Sovereignty and Legitimacy in the Rule of Law Equation

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*Sovereignty is formally assumed for the modern state, perhaps marking the distinction of simple authority (eg, Hobbes) measured against ideas of social contract (eg, Rousseau) that assume legitimacy under formal arguments about democracy and nationalism. At the same time, the legitimacy of various states and governments is increasingly subject to open question. The most current high profile example may be reflected in arguments about regime change opposing events in countries like Libya and Syria, linked with a sense that doctrines like a duty of rescue and ideas about the “international community” at the UN level have been ineffective. But the same kinds of problems are equally visible in areas like legal development, particularly under circumstances of legal pluralism and in non-Western settings.*

*The practical issue is whether it still makes sense to even talk of sovereignty, and whether a better set of rules or at least approaches might be articulated to address in practical terms the uneasy relationship between sovereignty, legitimacy and intervention in terms of how foreign states undertake or justify actions reaching outside their own territory. In these terms, the problem is less about invasive short term self-defense or similar measures under traditional analysis like the Caroline rule, and more about how to deal with the longer term divide between sovereignty and legitimacy.*

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Sovereignty and Legitimacy in the Rule of Law Equation

*Intervention is the interference of a state or group of states in the affairs of another state, for the purposes of compelling it to do or refrain from doing certain acts. Its essential characteristic is force, either open or concealed. Simple mediation or even a formal protest, unless there is present the intention of enforcing the demand, does not constitute intervention.*

*The relation of intervention to international law and even the rules governing the practice are still in an extremely unsettled state. Most writers content themselves with a discussion of the particular conditions under which intervention is or is not justifiable, and make no attempt to determine the place of intervention in a system of international law. Almost without exception they treat the subject in an “a priori” manner. From the premises that nations are independent, politically equal and possessed of the same rights, they deduce what the doctrine of intervention must be and what the conditions which must justify its use.*

*Whatever may be said in favor of this deductive method from the ethical standpoint, from the legal and historical point of view it must always remain unsatisfactory. It proceeds from ideals rather than from the facts of history; from the standpoint of what ought to be, rather than from that of what is. States to-day do not base their actions on innate ideas of justice, or upon precepts deduced from considerations of absolute rights antecedent to custom and law, but on rules which can be shown to have been followed by all or most of the states. In every other branch of international law, writers arrive at the doctrine and principles from the practice and precedents established by nations in their dealings with each other. There is no adequate reason why this should not be done with regard to intervention.[[1]](#footnote-1)*

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The above demonstrates that intervention and sovereignty are not new conceptual issues, and the manner of posing the question has hardly changed in 100+ years. Lingelbach’s estimation was that the true guide to intervention should be state practice, rather than deductions from “the premises that nations are independent, politically equal and possessed of the same rights.” He was looking backwards in 1900 at a nineteenth century in which the great powers of the Concert of Europe held sway. The predominant ideology seemingly supported intervention to uphold rational monarchal government in the face of “radical” democratic and republican concepts in the wake of the French Revolution. Then, fourteen years later, the world as he knew it came crashing to the ground when the monarchal approach ran afoul of a multi-ethnic governance problem (Sarajevo).[[2]](#footnote-2) Meanwhile, Lingelbach’s language concerning “deductions” is recognizably a lineal predecessor of the “territorial integrity” and “existing political independence” terminology of the 1919 League of Nations Covenant Article 10, which itself is the lineal predecessor of the UN Charter’s paired Article 2(1)’s “sovereign equality” and Article 2(7)’s internal affairs (non-intervention principle) focus limiting also Security Council authority, together with Article 2(4)’s prohibition on the threat or use of force against the “territorial integrity” and “political independence” of any state.[[3]](#footnote-3)

My argument is that self-defense based drone use is for an armed conflict lawyer an easy case under the *Caroline* approach, so long as the immediacy and proportionality requirements can be met. The practical problem is legitimacy, a mixed legal and political question. Drones are just another technology, meanwhile what the executive as part of our government does may concern us domestically, but the actions of the executive are simply the actions of the US at the state level and so hardly concern foreigners as such. Technically speaking, the broader general international law problem involves the permissible bounds of intervention and a recognition of how phrasing the drone question solely or even primarily as a problem of armed conflict law may mislead. The same may be said of the cyberlaw inquiry, that asking the intervention question and recognizing sovereignty as relational rather than an absolute concept seems more promising than any armed conflict law treatment.

Legality as such is not the problem. The practical consideration is how to deal with the possibility that, particularly when not considered legitimate in local eyes, beyond legality in the classical formulation undiscerning drone strikes may create more “terrorists” than they kill due to collateral recruiting effects. So what is the proper measure of legitimacy, recognizing that for most of the world there has been a distinct preference for multilateralism over time, even while the UN Security Council has been recognized often to have failed in the clinch (Rwanda, Kosovo, Syria, etc.)? Meanwhile, US national security law is classically phrased in unilateral terms.

*Changing Intervention and Sovereignty*

Intervention as legal concept implicitly incorporates ideas about sovereignty, because otherwise why worry about restraints on reaching into a foreign state? When we discuss intervention currently, it is in the context typically of long-running arguments about unilateral humanitarian intervention and now, since 2005, a mooted “duty to save” in the context of threatened humanitarian catastrophe, alongside the traditional problems of recognition (from the international community’s viewpoint, a problem of managing external effects of internal or civil wars). On the armed conflict side, intervention is more often than not practiced under US views as voluntary and consensual support of a government faced with armed insurgents (e.g., counterinsurgency as most recently in Afghanistan).

CERL directs us towards drones, sovereignty and newer US views of executive authority which unfold against changing times. The picture closest to hand is of US drone strikes into Pakistani tribal areas targeting Islamic fighters in furtherance of military operations in Afghanistan. It is phrased in terms of unilateral actions, and, under traditional US views of self-defense, presumably fits comfortably under the *Caroline* precedent. The next closest picture to hand, however, is that China was reported recently to have decided against carrying out a drone attack in Myanmar targeting alleged river pirates who had murdered Chinese Nationals crewing Chinese trading vessels. Instead, a decision was taken apparently in favor of the foreign pirates’ physical capture in Myanmar, and the execution of the pirates in China was then nationally televised (presumably to convey a message to the Chinese domestic audience).

Our conference is couched in terms of actions of the US executive in the national security sphere, but we should remain conscious of the fact that drones are merely another technology, while whatever the US does with drones constitutes state practice. Meanwhile, it is widely reported that circa 25 nations, also including many non-Western and illiberal states, are seriously pursuing drone technology. So the state practice question and hence international law being made will confront the US eventually, perhaps more quickly than many realize judging by the Myanmar example.

