper structural level, however, they complement each other, and each legitimizes the other.<sup>51</sup>

But the action/reaction cycle continued, as events in the years after 9/11 began to complicate nascent support for the “responsibility to protect” norm articulated first by ICISS. Most significantly, in 2003, the United States invaded Iraq.<sup>52</sup> As you know, the Security Council had not authorized the invasion (though some made the rather tortured argument that the invasion could be justified via the ongoing effect of several pre-9/11 resolutions).<sup>53</sup> The invasion was

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50. See, e.g., Rosa Brooks, *An Ambiguous Legacy: Lessons for International Law from the Arab Spring*, 28 AM. U. INT’L L. REV. 713 (2013).

51. See ALEX J. BELLAMY, RESPONSIBILITY TO PROTECT: THE GLOBAL EFFORT TO END MASS ATROCITIES 33 (2009) [*hereinafter* BELLAMY, RESPONSIBILITY TO PROTECT] (“The whole concept of the R2P rests on the idea that sovereignty and human rights are two sides of the same coin, and not opposing principles locked in interminable struggle, as is often portrayed.”).

52. Authorization for the Use of Force against Iraq, Pub. L. No. 107–243, 116 Stat. 1498 (2002).

53. See S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (“*Recalling* that its resolution 678 (1990) authorized Member States to use all necessary means to uphold and implement its resolution 660 (1990) of 2 August 1990 and all relevant resolutions subsequent to resolution 660 (1990) and to restore international peace and security in the area.”); S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing Member States to “use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area”); S.C. Res. 660, U.N. Doc.

mainly premised on a legal theory justifying acts of “preemptive self-defense,” the notion being that while Saddam Hussein had not *yet* used the weapons of mass destruction he allegedly possessed, he might at any time use them against the United States, and the United States was therefore justified in taking preemptive action to eliminate the threat.<sup>54</sup> But within a few years, it became clear that rationale for the invasion of Iraq had relied, at best, on a misunderstanding or exaggeration of the nature of the threat posed by Saddam Hussein’s regime.<sup>55</sup> At worst, and in the eyes of many around the world, the invasion was based simply on a deliberate effort to misinform both the American public and the world.<sup>56</sup>

To the international community, the U.S. invasion of Iraq served as a powerful reminder of the dangers of permitting States to use force without Security Council authorization, and undermined structurally similar arguments addressing humanitarian intervention.<sup>57</sup> In the case of the Kosovo intervention, the legitimate ends (stopping the ethnic cleansing that was undeniably underway) were accepted by most states as justifying the essentially extra-legal

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S/RES/660 (Aug. 2, 1990) (determining that the invasion of Kuwait by Iraq is a “breach of international peace and security” and supporting “all efforts” to resolve situation); *see also* CORNELIU BJOLA, *LEGITIMISING THE USE OF FORCE IN INTERNATIONAL POLITICS* 135 (2009) (“Far from clarifying the issue, Resolution 1441 . . . muddied the waters even more. . . . The Security Council officially recognized that Iraq was in material breach of the terms of the 1991 cease-fire, but it refused to authorize the use of force to redress the situation.”).

54. *See* BJOLA, *supra* note 53, at 122 (underscoring the rarity of a major power engaging in military action against another country for preventative reasons); Alex J. Bellamy, *Conflict Prevention and the Responsibility to Protect*, 14 *GLOBAL GOVERNANCE* 135, 146 (2008) [*hereinafter* Bellamy, *Conflict Prevention*] (“To make matters worse, the 2003 invasion of Iraq was portrayed as an exercise of preventive war — particularly by Vice-President Dick Cheney.”).

55. S. REP. NO. 108–301, at 14 (2004) (finding that the Intelligence Community’s October 2002 National Intelligence Estimate, “Iraq’s Continuing Programs for Weapons of Mass Destruction,” mischaracterized the intelligence through overstatement and lack of support).

56. *See* James P. Pfiffner, *Did President Bush Mislead the Country in His Arguments for War with Iraq?* 34 *PRES. STUD. Q.* 25, 25–26 (2004) (concluding that the Bush Administration’s “claims about Iraq’s nuclear capacity were based on dubious evidence that was presented in a misleading manner”).

