Syrian boys, whose family fled their home in Idlib, walk to their tent, at a camp for displaced Syrians, in the village of Atmeh, Syria, Monday, Dec. 10, 2012.

The Limits of Sovereignty

The Case of Mass Atrocity Crimes[1]

BY GARETH EVANS

Sovereignty is like one of those lead-weighted dolls you can never get to lie down. One might have thought that multiple changes in the global and regional landscape had worked in the modern age to limit the salience of the concept. States' *economic* freedom of action has been limited by enormous economic and financial interdependence. Their *legal* freedom of action has been limited by multiple developments in international law, especially international humanitarian and human rights law. And their *political* freedom of action has been inhibited to at least some extent by peer-group pressure to address multiple global-public-goods and global-commons-protection issues. Many of these can only be tackled effectively by cooperative action, involving some subjugation of traditionally defined national economic and security interests to the larger regional or global interests. But, for all that, sovereignty talk, and its close cousin nationalist talk, are alive and well in the Asia Pacific, no less than everywhere else in the world, and maybe even a little more so.

In Myanmar recently I received a volley on the subject from President Thein Sein, who was kind enough to receive me in his palace in Nay Pyi Daw. When I asked him why his country's march toward democracy could not now take in its stride the candidacy of Daw Aung San Suu Kyi, I was told that every country's constitutional rules were its own sovereign business, and reminded that the U.S. Constitution did not allow Henry Kissinger to run for President because of his (if not his family's) foreign birth. When I responded that there did not seem to be evidence that anyone in the U.S. ever actually *wanted* to vote for Kissinger as President, he did not seem amused.

My conversations with other regional officials in recent years have left me in no doubt that other countries in South East Asia are no closer than they have ever been to submerging their distinctive national identities in a common ASEAN identity, any more than their counterparts in Europe give greater weight to their EU identity than their own individual sovereign-state identities.

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Panorama of Photos of Genocide Victims - Genocide Memorial Center - Kigali – Rwanda

That doesn't diminish the historical importance of either ASEAN or the EU as conflict prevention and economic cooperation mechanisms, but it means that a great deal of room for individual freedom of action is both demanded and enjoyed.

India's decision in July 2014 to single-handedly block a major WTO trade facilitation agreement for domestic "food security" reasons was a major reversion to inward-looking policy, as was China's very recent decision to impose tariffs on coal imports. In both India and China, as well as in Japan, we now have charismatic nationalist leaders – in Modi, Xi Jinping, and Abe – who each tend to use similar national revival rhetoric to spur economic and social reform.

In none of these cases has national sovereignty chest-beating gone quite as far as in Vladimir Putin's Russia, with all its unhappy consequences for Ukraine, but there is a real risk of border disputes between China and its two big neighbours escalating out of control. As Gideon Rachman put it in an article in the *Financial Times* last year, "If we live in a borderless world, somebody seems to have forgotten to tell the Chinese, Japanese and Indians, who sometimes seem obsessed by the demarcation of their territory."[2]

The reality is that sovereignty continues to have powerful traction both psychologically, and in the institutional management of global and regional affairs. Both these points were clearly acknowledged in the report of the International Commission on Intervention and State Sovereignty (ICISS),[3] which I co-chaired in 2001. As to its psychological role we said:

> *…sovereignty is more than just a functional principle of international relations. For many states and peoples, it is also a recognition of their equal worth and dignity, a protection of their unique identities and their national freedom, and an affirmation of their right to shape and determine their own destiny.*

And as to its institutional role, we said this:

> *…effective and legitimate states remain the best way to ensure that the benefits of the internationalization of trade, investment, technology and communication will be equitably shared…And in security terms, a cohesive and peaceful international system is far more likely to be achieved through the cooperation of effective states, confident of their place in the world, than in an environment of fragile, collapsed, fragmenting or generally chaotic state entities.*

But for all its important continuing roles, sovereignty does have its limits. The context in which those limits have been most intensely

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debated in recent decades has been human rights violations, and in particular the most extreme and troubling of them, namely mass atrocity crimes involving genocide, ethnic cleansing, other crimes against humanity or large-scale war crimes committed behind sovereign state walls – and the doctrine developed in response, "the responsibility to protect" (R2P). It may be a stretch to describe, as the British historian Martin Gilbert has done, the emergence and evolution of R2P as "the most significant adjustment to sovereignty in 360 years," but it is certainly a fascinating case study of both the reach and the constraints upon sovereignty in the contemporary world.