Drone strikes and the internal and external sovereignty question are also juxtaposed in our conference, implicitly in terms of US national security law. There we should recognize that perhaps the greatest change internationally in armed conflict post-Cold War in a technical sense has been its reorientation towards (and the seeming increase of) intrastate or civil wars, versus interstate or international wars. This in turn has tended to reorient use of force legal discussions since the mid-1990s toward human rights problems like humanitarian intervention (the Former Yugoslavia, with mixed results in Srebrenica in 1995 and Kosovo in 1999), since 2005 a supposed the right to protect populations (Libya 2012), genocide (Rwanda 1994) and the legitimacy of multilateral versus unilateral approaches even while the UN Security Council as heart of the multilateral system visibly failed in several high profile instances (in Rwanda, Kosovo and arguably now Syria). There the analytical understanding is that at least three competing interests are in play: human rights versus sovereignty understood as application of the traditional non-intervention principle, versus the danger to international peace and security that any armed conflict presents, versus the legitimacy aspects of unilateral versus multilateral intervention, also when it may be doubtful that a civil war poses any realistic “threat to international peace.” The lawyer’s point there is that a threat to international peace and security is a jurisdictional prerequisite for any seriously coercive UN Security Council action, as heart of the traditional multilateral system, absent which non-intervention principles might be assumed to control.

Claims are also made commonly from a US perspective about an “emerging right” to democracy, relating back most visibly to Franck’s early 1990s paired emphasis on democracy and legitimacy.[[4]](#footnote-4) US democracy promotion through the 1990s largely enjoyed bi-partisan support, even while the Obama Administration visibly dialed it back as one part of addressing the problematic legacy of the Bush Administration (Iraq, Afghanistan and lingering effects of Abu Gharib, the absence of WMD, preventive war, etc.). Claims of a lack of democracy (also internal self-determination) have begun to proliferate at least in international relations circles as a claimed justification for intervention. In the meantime, there are many voices now registering the problem that procedural definitions of democracy (meaning focusing solely on elections) now compete with substantive definitions following the appearance of “illiberal” democracies. A variety of states are also now pushing back on democracy promotion, for example the Egyptian government’s criminal proceedings threatened against USAID personnel and funded organizations.

To put a current spin on the problem, many if not most of the so-called illiberal democracies have emerged in the non-Western world. Whoever wins in the internal struggle in Syria, the international relations challenge will be that they are unlikely to present a particularly progressive face to the world,[[5]](#footnote-5) and the outcome in Libya and still on-going events in Syria are instructive in this regard. How does this jive with US views of sovereignty, legitimacy and intervention in the non-Western world, particularly in the Islamic world and Africa as part of what is now designated as the arc of conflict to employ the terminology of armed conflict law practitioners? Beyond the legality calculation, what of legitimacy particularly when the knee-jerk reaction since 1945 is normally to stress multilateralism over sovereignty as procedural bridge to legitimacy?

*Traditional Belligerent Recognition and Intervention*

While subject to criticism,[[6]](#footnote-6) Lauterpacht’s 1947 formulation is presumably the modern academic starting point for consideration of belligerent recognition as the traditional doctrine under international law applied by third party states trying to deal with armed conflict (a civil war) in a state in turmoil:

[F]irst, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[[7]](#footnote-7)

Beyond belligerent recognition as such, the question is recognition as what? From the second element itself we recognize the traditional de facto government concept, while the first and third elements really address the existence of the conflict and adherence to the tenets of international humanitarian law. In traditional usage, the fourth element was typically the naval warfare problem of prize law, looking back to the American Revolution and the American Civil War as having raised the problem of how third party states were to deal with captured prizes. The lawyers’ problem was whether the prizes were lawfully captured by recognized insurgent parties and presumably subject to lawful sale in neutral ports, or whether those who captured them should be viewed as unlawful traitors and pirates as the enemies of all mankind (in the traditional formulation) and so the ships were simply stolen property. In modern usage, however, what would constitute “circumstances which make it necessary for outside states to define their attitude…?”[[8]](#footnote-8)

We look to the most recent intervention practice in Libya and on-going events in Syria for insight into current state practice following Lingelbach’s recommendation. The Libyan change of regime essentially took six months, commencing with a protest in Benghazi opposed with force on February 15, 2011, the first UN Security Council Resolution 1970 followed February 26, 2011 to “impose immediate measures to stop the violence [of the Qadhafi Regime], ensure accountability and facilitate humanitarian aid,” hostilities heated up until French recognition of the Libyan National Transitional Council on March 10, 2011, the UN Security Council endorsed a no-fly zone under UN Charter Chapter VII under Resolution 1973 of March 17, 2011, a string of further recognitions followed successively between March 27, 2011 and July 27, 2011 (involving successively Qatar, GCC members generally, Italy, the US and the UK), Tripoli fell sometime in the second half of August (exact dates may be somewhat flexible, differing August 16-22, 2011 depending upon when full control of the Libyan capital is assumed),and Qadhafi died on October 20,2011 after escaping Tripoli to fight in the Southern desert while apparently trying to reach Mali.[[9]](#footnote-9)

A closer look at the exact nature of the recognitions involved in Libya and Syria provides some insight into current state practice, including ways in which it arguably has evolved from the traditional standards of belligerent recognition,[[10]](#footnote-10) as well as implicit assymetries in US positions in particular. These arise out of the fact that the US in practice both opposes insurgents, for example when it offers assistance in opposing an insurgency on behalf of a serving government (e.g., counterinsurgency on behalf of the Karzai regime against the Taliban in Afghanistan, also ultimately involving the mooted drone attacks in Pakistan as hostilities spill over the border into sanctuary territory-- again, the traditional *Caroline*-type analysis but presumably indirectly in the name of the Afghan government). However, the US may oppose a de jure foreign government by favoring, for example, the Libyan National Transitional Council as “a legitimate representative of the Libyan people,” in opposition to the Qadhafi regime in the wake of its adoption of oppressive measures in opposing peaceful protestors (which measures were unanimously condemned and sanctioned under UN Security Council Resolution 1970/2011).

From the technical intervention perspective, the legal trick is navigating the problem of how to maintain sufficient distance and deal in legal terms simultaneously with both a rising de facto government in the form of insurgents in one part of the country, alongside a serving de jure government in the capital presumably in a different part of the country (particularly when for political reasons the third party state favors sub silentio one set of representatives over the other). The problem is that the de jure government continues to dispose in a formal sense over state assets abroad, accredits ambassadors, and presumably controls title to valuable state-owned resources such as hydrocarbons in the ground,[[11]](#footnote-11) even while being owed a variety of duties under the Vienna Convention on Diplomatic Relations (for example, its representatives enjoy diplomatic immunity, have the right to occupy their country’s embassies, etc.). By the nature of problem, within a state in turmoil there is likely to be some fighting within urban areas and at least low intensity armed conflict in the countryside. But who controls what areas and who constitutes a responsible authority within the country, which coincidentally presumes some measure of legitimacy in public eyes? There are always formalistic arguments concerning de facto and de jure governments and sovereignty issues to be made, except that kind of formalism is presumably that to which Lingelbach objected.