57. *See* Bellamy, *Conflict Prevention*, *supra* note 54, at 144 (arguing that the international community, particularly those states likely to be on the receiving end of preventative measures, worried that a broader license for intervention could be used to serve the self-interests of powerful nations).

means (the use of force without Security Council authorization).<sup>58</sup> Perhaps the same might have happened in Iraq. It's one of history's many "what ifs": what if the United States had ousted Saddam Hussein, but had not pushed through de-Baathification and had not disbanded the Iraqi army? What if the U.S. invasion had produced a genuinely stable, peaceful, and democratic Iraq? Perhaps, in those circumstances, the international community might have been prepared to overlook the evidence demonstrating that Iraq had never possessed weapons of mass destruction. But that's not what happened: the U.S. military intervention was not only justified based on misinformation, but was generally perceived as having done more harm than good both for the Iraqi people and for regional stability.<sup>59</sup> For several years, the Iraq fiasco powerfully discredited other kinds of arguments about military intervention.<sup>60</sup>

But time passes, and again the pendulum swung back—at least for a time. President George W. Bush was succeeded by President Barack Obama, who, at least during his presidential campaign, was sharply critical of Bush era doctrines of preemptive armed conflict and associated attitudes towards military intervention.<sup>61</sup> Obama promised to withdraw U.S. troops from Iraq and bring the conflict in Afghanistan to a responsible end, and these promises eased the concerns of many in the international community.<sup>62</sup> Even as then-candidate Obama repudiated the Bush doctrine of preemptive self-

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58. See Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301 (2000) (noting that within the NATO states there was discussion and agreement to intervene to stop the brutal expulsion and atrocities, while no single legal justification was satisfactory); *but see* BJOLA, *supra* note 53, at 132 (arguing that the legal basis for the Iraq invasion was slightly stronger than for Kosovo, due to the fact that the Iraqi regime had breached or ignored several UN resolutions adopted after the 1991 Gulf War).

59. See BJOLA *supra* note 53, at 131 (arguing that while one of the major reasons for the invasion of Iraq was to stabilize the area, the invasion actually helped to stimulate a large network of local and foreign insurgents into a "well-developed terrorist network").

60. See BELLAMY, *Responsibility to Protect*, *supra* note 51, at 68 ("[C]onstructive debate about the R2P was hampered by the US-led invasion of Iraq"); Rebecca J. Hamilton, *The Responsibility to Protect: From Document to Doctrine – But What of Implementation?*, 19 HARV. HUM. RTS. J. 289, 293 (2006).

61. Barack Obama, Speech on Iraq (Oct. 12, 2007) (transcript available at <http://edition.cnn.com/2007/POLITICS/12/21/obama.trans.iraq/>).

62. 153 CONG. REC. S709, 722–23 (daily ed. Jan. 18, 2007) (statement of Sen. Barack Obama).

defense, other influential members in his administration—such as Samantha Power and Susan Rice—publicly embraced the Responsibility to Protect, and began to aggressively push it at the United Nations level, urging the Security Council to reference and endorse the concept.<sup>63</sup>

They succeeded, in part as a result of a burst of international good will towards the new Obama administration, and reduced suspicion of the United States internationally.<sup>64</sup> The Security Council made positive reference to the responsibility to protect in several resolutions,<sup>65</sup> and the concept reached its apotheosis in March of 2011, when the Security Council authorizing the use of force to protect civilians both in Libya (where NATO took the lead) and in Cote d'Ivoire (where UN peacekeepers assisted by French troops used force to restore civil order following post-election violence).<sup>66</sup> In both cases, the Council expressly invoked the Responsibility to Protect.<sup>67</sup>

This was the high water point for the R2P norm.<sup>68</sup> After Libya and Cote D'Ivoire, there was a brief period in which numerous commentators declared that R2P had finally “grown up,” achieving,