It may be going too far to suggest, as I confess I often have, that under the Westphalian system, when it came to internal human rights violations, states had so much respect for the principle of non-intervention in each other's affairs, and so little a sense of any limits to their authority, that sovereignty was effectively a "license to kill." Luke Glanville, in his recently published book *Sovereignty & the Responsibility to Protect: A New History*[4] has argued at length that there have always been certain limits to the reach of sovereign states' power when it came to the treatment of their own populations, with a degree of accountability always evident to God, the people, or the international community, or all three.

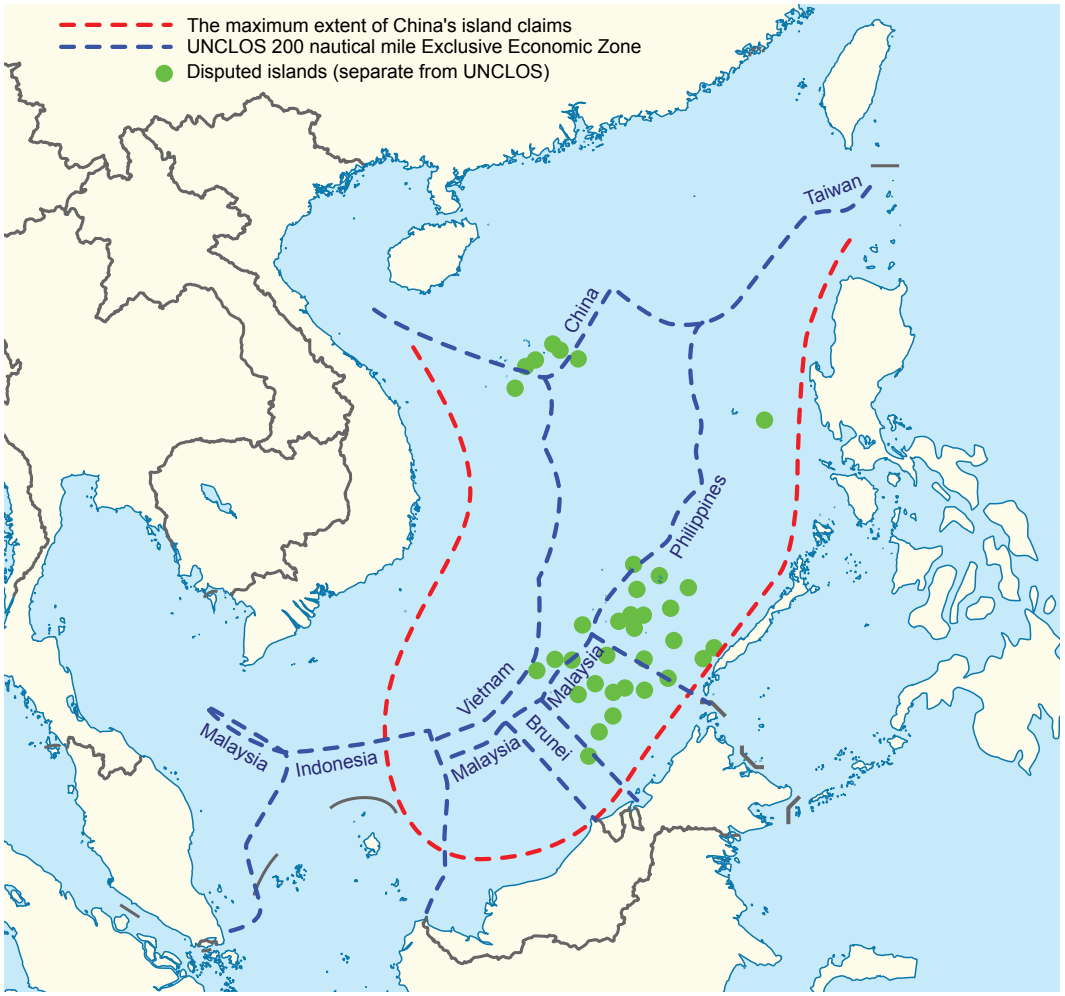
Certainly in the aftermath of Hitler's Holocaust many more formal constraints on state power in this context came into play, with the recognition of individual and group human rights in the UN Charter and, more grandly, in the Universal Declaration of Human Rights; the recognition by the Nuremberg Tribunal Charter in 1945 of the concept of "crimes against humanity;" the signing of the Genocide Convention in 1948; and the new Geneva Conventions of 1949.