One technical issue is that the legal judgment concerning a de facto government may be less clear cut in popular uprising cases such as are presented post-Arab Spring, as opposed to a classic popular liberation or a secession movement with a clearer hierarchy and organization. In the popular uprising case, it may remain quite unclear who really constitutes the opposition to the de jure government for purposes of making determinations like whether they control territory (Lauterpacht’s responsible authority). The practical concern is that facts on the ground determine legal judgments, at least in the case of unilateral state action.[[12]](#footnote-12) So harking back to traditional non-intervention principles, if the opposition in a popular uprising is insufficiently formed to exert governmental control, recognizing and treating it as a de facto government arguably is an interference in the internal affairs of the state in turmoil. Similarly, if a de facto government were to be recognized in fact that presumably is the case only for the territory which it controls. Recognizing any de facto government as the de jure government would automatically remove recognition from a serving de jure government, so the de facto candidate has to control substantially all the territory of the state in turmoil, presumably including its capital, before de jure recognition. Otherwise, that similarly could be interpreted as impermissible interference in the internal affairs of the state in turmoil.

Thus we observe the significance of different kinds of “recognition” in practice. Arguably evolving from traditional intervention principles, one current key lies in the view that opponents of the de jure government of a state in turmoil may be representatives of its people (for example, the Libyan National Transitional Council was recognized by France early on as “the legitimate representative of the Libyan people”), which language is reminiscent of the self-determination language and national liberation fronts of the 1960s-1970s.[[13]](#footnote-13) This formulation should be understood in opposition to recognition of the Libyan National Transitional Council as representative of Libya, which only occurred towards the end of the Qadhafi regime’s downfall. France recognized the Libyan National Transitional Council as “the only holder of governmental authority in the contacts between France and Libya and its related entities” on June 7, 2011 and the UAE recognized it as “a legitimate Libyan government” on June 12, 2011.[[14]](#footnote-14) The rationale is that any such recognition as representative of Libya itself presumably may be interpreted as de jure or full diplomatic recognition.

The theoretical touchstone is that recognition as representative of the Libyan people does not convey any sovereign rights as the self-determination language is prospective (but, at least latently, arguably could incorporate “democracy” concerns as internal self-determination). So looking to the Palestinians as example, recognition of the PLO as its representative did not entail any recognition of a state prior to very recent efforts at the UN. However, there still must be a certain degree of internal coherence and broad acceptance for such a group to be recognized even as representative of a state’s people. Nonetheless, the language of representation of the people conveys with it a certain degree of internal political legitimation in the struggle against the de jure government, some external legitimation in proving some acceptance in the international community, an entrée to international organizations as speaking for a country’s people and the ability in many third party states to open representative offices, and typically results in improved access to financial assistance from third party states. Meanwhile, the third party states can continue to recognize and deal with the current de jure government of the state in turmoil via that government’s accredited diplomats.

The standards for the representative drawing upon the self-determination language would seem largely to track the qualities of a de facto government (effective control over territory), at least in terms of Lauterpacht’s “responsible authority.” This raises again the problematic borderline with interference in internal affairs precisely because third party countries like the US are trying via financial and similar support to build up in the opposition what it considers secular and moderate Islamic groups and accordingly to undermine what it considers Islamic extremist elements in any opposition coalition in countries like Libya and Syria (who, however, may be supported by regional powers supplying weapons which as Muslim majority states may have a considerably broader view of politically acceptable Islamic groups).

How delicately such lines may be drawn is demonstrated in the Libyan context where the US government eventually extended full diplomatic recognition to the Libyan National Transition Council essentially when Tripoli fell, but the “people’s front” was not entirely stable to the extent the US Ambassador was killed relatively shortly thereafter on September 11, 2011 by what appeared to be a local armed anti-Qadhafi faction in Benghazi associated with Al Qaida (Islamic extremists in US terminology, perhaps Sunni fundamentalist fighters under local views), but presumably favoring the Libyan National Transition Council. Meanwhile, according to the New York Times, the Central Intelligence Agency has been coordinating arms airlifts to Syrian rebels from regional powers (e.g., Saudi Arabia, Qatar and Jordan via Turkey).[[15]](#footnote-15) While Turkish officials are reported as largely responsible for managing the program (presumably because the weapons go over the Turkish border into Syria), conduct being alleged includes US intelligence officers helping Arab allies to shop for weapons for the Syrian opposition, vet rebel commanders and help determine who should receive the weapons in terms of factions within Syria.

Even more criticism seemingly was encountered due to the lack of transparency and at times the membership of the Syrian opposition to the Assad regime as de jure government than was the case with the Libyan National Transition Council. US recognition of the Syrian National Council occurred on December 11, 2012, with President Obama only declaring in an interview nearly two years into the Syrian crisis that "[w]e've made a decision that the Syrian Opposition Coalition is now inclusive enough, is reflective and representative enough of the Syrian population that we consider them the legitimate representative of the Syrian people **i**n opposition to the Assad regime."[[16]](#footnote-16) But to what extent is recognition a one-way street, determined definitively here, since recognition at this point may serve more political than international law standards?

The problem lies in the continuing story, since the US was previously widely reported to be hesitant about dealing with the Syrian opposition due to worries about Islamic extremists’ role (recall the fate of the US Ambassador to Libya). Then, the widely reported criticism was that Islamic extremist elements were gaining ground within Syrian opposition circles due to the effectiveness of their (foreign?) fighters, until measures were taken including an accelerated weapons supply effort for the Syrian opposition starting by sometime in the fourth quarter of 2012. In parallel to stories about the new weapons pipeline, more than three months after US recognition of the Syrian Opposition Coalition as the “legitimate representative of the Syrian people” the president of the main coalition of the Syrian opposition in exile declared that “he was resigning, and he complained bitterly about foreign powers that he said were withholding aid from the Syrian rebels while trying to control every move.”[[17]](#footnote-17) Meanwhile, Secretary of State Kerry was visiting Iraq and was widely reported to have pressed Iraq to stop arms shipments transiting Iraqi airspace from Iran to Syria in support of the Assad regime.[[18]](#footnote-18) Most recently, at an Arab League meeting held in Qatar, to the annoyance of the Assad regime the Syrian Opposition Coalition formally took the vacant seat of the Syrian (Assad) government suspended since November 2011, seeking further military support and Syria’s seat at the UN, with the only public expression of opposition at the meeting coming from Iraq.[[19]](#footnote-19) Qatar was both host to the Arab League meeting and one of the chief suppliers of weapons to the Syrian opposition.