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63. See Susan E. Rice, *The Genocide in Darfur: America Must do More to Fulfill the Responsibility to Protect*, BROOKINGS INSTITUTE, (2007) [http://www.brookings.edu/~media/Research/Files/Papers/2007/10/24darfur%20rice%20Opp08/PB\\_Darfur\\_Rice.PDF](http://www.brookings.edu/~media/Research/Files/Papers/2007/10/24darfur%20rice%20Opp08/PB_Darfur_Rice.PDF); Samantha Power, *Why the Movement Needs Help: The Void*, NEW REPUBLIC 16–18 (May 15, 2006), available at [http://www.hks.harvard.edu/cchrp/pdf/20060515\\_Power\\_TheVoid.pdf](http://www.hks.harvard.edu/cchrp/pdf/20060515_Power_TheVoid.pdf) (suggesting that the key to protecting Darfur from continued genocide is for the United States to mobilize and deploy a large force of peacekeepers). *But cf.* Samantha Power, *How to Stop Genocide in Iraq: Offering the Carrot of U.S. Withdrawal May be the Best Way to End Ethnic Cleansing in Iraq*, L.A. TIMES (Mar. 5, 2007) <http://www.latimes.com/news/la-oe-power5mar05,0,114719.story#axzz2zjgUYvsx> (suggesting that warnings of atrocity are misused by people wanting to justify their mistaken support for the war in Iraq).

64. See Peter Baker, *Good Will, but Few Foreign Policy Benefits for Obama*, N.Y. TIMES, Sept. 20, 2009, at A18.

65. See, e.g., S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006); S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); S.C. Res. 1975, U.N. Doc. S/RES/1975 (Mar. 30, 2011); S.C. Res. 1996, U.N. Doc. S/RES/1996 (July 8, 2011); S.C. Res. 2014, U.N. Doc. S/RES/2014 (Oct. 21, 2011).

66. S.C. Res. 1973, *supra* note 65; S.C. Res. 1975, *supra* note 65.

67. *Id.*

68. Gareth Evans, Responsible Protection: Building a Safer World, China Institute of International Studies Conference (Oct. 17, 2013) [*hereinafter* Evans, Responsible Protection].

or certainly getting within spitting distance, the status of a norm of customary international law.<sup>69</sup>

That period lasted only about three months, however.<sup>70</sup> Within months, the Libya intervention began to appear at least to critics more like a regime change intervention than a civilian protection intervention.<sup>71</sup> Perhaps this was inevitable: it's not clear how an intervention intended to protect civilians from predation by their own government could avoid morphing into a regime change intervention in the face of continued government attacks on civilians.

Regardless, the NATO shift towards a straightforward attack on Libyan government forces triggered anxiety and anger in many states, including, most notably, Russia, China, and South Africa.<sup>72</sup> In their eyes, the United States had arguably tricked the Security Council into authorizing force for a limited, humanitarian purpose—and had then quickly moved to depose a sitting government.<sup>73</sup> Even if the United States and other NATO powers had not initially intended the intervention to expand, argued critics, the conflict in illustrated that using force for civilian protection purposes could easily end up having unintended consequences.<sup>74</sup>

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69. *Id.*; see also, e.g., Gareth Evans, Responding to Mass Atrocity Crimes: The Responsibility to Protect (R2P) After Libya and Syria, Public Lecture at the Central European School of Public Policy (Oct. 24, 2012) [*hereinafter* Evans, Central European University Lecture] (“It was not until 2011 that the UN Security Council itself took coercive action explicitly invoking R2P. But when it did so, in the cases of Cote d’Ivoire and Libya, this was widely heralded—including by me—as the coming of age of the responsibility to protect.”).

70. Evans, Central European University Lecture, *supra* note 69.

71. *Id.*; see also Solomon A. Dersso, *The African Union*, in AN INSTITUTIONAL APPROACH TO THE RESPONSIBILITY TO PROTECT 220, 242 (Gentian Zyberi & Kevin T. Mason eds., 2013) (suggesting that the way in which Security Council Resolution 1973 was executed further heightened the concerns that civilian protection was just a pretext for a regime change).

72. Evans, Central European University Lecture, *supra* note 69.

73. Louis Charbonneau, *Russia U.N. Veto on Syria Aimed at Crushing West’s Crusade*, REUTERS (Feb. 8, 2012), <http://www.reuters.com/article/2012/02/08/us-un-russia-idUSTRE8170BK20120208>.

74. See Evans, Responsible Protection, *supra* note 68 (suggesting that an unintended consequence in the wake of the Libyan intervention is the extreme difficulty to gain un-vetoed authorization by the UN Security Council for the future use of force for civilian protection, due in large part to the mistrust of United States, United Kingdom, and France by the BRICS nations).

