

The Selectively Expansive UN Security Council: Domestic Threats to Peace and Security

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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.

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

WHEN LEGAL AND TECHNOLOGICAL TRENDS INTERSECT

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

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

Proponents of R2P and counterterrorism-based sovereignty-limiting theories need to acknowledge that both directly challenge the UN Charter's collective security framework. This may not be a bad thing: the world we live in has changed substantially since 1945, both in terms of widely shared normative assumptions and in terms of technology and risk. But if the Charter system is being tacitly jettisoned, the least we can do is acknowledge it, and begin the difficult project of developing new rules and institutions to preserve peace in this new era. If we don't, we risk a return to the Hobbesian international order the Charter was designed to eliminate.

THE SELECTIVELY EXPANSIVE UN SECURITY COUNCIL: DOMESTIC THREATS TO PEACE AND SECURITY

*By Ian Hurd**

In response to the mass killing in Syria, many observers have been appalled at the failure of the UN Security Council to take meaningful action. To many, it recalls the failure to help the victims of genocide in Rwanda in 1994, and contrasts badly with the successful effort against Qaddafi in Libya in 2011. Setting aside the question of whether international military

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action is the right solution to the problem, the Syrian situation recalls the distinction between domestic and international matters in the UN Charter. Specifically, I note that there is no international legal category of a “threat to domestic peace and security” which might serve as the counterpart to the idea of a “threat to international peace and security.”

The Security Council has over its history employed a series of devices to overcome this limitation and to discover a legal capacity to intervene in states for problems that are essentially domestic rather than international. While some might condemn these as illegal, I argue they are quite clearly lawful due to the Council’s authority to define and redefine the distinction between domestic and international legal matters. However, they may prove to be conceptually problematic since they erase the distinction between domestic and international matters on which the Charter was premised, which then enables us to pretend that international human rights law is what we would hope it could be rather than what it actually is.

The United Nations was designed to serve the purpose of international peace and security—international, in the sense of *between* states. It was built around the idea that a threat to international peace and security is the concern of everyone, but the domestic affairs of a state are the concern of no one except the state itself. The UN is forbidden by Article 2(7) of the Charter from taking any action that deals with matters “essentially within the jurisdiction of” any member. But it is authorized under Article 42 to take “such action . . . as may be necessary,” including war and invasion, to respond to a threat to international peace and security.

The three decades since the end of the Cold War are full of ad hoc efforts to get around the Charter’s protection of domestic matters. This has been necessary in order to make the Security Council relevant for the pressing issues of the day, which have generally not been the kind of inter-state conflicts for which the Charter was written. At each step, the Council has had to find a legal language to frame the problem as one of international peace and security: in Rwanda in 1994, it decided that the large number of refugees fleeing the killing constituted a threat to international peace and security because they were destabilizing neighboring countries; in Libya in 2011, it decided that the threat of mass killing by the government was *in itself* a threat to international peace and security; in 2001, it decided that certain banking regulations inside countries could constitute a threat to international peace and security because they might hide financing of international terrorism; in 2000, it decided that the “particular needs of women and girls” in and after armed conflict were actionable as they constituted a subset of its responsibility for international peace and security.

There is nothing wrong with these decisions within the parameters of international law. The Council has the authority to decide for itself what is or is not a threat to international peace and security, and once it has, its decision is binding on all members of the United Nations. This is part of its constitutional authority under the Charter, and it is not in any strict sense acting illegally, or even improperly, in these instances. Thus, the Council could decide that the Syrian government is this kind of a threat, and then it would be entirely legal for the Council to order any kind of intervention it wished. The fact that the line between domestic and international is both blurry and moveable is not in itself a problem, nor is it surprising, and it certainly was not unforeseen by the framers of the Charter—it was for precisely this reason that the Council was given the authority to decide the question on a case-by-case basis.

However, the Council’s practice in this area highlights the absence of international authority over threats to domestic peace and security. To reach these areas, the Council has been

redefining them as international rather than domestic, and this practice raises two sets of problems worthy of further attention.