One issue is the extent to which the continuing lack of cohesion in the Syrian Opposition Coalition linked with divisions among Syrian rebels fighting within Syria undercuts the position directly articulated by President Obama understood as a legal declaration about the character of the Syrian Opposition Coalition as “responsible authority.” The continuing developments problem is posed in light of applicable substantive law requiring satisfaction of some objective standard for Lauterpacht’s responsible authority controlling their own military to avoid claims of impermissible interference in internal affairs. To compound matters, the Syrian Opposition Coalition’s president who denounced outside interference in tendering his resignation shortly before, participated in the Arab League meeting as part of the Syrian Opposition Coalition delegation.

Legitimacy itself is a hidden problem here to the extent the US would claim to be reaching into an internal conflict between the Assad regime and its own population. From the Islamic perspective, however, the Syrian crisis in regional perspective is viewed arguably more as something of a proxy war involving Iran and Saudi Arabia, in which the US itself and even Syria may play a theoretically secondary role if the true protagonists were others. Meanwhile, legitimacy of the conflict itself within the Islamic world is presumably perceived differently, including for these purposes by Syrians themselves as well as Saudi Arabia, Qatar, Jordan and even Turkey with Iran as the Assad regime’s chief regional ally and arguable proxy war counterpart. While humanitarian concerns are certainly present, there is an issue whether “legitimacy” here is the localized regional understanding closer to the players, versus the traditional view focused on a broader hypothetical international community and the UN, which hardly works here given the veto problem in the Security Council. So query whether the US would be perceived as intervening on its own behalf, versus rather secondarily offering support in local’s eyes as adjunct to the regional powers pursuing the apparent proxy war. Posing simple questions about internal versus external legitimacy and sovereignty may mislead, if regional players simply have a different frame of reference for legitimacy.

What is the import for our concern about drones? Part of the hidden problem is that the US following accepted Cold War practice arguably is focused on enhancing the perceived political legitimacy of interventions in the region post-Arab Spring by either pursuing a collective (unilateral) security option, or by pursuing UN Security Council mandates as in Libya. But it is not clear that the time-tested formula of pursuing UN Security Council interventions under its Chapter VII authority, or even a broad collective security coalition of Western States as under NATO, is credibility/legitimacy enhancing in areas like the Islamic world and Africa. There the argument is often made for regional initiatives (e.g., OAU or Arab League peacekeeping troops) formally as a subsidiarity matter, but this formal designation does not touch on collateral signs like African behavior disfavoring recent US security initiatives such as Africom. Viewed from a legitimacy perspective, steering peace and security matters to regional organizations and away from the Security Council carries its own judgment. In that regard, it would seem that even recent consensual drone basing arrangements in North Africa to monitor areas like Mali seemingly are rooted in limited consents permitting observation flights, but not armed drones. However, does it render matters any less interventionist to devolve responsibility to the regional level?

How have things changed in 100+ years, if at all, looking at some of the more recent controversies, also the drone problem? Looking backwards from the present, Western legal scholars through the end of the Cold War typically bemoaned the death of a principled set of intervention principles, pursuant to which, once upon a time, states could not theoretically offer assistance to insurgents up to and until that point where they had truly established themselves in opposition to existing government, while theoretically outside states were compelled to cease assistance to existing government at that point where insurgents established themselves as a truly viable alternative.[[20]](#footnote-20) The common claim was that this theoretically balanced system never recovered from outside states choosing sides in the Spanish Civil War (e.g., The Non-Intervention Pact and false private initiatives of the Condor Legion versus the Abraham Lincoln Brigade), then was completely superceded in the Cold War’s series of proxy wars. But were Lingelbach to be believed, the good old days were never that good.

*State Recognition and From Humanitarian Intervention to R2P*

We now move our intervention focus more to the humanitarian intervention versus state recognition side. Until the mid-1990s, the United States and American international law scholarship typically focused in the armed conflict area on self-defense, bemoaning an UN Security Council collective security apparatus largely frozen during the Cold War period (via offsetting vetoes of the Soviet Union and US as permanent members).[[21]](#footnote-21) At the same time, it disputed competing legal interpretations of UN Charter Article 51 tending to limit its freedom of action by narrowing the self-defense concept,[[22]](#footnote-22) which disputes reflected again very close to the surface concerns about large states’ unilateral actions serving their own political interests under the cover of principled claims.[[23]](#footnote-23) Then the end of the Cold War changed the direction but not the ultimate tenor of the debate. US liberal internationalists as strong human rights proponents then took up the cudgel of humanitarian intervention with the same fervor as Cold Warriors, once upon a time.

The initial reorientation of the debates within international law focused on the large state-small state issue and intervention can be traced back to overlapping events in terms of the original 1991 Gulf War (Iraq’s invasion of Kuwait), the sobering 1992-94 (from a US perspective failed) Somalia humanitarian relief operation, the 1994 Rwandan genocide, and the 1990s break-up of the former Yugoslavia (culminating finally in Kosovo’s 2008 independence). The 1990s paradoxically to a great extent revived aspirations for multilateral collective security actions rooted institutionally in the UN Security Council, only then emerging from its Cold War dormancy. Our attention has been directed to drone issues, which have arisen in the midst of the so-called War on Terror. But development of the current armed conflict law issues was arguably clear well in advance of 9/11, because they are tied into intervention issues more generally.

Shortly after the Berlin Wall came down, the 1990 invasion of Kuwait occurred. The UN Security Council responded in almost textbook fashion to a classically defined case of international aggression in the form of the invasion, followed by a seven month occupation and Kuwait’s claimed annexation as the 19th province of Iraq. As justification Iraq asserted at best very weak territorial claims based upon Kuwait’s relationship to what became Iraq at the time the Ottoman Empire’s broke up (e.g., 75 years before). However, the contemporaneous understanding was that on-going Iraqi invasion threats were motivated in the alternative to procure war debt forgiveness (for monies owed Kuwait under loans given during the Iraq-Iran War), or to force Kuwait to lower its own oil production to benefit Iraqi oil pricing. Then the invasion threats allegedly got out of hand , as Iraqi intentions morphed into an oil reserves grab. A multinational coalition formed quickly for the supply of military contingents to enforce the Security Council’s Chapter VII resolutions, a traditional approach.

In legal terms, the Kuwait crisis was almost too easy and arguably had the indirect effect of *reviving* optimism in the workability of collective security approaches under the Security Council system after the long Cold War hiatus. That was effectively counterbalanced in US calculations by the 1992-94 Somalia relief operations, perceived as ending in a debacle as US troops were pulled into inter-clan struggles in the failed state environment (Blackhawk down), leading then President Clinton to stress “African solutions for African problems,” and indirectly arguably inaction in the face of the 1994 Rwandan genocide.

On the other hand, the extended 1990s break-up of the multiethnic former Yugoslavia presented a much more nuanced if confused picture of mixed domestic and international armed conflict and intervention. Here the problems of modern state recognition practice came to the fore, to the extent early on Germany, followed by the European Community and somewhat later the US recognized various pieces of the former Yugoslavia as newly independent states in an attempt to minimize armed conflict. That particular attempt failed, but the real object lesson from the viewpoint of intervention was that the entities in question were recognized as new states instrumentally. That is to say that the real rationale for pushing state recognition was better understood as part of a political calculation, rather than under any perceived legal imperative.