So the pendulum once again swung away from norms favoring humanitarian intervention and the responsibility to protect and towards an insistence on sovereign non-intervention—or, at the very least, a deep wariness of interventionist arguments. This is reflected in the UN debate about Syria, where, despite some 150,000 deaths, the Security Council has been unwilling even to use “responsibility to protect” terminology in connection with the conflict.<sup>75</sup>

In the United States, President Obama seems to have taken this to heart, as evidenced by his conflicted response to events in Syria.<sup>76</sup> President Obama has made it clear he has no appetite for a unilateral humanitarian intervention intended to protect civilians; inside sources suggest that he is as concerned about slippery slopes as any U.S. critic.<sup>77</sup> In August and September of 2013, however, Obama—trapped by his own rhetorical declaration that the use of chemical weapons in Syria would cross a U.S. “red line”—briefly declared his willingness to use military force for the limited purpose of ending the Assad regime’s ability to use chemical weapons against his citizens.<sup>78</sup> In the process, he articulated a legal argument justifying the potential unilateral use of force for the purpose of protecting civilians, even in

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75. *Id.*

76. Compare President Barack Obama, Remarks by the President to the White House Press Corps. (Aug. 20, 2012) [*hereinafter* President Obama, Press Corps Remarks] (“I have, at this point, not ordered military engagement in the situation. . . . In a situation this volatile, I wouldn’t say that I am absolutely confident. What I’m saying is we’re monitoring that situation carefully. We have put together a range of contingency plans.”), with Mark Landler et al., *Obama Set for Limited Strike on Syria as British Vote No*, N.Y. TIMES (Aug. 29, 2013), <http://www.nytimes.com/2013/08/30/us/politics/obama-syria.html> (reporting that President Obama was going ahead with plans for a limited military strike against Syria, despite the rejection of a strike by the British people and mounting questions from U.S. Congress).

77. Frederik Pleitgen & Tom Cohen, ‘War-Weary’ Obama Says Syria Chemical Attack Requires Response, CNN (Aug. 30, 2013), <http://www.cnn.com/2013/08/30/world/europe/syria-civil-war/> (reporting that President Obama has declared himself “war-weary,” and would prefer to build a coalition of strong NATO allies).

78. President Obama, Press Corps Remarks, *supra* note 76 (“We have been very clear to the Assad regime, but also to other players on the ground, that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized.”); President Barack Obama, News Conference by the President (Apr. 30, 2013) (“[W]hat I’ve also said is that the use of chemical weapons would be a game-changer not simply for the United States but for the international community. . . . And what we now have is evidence that chemical weapons have been used inside Syria, but we don’t know how they were used, when they were used, who used them.”).

the absence of Security Council authorization.<sup>79</sup> The United Kingdom's prime minister did the same, asserting explicitly that a humanitarian intervention would be lawful under the circumstances.<sup>80</sup> In the United States, the United Kingdom and France, key surrogates—such as former U.S. State Department Legal Advisor Harold Koh—also advanced arguments justifying a potential U.S. intervention in Syria.<sup>81</sup>

These arguments were far from universally accepted.<sup>82</sup> The response both from domestic U.S. constituencies and even many close U.S. allies was sharply critical.<sup>83</sup> The British parliament declined to authorize British participation in any use of force in Syria,<sup>84</sup> and in the United States, it seems quite likely than Congress

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79. See John Kerry, U.S. Secretary of State, Statement on Syria (Aug. 30, 2013) (emphasizing the Administration's focus on a U.S. intervention in Syria on national and collective security grounds, due to the intelligence information supporting use of banned chemical weapons by Syria; citing signed agreements such as the START Treaty, the New START Treaty, and the Chemical Weapons Convention; citing the "guaranteed Russian obstructionism" in the UN Security Council; and stating that action taken by the U.S. would be "limited and tailored").

80. *Syria Crisis: David Cameron Makes Case for Military Action*, BBC NEWS (Aug. 29, 2013, 4:26 PM), <http://www.bbc.co.uk/news/uk-politics-23883427>.

81. See, e.g., Harold Koh, *Strike on Syria for Chemical Weapons—Not Illegal*, YALEGLOBAL ONLINE (Oct. 3, 2013), <http://yaleglobal.yale.edu/content/strike-syria-chemical-weapons-%25E2%2580%2593-not-illegal>.