First, it shows that international human rights law does not clearly forbid what the Syrian government has been doing to its people. This is a striking and unfortunate fact, which should be carefully understood. There are, of course, treaties that forbid torture, arbitrary detention, killing political opponents, genocide, landmines, chemical weapons, and much more. These treaties are binding on governments that consent to them, and, of course, the Syrian government has not ratified very many. It therefore has few legal commitments about how it will treat its people. Syria has signed the Geneva Conventions and so has a legal obligation to treat combatants according to particular rules (though only if the situation is understood as a “non-international armed conflict,” with its particular legal meaning). The classical tools of international law (i.e., treaties, state consent, and the rest) impose few constraints on governments that choose not to sign them. International law largely fails as a source of authority when confronted by a government that chooses not to accept a treaty, and it is difficult to find solid legal grounds to claim that governments are forbidden from using lethal force against anti-government protests. The naïve assumption that international law naturally outlaws the things we find abhorrent should have been decisively refuted when (as Koskeniemi says) “the juggernaut of modernity crashed into Auschwitz.” What is at stake in Syria are not the “standards of law,” but rather (to paraphrase Hedley Bull) “standards of conduct” of international society.

The use of the Council in these ways reflects the fact that we have few other international instruments with which to advance human rights protection. Having no institution with authority over the depredations of government, we turn to what we have: a collective body of powerful states that can define its own terms of intervention and can marshal overwhelming military power when it so chooses.

This leads to the second problem: it destabilizes international law and encourages the imperial tendencies of the Security Council. In approaching the UN Charter with an intentional disregard for what the Charter actually says, it becomes inconsistent then to claim that others should scrupulously abide by international law as it exists. The reading of the Charter that permits Council intervention in a domestic matter is turning the plain language of the Charter on its head. This amounts to an amendment of the treaty, one conducted by a subset of its members, in the pursuit of a particular substantive outcome, and without the consent of the whole. These are the kinds of practices toward obligations that formal treaty law was supposed to prevent.

We may well be better off allowing a misreading of the Council’s jurisdiction in order that we might stop at least some predations. Failure to act in support of the victims of government atrocity is pathetic. But we must then pay attention to the consequences of the interpretive activism that is involved: it removes from international law the stability that is often advertised as its best feature.

Each time that the Council finds that a matter, such as human rights or banking regulation, is a concern of international peace and security, the scope of domestic sovereignty is thereby reduced. Gradually, as the Council has multiplied these findings, what it means to be a sovereign state has been reduced. Article 2(7), with its protection of domestic affairs, is shrinking in proportion to the expansion of the “international” sphere as defined by the Council. The politically motivated misreading of the Charter will also have a constitutive effect, in that it might in the extreme case come to be accepted and thereby legalize what

was previously illegal. This has happened elsewhere: for instance, an abstention by a permanent member in the Council is not treated as a veto, despite the fact that the Charter was written to say that it should.

This is fine as long as one agrees with the version of international obligation that the Council is imposing—many might prefer to live under the authority of the Security Council than our own national governments. But it is easy to see how the growth of Council authority, and the shrinking of domestic autonomy, can lead to a kind of imperialism: the imperial Security Council.

CONCLUSIONS

There is no international legal category of a “threat to domestic peace and security.” International law does only a fragmentary job of enshrining human rights. As a result, the Security Council has been repeatedly pressed into service to prevent atrocities by governments against their own people, despite the fact that this has little legal grounding in the Council’s authority over “international peace and security.”

The UN Security Council was designed to do one particular thing: to allow the great powers collectively to manage problems of international peace and security as they saw fit. In recent years, the Council has instead been put to work at a very different job: responding to governments that are intent on killing their own people on a large scale. This can be done—there have many examples of the Security Council successfully siding with people against their governments. But to do so requires giving new meaning to the UN Charter, to overcome the fact that it is operating outside its actual zone of competence.

This may pose no problems if it is the case that the Council’s behavior is in fact protecting the lives of people who would otherwise suffer under their government’s atrocity. But we should be clear about how this practice relates to the rules and institutions of international law and politics: it violates the rules, it may contribute to remaking the rules, and it also empowers the Security Council and the permanent five at the expense of other states.

REMARKS BY PATRICIA O’BRIEN*

As we are limited by time, I will focus my comments on the concept of the responsibility to protect (R2P) in the context of current work at the United Nations, and its implementation in the situations of Libya and Syria.

2005 WORLD SUMMIT

In 2005, more than 150 heads of state unanimously embraced the responsibility to protect. They declared that “each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity,” and that “the international community, through the United Nations, also has the responsibility . . . to help protect populations” from those crimes.

THE THREE PILLARS OF R2P

In addressing the challenge of “operationalizing” R2P, the Secretary-General has identified three pillars of action. Pillar I is the enduring responsibility of states to protect their populations. Pillar II is the role of the international community to assist states to protect their

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