Without reviewing self-determination aspects of the initial secession of Croatia and Slovenia, their 1991-92 conflict with Serbia was effectively ended via an arguably premature recognition of them as states by Germany in late 1991 despite dissenting voices in the European Community,[[24]](#footnote-24) with the US following in recognition of the new states some months later.[[25]](#footnote-25) At the time, Bosnia Herzegovina (together with Macedonia) was similarly situated, except in terms of domestic Yugoslavian public law they were effectively political sub-units of Serbia. The details hardly matter, except Serbia relatively quickly accepted the independence of Croatia and Slovenia, but fought tooth and nail what it considered to be the dissolution of its own territory.

In Bosnia in particular, the US and EC recognized Bosnia Herzegovina arguably with some reluctance as state only upon its declaration of independence in mid-1992, immediately triggering what amounted to a bloody civil war considered in the alternative an attempt at genocide or ethnic cleansing, with eventual massacres (Srebrenica) and UN alongside independent NATO involvement. It included a substantial “refreezing” of the collective UN Security Council system due to traditional ties between Serbia as de facto rump Yugoslavia and Russia as veto-bearing permanent member of the Security Council. The Bosnian War incorporated ethnic cleansing, UN peacekeeping operations under chaotic rules of engagement, and, as war crimes and crimes against humanity increased and transfixed European publics in particular, eventually “unilateral” collective security measures on NATO’s part in the absence of functional UN Security Council Chapter VII authority.

This culminated in NATO’s 1995 air campaign against Bosnian Serb forces in the wake of the Srebrenica massacre, ended only in practical terms by the 1995 Dayton Accords. The ultimate technical characterization of armed conflicts for international humanitarian law purposes in fact only followed the conflict via the Tribunal for the Former Yugoslavia created in 1993. The former Yugoslavia’s dissolution continued still later when Kosovo, technically subordinated to Serbia under Yugoslav public law was subject to Serbian military pressure in 1999, from which it was released by another NATO air campaign. In 2008 Kosovo declared its independence while under the control of UN peacekeepers (UNMIK). This action was subsequently challenged by Serbia before the International Court of Justice, which only recognized Kosovo’s position weakly as in accordance with international law in 2010.

While lawyer’s arguments could be made along the lines of declarative versus constitutive theories of state recognition, it seems a fair statement that the general consensus concerning outside recognition of the various states emerging out of the former Yugoslavia over time was that they proceeded more from human rights principles (also involving a lack of internal self-determination due to Serbian control) and foreign policy concerns of outside states, rather than ordinary considerations of statehood.[[26]](#footnote-26) Similarly, the UN Security Council system was perceived as having failed, since military force in peacemaking terms was largely supplied by the NATO air campaigns. As a result, it is extremely difficult to draw meaningful lines in terms of the boundaries of permissible intervention, once human rights concerns come to the fore. Human rights advocates presumably think this a good thing, but one should recognize the facial inconsistency with sovereignty and intervention concerns. Meanwhile, self-determination arguments hardly distinguish the situation from that in other states, raising real consistency concerns in any geographic area with multi-ethnic states-- for example, Africa.

One final oddity in conjunction with measures in Kosovo was that two of the most distinguished European publicists, Bruno Simma and the late Antonio Cassesse, themselves strong human rights proponents, judged the unilateral Kosovo bombing campaign to be in violation of international law, even while they embraced it as morally justified.[[27]](#footnote-27) It seems more than problematic when traditional legal approaches including jus cogens concepts like restrictions on the use of armed force prove unusable in practice. Simma is a former International Law Commission member and judge of the International Court of Justice, while Cassesse was former president of the Tribunal for the Former Yugoslavia (and served on the Tribunal for Lebanon, until forced to resign for health reasons). So it is fair to say that the views of Simma and Cassesse are not outliers.

This very tension led to the next step in apparent legal development in the form of a push particularly sponsored in international law circles by Canada and groups like the ICG, of the concept of a “duty to intervene” on the part of third party states in cases of threatened humanitarian disaster, reaching back to the Rwandan genocide and which unsurprisingly fit the circumstances of Kosovo, and now arguably Syria.[[28]](#footnote-28) For those interested in the law of armed conflict, its proponents reacted to the seeming crisis of legality surrounding humanitarian intervention and Kosovo’s reception more from the politics and institution-building viewpoint of conflict prevention/minimization rather than law or human rights as such. It was recognized that the UN Security Council multilateral security system had failed yet again, to which the answer was . . . a renewed commitment to the UN Security Council multilateral security system.[[29]](#footnote-29)

There were a variety of academic works in support of the new R2P,[[30]](#footnote-30) and from the academic point of view the whole R2P effort reminds one of efforts via scholarship and the International Law Commission a generation ago working through the Draft Code on State Responsibility to create a viable collective security system to work around the Cold War era Security Council stasis in articulating a system of mandatory duties for state intervention based upon the idea that sovereignty entailed a responsibility to protect.[[31]](#footnote-31) Thus, one state initially had a duty to provide a secure environment for its citizens, but must be replaced by other (intervening) states when it failed in that legal duty entailed in sovereignty itself.[[32]](#footnote-32) The R2P movement separated itself from muscular American views of unilateral humanitarian intervention in stressing the legitimating influence of the multilateral system, but seemingly sensed potential failure again in Libya and Syria.[[33]](#footnote-33) The R2P movement’s most lasting effect may be that its basic ideas were absorbed by UN Secretary General Kofi Annan under the so-called 2005 World Summit Outcome Report and its precursors,[[34]](#footnote-34) but it is unsurprising ultimately that the UN apparatus itself reaffirmed its involvement.[[35]](#footnote-35)

Returning to the legitimacy issue, the more surprising outcome is that increasingly voices are heard questioning whether the UN Security Council’s quiet expansion of its powers in the 1990s has gone too far. The question is whether the Security Council exceeds the mandate also proscribed by UN Charter Article 2(7) when it acts coercively via Chapter VII in intrastate or internal armed conflicts. The question arises via interpretation when the Security Council effectively concluded that civil wars or internal armed conflicts almost invariably presented a threat to international peace alongside international conflicts, and so fit within the Security Council’s Chapter VII mandate under UN Charter Art 39.[[36]](#footnote-36) The practical problem is the effective unreviewable nature of Security Council actions, balanced by the idea that the only effective restraint is really legitimacy concerns.

I highlight an underappreciated aspect here, namely whether and why simply running collective (international) security through bodies like the UN Security Council should be invariably viewed as a legitimating exercise by all states. One aspect our time may share with Lingelbach’s is a lingering sense of real tension between state practice and doctrinal constructs. There may be some fondness, perhaps, for the supposed promise of an institutional approach of the international community, as opposed to the cacophony of unilateral approaches of individual nations, but those also may not work out well. The question is why, and my own view is that it reflects in large part a perceived continuation of the great power dynamic within the institutional approach. This similarity is documented by smaller states’ consistent position over time asserting their interests in terms of Lingelbach’s “deductions.”