82. See Colum Lynch, *U.N. Chief Ban Ki-moon Warns G-20 Leaders Against Possible Military Action in Syria*, WASH. POST (Sept. 6, 2013), [http://www.washingtonpost.com/world/national-security/un-chief-ban-ki-moon-warns-g-20-leaders-against-possible-military-action-in-syria/2013/09/06/040b6fd8-1711-11e3-a2ec-b47e45e6f8ef\\_print.html](http://www.washingtonpost.com/world/national-security/un-chief-ban-ki-moon-warns-g-20-leaders-against-possible-military-action-in-syria/2013/09/06/040b6fd8-1711-11e3-a2ec-b47e45e6f8ef_print.html) ("U.N. Secretary-General Ban Ki-moon and his top Syria mediator sharply but indirectly criticized potential U.S. military strikes against Syria, saying any additional use of force could exacerbate the country's civil war while violating international law.").

83. Krishnadev Calamur, *Where U.S. Allies Stand on a Strike Against Syria*, NPR (Aug. 30, 2013, 12:16 PM) <http://www.npr.org/blogs/parallels/2013/08/30/217189600/where-u-s-allies-stand-on-a-strike-against-syria> (reporting that while the U.K. Prime Minister strongly supported intervention, Parliament vetoed the vote; Germany stated it would support intervention but would not take part; and the Italian foreign minister stated that an intervention without a UN mandate could turn into a "global conflagration").

84. Nicholas Watt & Nick Hopkins, *Cameron Forced to Rule out British Attack on Syria After MPs Reject Motion*, THE GUARDIAN (Aug. 29, 2013, 6:07 PM), <http://www.theguardian.com/world/2013/aug/29/cameron-british-attack-syria-mps>.

would have done the same.<sup>85</sup> Ultimately, they were not put to the test, as the United States opted against military action when Syria's government agreed to surrender its chemical weapons under international supervision.<sup>86</sup>

There's an interesting irony here: the legal case for unilateral humanitarian intervention was articulated most explicitly by several powerful states at the very moment support for a norm permitting such interventions was at its weakest in many other states. On the one hand, the Syria debate saw three permanent members of the Security Council go well beyond previous expressions of support for the responsibility to protect and explicitly embrace the view that humanitarian interventions are lawful even in the absence of Security Council authorization. On the other hand, the Syria debate also shored up opposition to norms permitting humanitarian intervention, as Russia, China, and other states weighed in to express their opposition.

To put it a little differently, norms supporting military intervention for humanitarian purposes—even unilateral intervention—have evolved substantially in the last two decades, both as a result of the 2001 ICISS report and as a result of the subsequent embrace of the responsibility to protect by the United States and other influential states. But even as norms supporting humanitarian intervention have been articulated, elaborated, and placed on a firmer theoretical and legal footing, becoming linked to changing norms about sovereignty more generally, the international consensus supporting such humanitarian interventions is in greater disarray than at any time since the end of the Cold War.<sup>87</sup>

So where are we now, given this cycle of action, reaction, and counter-reaction: Do we have a norm of customary international law permitting humanitarian intervention, or not? And what does the future hold? What does the ongoing debate about interventions tell us about the world in which we live?

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85. See Mark Landler & Jonathan Weisman, *Obama Delays Syria Strike to Focus on a Russia Plan*, N.Y. TIMES, Sept. 11, 2003, at A1 (“The president said he had asked Congressional leaders to postpone a vote authorizing military action—a vote he was almost certain to lose. . .”).

86. *Id.*

87. Gareth Evans, *The Responsibility to Protect in Action*, 74 COURIER 4, 5 (2012) (arguing that the paralysis of the Security Council to act regarding Syria partially results from Russian “realpolitik,” push back from the BRICS regarding the NATO-led coalition in Libya overstepping its UN mandate, and the United States, United Kingdom, and France pushing for R2P solution).

On the first question, I think the honest answer is that customary international law remains in disarray on this subject. It would be going too far—after Kosovo, after the Syria debate—to assert that customary international law clearly *prohibits* any and all humanitarian interventions undertaken without Security Council blessing. But it would also be going too far to assert that such interventions are clearly *permitted* under customary international law. The law is unsettled and likely to remain so for the foreseeable future.