Their apparent fear was, absent some principled bulwark, major states would hide their intentions in interventions claimed to reflect broader principles, but motivated in fact more by political interest calculations. This is presumably visible in Russian claims about US or Western regime change goals constituting the hidden curriculum for recent initiatives in Libya, now affecting its positions in Syria. Meanwhile, the US lays claim to a goal of democratizing the Middle East, but in many if not most Islamic countries US Middle Eastern engagement is perceived as pursued in its national interests, despite genuflecting towards democracy . To that extent, things arguably have not changed that much from Lingelbach’s world at a certain level, except now we speak of action in the UN Security Council in lieu of the Concert of Europe (in fact, concerted action among permanent members of the Security Council, since rotating members may influence, but very rarely overcome prior arrangement among permanent members).

The underlying assumption is that political self-interest motivates major state actions; meanwhile, their interventions in the affairs of smaller states were legally justified as a formal matter by some broader principle. We still face the problem of whether state practice or the “deductions” are a surer guide to international law, except now we are also stretching intellectual boundaries in moving the supposed focus from state level concepts like traditional national security (e.g., interstate armed conflict) to newer ideas like human security focused more upon threats to the individual (AIDs, hunger, etc.), non-state actors, or at least people in human rights terms rather than political entities or states as under traditional international law approaches.[[37]](#footnote-37)

*Intervention and Legitimacy: The Local View*

While recourse might be had to the entire apparatus of UN Security Council Chapter VII resolutions to justify interventions like drone usage, the evidence seems to be that most use will remain a unilateral exercise, presumably to be evaluated both as an intervention and, where appropriate, under armed conflict law rules (in the alternative under consent or presumably the *Caroline* analysis in the non-consensual setting). That leaves us, however, with the legitimacy problem.

The hidden aspect may be the extent to which in the non-Western setting just associating actions with the UN or humanitarian efforts more generally in a procedural sense does not automatically convey legitimacy in local eyes. That is a message that should have been conveyed presumably by the 2003 bombing of the UN Mission in Iraq killing 23 mission staff members, including the Secretary-General's Special Representative in Iraq Sergio Vieira de Mello, and is implicit in what seems to be the increasing targeting of humanitarian personnel generally in conflict areas. But judging by available scholarship, most Westerners do not even ask questions about what may be perceived as legitimate on a local basis, unless perhaps forced to by the question whether actions considered “legal” in terms of armed conflict law are perceived as illegitimate on a local level. To the extent the question arises, it seems to be viewed as a cultural sensitivity exercise. But specifically in conjunction with the drone question, if one talks with Pakistanis based upon an unscientific survey the view is common that drone attacks do indeed produce more terrorists than they kill, because of collateral recruiting effects.

Is there a way out of this potential dead-end view of legitimacy, that local standards, for example in Pakistan currently, but equally I suspect throughout much of the Islamic world, are simply different than Western philosophical or political views which set special store in multilateralism and the analytical exercise of determining legality? There is arguably a current wholesale response, which is the devolution of peacekeeping and similar armed conflict involvement at least to the regional level, as well as a retail response, considering a practical response in the military in Middle Eastern deployments which may involve chaplains serving in an active capacity as adviser/negotiator for local unit commanders in dealing with local, village level religious leadership. But I would like to offer at the scholarly level another possibility derived from legal development or rule of law work, where the implicit question is the extent to which the hidden framework of beliefs and assumptions accompanying law is actually transferred.

In legal development circles, I would call this the “chicken and egg” problem focused on instrumental views of the law. Legal change is embedded in modernization, but can law be employed to shape behavior as a form of social engineering, or must social behavior change first, relegating legal change to follow as a form of ratification or reinforcement of changed behavior?[[38]](#footnote-38) “Legitimacy” implies social acceptance, so we optimistically assume shared views ex ante. Rather than going through the sociological details, I would rather offer a minimalist sketch as basis for discussion purposes.

In terms of the chicken and egg problem, the insights stem largely from a legal ethnographic treatment of the problem of legal change in women’s inheritance rights on a particular Indonesian island (Lombok, lying next to Bali) tracing the overlap of customary, shari’ah and secular national law,[[39]](#footnote-39) compared more with investigations of modern Indonesian society’s treatment of their interplay.[[40]](#footnote-40) The evidence, perhaps unsurprising to those familiar with cultural or institutional explanations of behavior, is that the “mental map” in legitimacy involves choice among multiple, sometimes conflicting legal sources, which infers there is arguably more than one appropriate choice in legitimacy terms.

Americans suffer somewhat, also in the international law area, from what I would term a legality or rule of law fetish that I suspect carries over into the drone discussion. On an abstract level, it seems unlikely that a “procedural” approach to legitimacy will work. By that I mean simply asserting that something is done under the auspices of a multilateral measure such as pursuant to Article VII authority under a UN Security Council resolution, or more generally by analyzing the legality of a measure under armed conflict law in the case of an unilateral measure. The mental map itself can be changed, but first we presumably must be clear on what we ourselves think the mental map is for our own purposes. The problem may not lie so much in absolutely convincing one single person, but more broadly making the case to the locals in their own terms of reasonable justifications in their foreign society. That, however, requires a more careful ear than seems to be the case surrounding the current use of drones, and in practical terms presumably entails a much more sparing use.

1. W.E. Lingelbach, “The Doctrine and Practice of Intervention in Europe,” *Annals of the American Academy of Political and Social Science* (July 1900), 1-2. Lingelbach’s perplexity contemplating skewed aspects of then contemporaneous doctrine and precedent has been confirmed by modern scholars. See Higgins, “International Law and Civil Conflict,” in *The International Regulation of Civil Wars* 169 (Evan Luard ed. London: Thames and Hudson, 1972). [↑](#footnote-ref-1)
2. There is an argument that “democracy” in the international law setting was born thereafter in the self-determination concept articulated in the 1919 Paris Peace Conference to address problems of multiethnic empire, but it bears noting that multi-ethnicity had a hand arguably in starting the war too. [↑](#footnote-ref-2)
3. And the minorities problem in terms of self-determination is still with us, albeit in more refined form particularly since the Helsinki Accords in looking at internal and external self-determination, as witnessed most recently by events in Kosovo. Compare [↑](#footnote-ref-3)
4. See Franck, “The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium,” 100 American Journal of International Law 88-106 (2006); Franck, “The Emerging Right to Democratic Governance,” 86 American Journal of International Law 46-91 (1992); Franck, “Legitimacy in the International System,” 82 American Journal of International Law 705-59 (1988). The early 1990s was also the era of political scientist Francis Fukuyama’s “end of history” thesis concerning liberal democracy and what is viewed as triumphalism generally following the end of the Cold War. Franck the lawyer’s specific thesis may be viewed as representative for a broader school of views. In the interim such views have peaked and begun to recede under criticism among lawyers, compare Marks, “What has Become of the Emerging Right to Democratic Governance?” 22 European Journal of International Law 507-24 (2011) and Jean d’Aspremont, “The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks,” 22 European Journal of International Law 549-70 (2011) with Miller, “Self-Determination in International Law and the Demise of Democracy?” 41 Columbia Journal of Transnational Law 601-48 and implicitly also democracy scholars, see Duedney and Ikenberry, Democratic Internationalism: An American Grand Strategy for a Post-exceptionalist Era (Council of Foreign Relations International Institutions and Global Governance Program Working Paper Nov. 2012), accessible at http://www.cfr.org/united-states/democratic-internationalism-american-grand-strategy-post-exceptionalist-era/p29417. [↑](#footnote-ref-4)
5. The problem may be in the concept of “progressive” itself, which tends in the West towards a vision of a liberal, secular government, while in the Islamic world the focus is rather on competing strains within what might be best termed the Islamic discourse concerning modernity. So the West tends to criticize attitudes if not the treatment of women, meanwhile the Islamic world is quietly criticizing back the treatment of the poor and ultimately the complex social justice issue. The problem has been noted that, as democratic governments have proliferated also in non-Western states, the old views simply laying a claim to American exceptionalism no longer have the same force. Se Duedney and Ikenberry, Democratic Internationalism: An American Grand Strategy for a Post-exceptionalist Era (Council of Foreign Relations International Institutions and Global Governance Program Working Paper Nov. 2012), accessible at http://www.cfr.org/united-states/democratic-internationalism-american-grand-strategy-post-exceptionalist-era/p29417. [↑](#footnote-ref-5)
6. E.g., Halabi, “Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context,” 27 American University International law Review 321, 331-34 (2012). [↑](#footnote-ref-6)
7. See Lauterpacht, Recognition in International Law 176-78 (Cambridge: Cambridge University Press, 1947). [↑](#footnote-ref-7)
8. The whole traditional law of neutrality, including the seizure of neutral cargos versus ships, and the problems of letters of marque and blockades, presented a classic institutional problem for the third party states. Particularly following the 1856 Declaration of Paris, a joint undertaking of the major powers, one possibility is to treat the fourth element as presenting an economic interest of third party states (arguably the private property problem of adjudicating the sale of prizes). The other is to regard it instead as presenting the institutional interest of the community of third party states in dealing generally with the combatants in terms of controlling the presumed disturbance of the broader international community presented by their struggles. The question in present day terms might be stated in terms of how to distinguish and reconcile the Libya situation, alongside approaches to the on-going events in Syria? We shall return to the matter, but succinctly, is the problem that commercial dollars must be associated with the third party states as underlying justification (e.g., who controls Libyan oil exploitation?), or whether addressing institutional meaning is enough generally (e.g., the UN and particularly using the Security Council system to address whatever issues)? [↑](#footnote-ref-8)
9. This chronology is largely condensed from Halabi. [↑](#footnote-ref-9)
10. This state practice-oriented description of Libyan events largely draws upon Talmon, “Recognition of the Libyan National Transitional Council,” 15 ASIL Insights Issue 16 (June 16, 2001), http://www.asil.org/pdfs/insights/insight110616.pdf. [↑](#footnote-ref-10)
11. Subject, of course, to the enforceability of concessions granted by a de facto government as in the Tinoco arbitration. [↑](#footnote-ref-11)
12. The case might appear to be somewhat different in the case of a prior UN Security Council Resolution under Chapter VII (maintaining international peace), since a state adhering to whatever program of the Security Council authorizes in dealing with the state in turmoil presumably acts under Security Council authority, insulated against interference claims so long as the UN Security Council itself does not exceed its powers, which problem we discuss subsequently. In practice, however, the difference between the Libyan and Syrian situations is presented by the idea that China and Russia as permanent members of the Security Council went along with Security Council actions in Libya, but have to date resisted broader Security Council authorizations for Syria (allegedly because of their view that the purpose of the same in Syria would simply be regime change, rather than preserving international piece). [↑](#footnote-ref-12)
13. See Talmon, “Recognition of the Libyan National Transitional Council,” 15 ASIL Insights (issue 16, June 16, 2011) [↑](#footnote-ref-13)
14. Talmon,“Recognition of the Libyan National Transitional Council,” 15 ASIL Insights (Issue 16, June 16, 2011). [↑](#footnote-ref-14)
15. See C.J. Chivers and Eric Schmitt, “Arms Airlift to Syria Rebels Expands, With C.I.A. Aid: Lethal Assistance Reaches Assad’s Foes on Jordanian, Saudi and Qatari Planes,” *New York Times*, A1 (March 25, 2013). [↑](#footnote-ref-15)
16. See Jill Dougherty, “Obama recognizes Syrian opposition coalition,” CNN website, [↑](#footnote-ref-16)
17. See Anne Barnard and Hala Droubi, “Syrian Opposition Leader Quits His Post,” *New York Times* A11 (March 25, 2013). [↑](#footnote-ref-17)
18. See Michael Gordon and Tim Arango, “In ‘Spirited’ Talks, Kerry Tells Iraq to Help Stop Arms Shipments to Syria,” *New York Times* A11 (March 25, 2013) [↑](#footnote-ref-18)
19. Compare Hala Droubi and Rick Gladstone, “Syrian Opposition Joins Meeting of Arab League,” *New York Times* A3 (March 27, 2013) with Sam Dagher and Rima Abushakra, “Syrian Rebels Get Arab Nod,” *Wall Street Journal* A13 (March 27, 2013). [↑](#footnote-ref-19)
20. Eagleton? The rationale was presumably to allow citizens of a state were the legitimate government is contested to make an undisturbed choice of their own government. [↑](#footnote-ref-20)