This shouldn't surprise us. In many ways, the debate about humanitarian intervention is both part of and a symbol of a broader struggle to understand what sovereignty can possibly mean in a globalized era. These days, it's impossible to draw clear lines between the internal and the external—the foreign and the domestic.<sup>88</sup> What can sovereignty mean, in an era in which “internal” civil conflict easily spills beyond borders, and in which modern communications technologies—Twitter, YouTube, and so on—make the moral impact of conflict global and immediate? Looked at through the lens of economics or climate or public health, borders are increasingly meaningless, and states have less and less ability to function autonomously. (In some ways, all states today intervene constantly in the internal affairs of all other states, whether they know it or not—and even whether they like it or not).<sup>89</sup>

From a security perspective, too, traditional conceptions of sovereignty have been undermined: as the 9/11 attacks made clear, what happens in Afghanistan (or Mali or Yemen) cannot be expected to stay in Afghanistan (or Mali or Yemen).<sup>90</sup> Lethal harm can be exported across borders more rapidly—and by an ever-widening range of non-state actors—than ever before.

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88. See James Crawford, *Sovereignty as Legal Value*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 117, 121 (James Crawford and Martti Koskenniemi eds., 2012).

89. See Tom Hadden & Colin J. Harvey, Int'l Comm. of the Red Cross, *The Law of Internal Crisis and Conflict*, INT'L REV. OF THE RED CROSS (Mar. 31, 1999), <http://www.icrc.org/eng/resources/documents/article/other/57jpt4.htm> (“There is an increasing expectation of intervention by external States and voluntary agencies to protect and relieve the suffering of those affected by internal crises and conflict.”).

90. See Rotberg, *supra* note 49, at 128 (“Failed states have come to be feared as ‘breeding grounds of instability, mass migration, and murder’ (in the words of political scientist Stephen Walt), as well as reservoirs and exporters of terror.”).

Indeed, it's no coincidence that arguments about the use of force for counterterrorism purposes are structurally similar to arguments about the responsibility to protect. If a state's inability or unwillingness to protect its own population makes it subject to external intervention for the purpose of population protection, why shouldn't a state's inability or unwillingness to protect *other* states' populations from the consequences of activities inside its borders render it similarly subject to external intervention? (Note that this is not the same as traditional arguments justifying the use of force in national self-defense, though it overlaps with such arguments. The theory of sovereignty that undergirds the responsibility to protect offers an alternative logic justifying intervention. A logic that, taken to its extreme, would allow states considering military intervention to bypass traditional requirements of imminence and use force even when the threats are directed at third-party states).

I find myself actually profoundly ambivalent about all this. The arguments that have emerged in favor of the responsibility to protect—and indeed, for counterterrorism-based interventions—have a tremendous amount of moral legitimacy to them in this globalized world. At the same time, however inadequate we may find traditional conceptions of sovereignty, sovereignty is one of the sole bulwarks against a renewed era of interstate conflict. Because Kofi Annan's 1999 warnings still ring true: once you open up the door to unilateral military intervention—once you have a norm permitting a single state to decide for itself when a situation justifies the use of armed force—what will prevent a slide back towards the kind of dangerous free-for-all the UN Charter was designed to prevent?

This is where we are right now, and we don't have the answer to that dilemma. In an ideal sense, the way out of this dilemma lies in developing more robust, responsive and accountable forms of international governance. That's the logic of the situation in which we find ourselves: in the age of globalization, we need, more than ever, an empowered global referee committed both to stability and to human dignity—a global referee that can make these difficult decisions about when and where to use force, so it's not just one state's views against another's.

We don't, of course, have anything close to this more robust system of international governance right now. We should surely strive for it—it is surely in the ultimate interest of all states. How else can we prevent the (perhaps inevitable) erosion of traditional norms of sovereignty from leading to a slide towards conflict and

instability? How else can we address urgent collective problems such as climate change?