21. Properly speaking, the position would be that only insignificant conflicts, or otherwise conflicts in which major states had no real interest could be consigned to the UN Security Council, which is a description effectively of how the UN peacekeeper system originated. [↑](#footnote-ref-21)
22. As a technical matter, contemporaneous interpretive disputes concerning the use of force stretched beyond UN Charter Article 51. The textual case initially made on the US side for humanitarian intervention involved an interpretation of Article 2(4)’s ban on the use of armed force in violation of the Charter scheme based upon a claim that armed force used in furtherance of human rights was in support of the Charter scheme, hence permissible. [↑](#footnote-ref-22)
23. See Linnan, Self-Defense, Necessity and U.N. Collective Security: United States and Other Views, 1 Duke J. Comparative & Int'l L. 57-123 (1991). This worked its way down in the armed conflict and intervention sphere to some doubtful legal claims in justification of US interventions in the late Cold War period (for example, 1989 Operation Just Cause, or the invasion of Panama, clearly reflected more political interests than legal principles since it would be hard to make an argument that Panama under any circumstances presented an existential threat to the US). The official US justification for the invasion was articulated by President George H. W. Bush on the morning of December 20, 1989, a few hours after the start of the operation. Bush listed four reasons for the invasion. First, safeguarding the lives of US citizens in Panama. In his statement, Bush claimed that Noriega had declared that a state of war existed between the U.S. and Panama and that he threatened the lives of the approximately 35,000 U.S. citizens living there. There had been numerous clashes between U.S. and Panamanian forces; one U.S. Marine had been killed a few days earlier. Second, defending democracy and human rights in Panama. Third, combating drug trafficking. Panama had become a center for drug money laundering and a transit point for drug trafficking to the U.S. and Europe. Fourth, protecting the integrity of the Torrijos–Carter Treaties. Members of Congress and others in the U.S. political establishment claimed that Noriega threatened the neutrality of the Panama Canal and that the U.S. had the right under the treaties to intervene militarily to protect the canal. See *New York Times,* 21 December 1989, "A Transcript of President Bush's Address on the Decision to Use Force." There was also an apparent attempt after the fact to justify the invasion in terms of the US intervention having been invited by President Guillermo Endara whose election had been annulled by Noriega. The problem was that the apparent invitation was extended after the invasion and following Endara’s installation as Panamanian president by US forces. [↑](#footnote-ref-23)
24. The practical aspect is that the European Community had established the so-called Badinter Commission to look at the state recognition question, but then Germany decided for its own reasons to proceed with recognition before the Badinter Commission finished its inquiry, and in the face of some opposition from other EC member countries. [↑](#footnote-ref-24)
25. See “European Ties: Recognizing Slovenia, Croatia brought peace, Genscher said,” June 25, 2011, http://www.dw.de/recognizing-slovenia-croatia-brought-peace-genscher-says/a-15182463. [↑](#footnote-ref-25)
26. Compare Vidmar, “International Legal Response to Kosovo’s Declaration of Independence,” 42 Vanderbilt Journal of Transnational Law 779 (2009). [↑](#footnote-ref-26)
27. See Simma, “NATO, the UN and the Use of Force: Legal Aspects,” 10 European Journal of International Law 1, 5-6 (1999); Cassesse, “Ex Iniuria ius oritur: Are We Moving towards International Legitimation of Forcible H umanitarian Countermeasures In the World Community?” 10 European Journal of International Law 23 (1999). Simma’s rejection of unilateral humanitarian intervention seems absolute, and in the tradition of most non-American scholars opposing it, while Cassesse seemed to edge towards what then became the so-called duty to save. Others have treated the whole humanitarian intervention question as involving a conflict of values in terms of sovereignty versus human rights, which we note elsewhere. See Rodley and Cali, “Kosovo Revisited: Huamnitarian Intervention on the Fault Lines of International Law,” 7 Human Rights Law Review 275 (2007). [↑](#footnote-ref-27)
28. See Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf>. The whole enterprise of R2P report, as it has come to be called, reminds of nothing so much as the Brundtland Commission and related report of the late 1980s, which created the sustainable development concept. In that sense, it seems more a political than legal exercise. [↑](#footnote-ref-28)
29. See Gareth Evans, “From Humanitarian Intervention to the Responsibility to Protect,” 24 Wisconsin International Law Journal 703 (2006). [↑](#footnote-ref-29)
30. E.g., Dillon, “Yes, No, Mayb e: Why no Clear “Right” of the Ultra-Vulnerable to Protection Viua Huamniotarian intervention,” 20 Michigan State International law Review 1979 (2012); Kahler, “Legitimacy, humanitarian intervention, and international institutions,” 10 Politics, Philosophy & Economics 20 (2011); Macfarlane, Thielking & Weiss, “*The Responsibility to Protect*: is anyone interested in humanitarian intervention?” 25 Third World Quarterly 977 (2004); Weiss, “The Sunset of Humanitarian Intervention? The Responsibility to Protect in a Unipolar Era,” 35 Security Dialogue 135 (2004) [↑](#footnote-ref-30)
31. See Linnan, *“*Self-Defense, Necessity and U.N. Collective Security: United States and Other Views*,”* 1 Duke J. Comparative & International Law 57 (1991) [↑](#footnote-ref-31)
32. In international relations, this was articulated as the idea of relational sovereignty. See Stacy, Humanitarian Intervention and Relational Sovereignty,” Stanford Journal of International Relations (2006), available at <http://www.stanford.edu/group/sjir/7.1.06_stacy.html>. [↑](#footnote-ref-32)
33. Findley, “Can R2P Survive Libya and Syria?, Strategic Studies Working Group Papers (2011), available at <http://www.opencanada.org/wp-content/uploads/2011/11/SSWG-Paper-Martha-Hall-Findlay-November-2011.pdf>. [↑](#footnote-ref-33)
34. See World Summit Outcome Report A/RES/60/1 (October 24, 2005), avaiulable at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760..pdf?OpenElement>;UN Report of the Secretary General, In Larger Freedom. Towards Development, Security and Human Rights for all A/59/2005/Add.3 (May 26, 2005, available at <http://unrol.org/files/A.59.2005.Add.3%5B1%5D.pdf>. [↑](#footnote-ref-34)
35. Chesterman, The UN Security Council and the Rule of Law, NYU Public Law & Legal Theory Research Paper Series Working Paper No. 08-57 (November 2008), available at strikes a similar note, perhaps on account of its origin as UN product. [↑](#footnote-ref-35)
36. E.g., Yueksel, “Operation *Unified Protector* and Huamnitarian Intervention with Security Counsel Authorization: Intra Vires?” 9 Anakara Law Review 53 (2012); Schott, “Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency,” 6 Northwestern Journal of Internationasl Human Rights 24 (2007); Kirgis, “The Security Council’s First Fifdty Years,” 89 American Journal of International Law 506, 537-38 (1995). [↑](#footnote-ref-36)
37. The doctrinal problem is that, even as we accept the that armed conflict treaty law has been extended to intrastate armed conflicts as customary law under IHL analysis, armed conflict law analysis remains ill-suited as general approach to human security problems. [↑](#footnote-ref-37)
38. See Linnan, ed., Legitimacy, Legal Development and Change: Law and Modernization Reconsidered 1-2 (Farnham, Surrey: Ashgate, 2012). [↑](#footnote-ref-38)
39. See Rajagukguk,“Legal Pluralism and the Three-Cornered Case Study of Women’s Inheritance Rights Changing in Lombok,” id. at 213. [↑](#footnote-ref-39)
40. Compare Bush, “Islam and Constitutionalism in Indonesia,” id. at 173, with Suryakusuma, From Both Sides Now: *Shari’ah* Morality, “Pornography” and Women in Indonesia,” id. at 193. [↑](#footnote-ref-40)