I'm not particularly optimistic that we will get there, however. In the not-so-distant past, we humans have demonstrated a remarkable incapacity to make clearly necessary changes incrementally and peacefully. Think of the major inflection points in international law: the Peace of Westphalia, or the post World War II creation of the UN Charter system. The bursts of creativity and change symbolized by the emergence of the Westphalian order or the UN system did not emerge out of peaceful collaboration between States.<sup>91</sup> On the contrary, these dramatic changes in the international system arose out of cataclysm. The religious wars that wracked Europe before the Peace of Westphalia left nearly a third of the population dead in parts of Central Europe.<sup>92</sup> World Wars I and II were nearly as devastating, leaving tens of millions dead and many of Europe's great cities in ruins.<sup>93</sup>

There is nothing inevitable about progress (in the international domain or any other domain). Perhaps today's international system will gradually and peacefully morph into a more powerful, equitable, and effective system of global governance—but perhaps it won't. Perhaps instead the current system will collapse as catastrophically as the pre-World War II international order.

Change is inevitable, but it not inevitably for the better; even when the ultimate outcome is good, the process of change may be neither pleasant nor gentle. We think of the post World War II UN Charter system as “better” than the rules and institutions that preceded it—but that “better” system could only be built on the ruins of the old system.

It will take a concerted effort and a whole lot of luck for us to stagger and stumble our way towards a stronger, more stable, and

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91. See Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569, 582 (1999) (citing the discord in which the Peace of Westphalia emerged, particularly the haggling over precedence at Münster as “legendary” and the repeated attempts and failures of the French and Swedish embassies to meet and negotiate in 1644).

92. THOMAS H. GREER & GAVIN LEWIS, *A BRIEF HISTORY OF THE WESTERN WORLD* 398 (2005).

93. *WWI Casualty and Death Tables*, PBS (last visited Feb. 8, 2014), [http://www.pbs.org/greatwar/resources/casdeath\\_pop.html](http://www.pbs.org/greatwar/resources/casdeath_pop.html) (listing total deaths during WWI at over 8.5 million).

more human rights friendly international system. If we don't have that much luck, and we may very well not, we would easily find ourselves back in a situation of very substantial global instability and conflict.

This is the central insight I struggle to communicate when I teach international law. We all have such a “presentist” bias. We assume that today's weather is the best predictor of tomorrow's weather, and statistically, so it is: tomorrow's weather is overwhelmingly likely to resemble today's weather. Until the day it doesn't, that is. Similarly, we assume that tomorrow, the international order will probably look a whole lot like it looks today. And this will also be true, right up to the day when it's not.

Think of it like this: none of our intelligence agencies predicted the collapse of the Soviet Union, or the Arab Spring and the rapid ouster of several Middle Eastern despots, for that matter.<sup>94</sup> Systems can seem very stable, but the fact that a system has not yet collapsed doesn't mean it's in a state of equilibrium.<sup>95</sup> Unstable systems can persist for long periods then collapse very suddenly.<sup>96</sup>

This, then, is the central challenge for those of you who care about international law: we inhabit an unstable international order premised on increasingly contested norms. Can we do anything to ensure the resiliency and adaptability of the current system—can we help nudge it towards something more responsive and robust? Or will we just watch in dismay as it falls to pieces around us?

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94. See Uri Friedman, *The Ten Biggest American Intelligence Failures*, FOREIGN POL'Y (Jan. 3, 2012) [http://www.foreignpolicy.com/articles/2012/1/3/the\\_ten\\_biggest\\_american\\_intelligence\\_failures](http://www.foreignpolicy.com/articles/2012/1/3/the_ten_biggest_american_intelligence_failures); Ken Dilanian, *U.S. Intelligence Official Acknowledges Missed Arab Spring Signs*, L.A. TIMES (July 19, 2012, 2:23 PM) [http://latimesblogs.latimes.com/world\\_now/2012/07/us-intelligence-official-acknowledges-missed-signs-ahead-of-arab-spring-.html](http://latimesblogs.latimes.com/world_now/2012/07/us-intelligence-official-acknowledges-missed-signs-ahead-of-arab-spring-.html).

95. See Robert I. Rotberg, *The New Nature of Nation-State Failure*, WASH. Q., 85, 91–92 (2002) (noting, for instance, that Sri Lanka, where 80 percent of the population believes the government performs reasonably well and there has been “robust” levels of economic performance since the 1990s, has still be engrossed in a civil war for over twenty years and, while not collapsed, remains a weakened state).

96. See, e.g., *id.* at 93 (“Zimbabwe is an example of a once unquestionably strong African state—indeed, one of the strongest—that has fallen rapidly through weakness to the very edge of failure.”).