But none of these treaty constraints seemed to make much difference when it came to states' willingness in subsequent years to perpetrate mass atrocity crimes, and the wider international community's willingness to treat these gross human rights violations as none of their business, as for example in Cambodia, Tanzania, and East Pakistan. The overwhelming preoccupation of those who founded the UN was not, in fact, human rights, but the problem of states waging aggressive war against each other. What actually captured the mood of the time, and the mood that prevailed right through the Cold War years, was, more than any of the human-rights provisions, Article 2.7 of the UN Charter: "Nothing… shall authorize [intervention] in matters which are essentially within the domestic jurisdiction of any State."

The issue did come to center stage in the 1990s when, following the break-up of various Cold War state structures, conscience-shocking situations repeatedly arose, above all in the former Yugoslavia and in Africa. But no

consensus at all could be reached between those in the global North who rallied to the flag of "humanitarian intervention" or the "right to intervene," and those in the global South who were determined to defend the traditional prerogatives of state sovereignty as they saw them. Overwhelmingly, the many new states born out of decolonisation were intensely proud of their new-won sovereignty, very conscious of their fragility, all too conscious of the way in which they had been on the receiving end of not very benign interventions from the imperial and colonial powers in the past, and not at all keen to acknowledge the right of such powers to intervene again, whatever the circumstances.

This was the environment that drove UN Secretary-General Kofi Annan to make his despairing and heartfelt plea to the General Assembly in his 2000 *Millennium Report:*



The South China Sea contains numerous contested archipelagos over which several states stake conflicting claims of territorial sovereignty, often with varying interpretations of historical events, international treaties, and fishing rights.

> *If humanitarian intervention is indeed an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?*[5]

It was in response to this challenge that the Canadian Government appointed the International Commission on Intervention and State Sovereignty (ICISS) to which I have referred, with me as co-chair, whose 2001 report conceived the idea of "the responsibility to protect" as a potential circuit breaker. After a difficult four-year gestation – but, in the context of the history of ideas, still representing a remarkably swift take-up – the core themes of our Commission report were unanimously endorsed at the 2005 World Summit by more than 150 heads of state and government sitting as the UN General Assembly on its 60th anniversary. The new doctrine that was thus endorsed changed the course of the international debate in three main ways.

The first innovation was presentational: re-characterising "the right to intervene" as "the responsibility to protect," and in the process restating the issue as not being about the "right" of any states, particularly large and powerful ones, to throw their weight around militarily, but rather the "responsibility" of all states to act to protect their own and other peoples at risk of suffering from mass atrocity crimes.

The second innovation was to broaden the range of actors in the frame. Whereas "the right to intervene" focused just on international actors able and willing to apply military force, the new R2P formulation spread the responsibility. It started by recognising and insisting upon the responsibility of each sovereign state itself to protect its people from harm; moved from there to the responsibility of other states to assist them if they were having difficulty and were willing to be assisted; and only then – if a state was manifestly failing, as a result of either incapacity or ill-will, to protect its own people – shifted to the responsibility of the wider international community to respond more robustly.

The third innovation was to dramatically broaden the range of responses. Whereas humanitarian intervention focused one-dimensionally on military reaction, R2P involved multiple elements in the response continuum: preventive action, both long and short term; reaction when prevention fails; and post-crisis rebuilding aimed again at prevention, this time of recurrence of the harm in question. The "reaction" element, moreover, was itself a nuanced continuum, beginning with persuasion, moving from there to non-military forms of coercion of varying degrees of intensity (like sanctions, or threat of international criminal prosecution), and only as an absolute last resort recognizing the legitimacy of coercive military force, provided this was consistent with the UN Charter.

There was a fourth innovation of the Commission, which has not yet been adopted formally by any UN body but which nonetheless has become well-embedded in current international discourse. This was to clarify the prudential principles which should govern that last, hard choice. Five criteria were identified as together determining when it might be right to fight: seriousness of the harm being threatened (which would need to involve large scale loss of life or ethnic cleansing to prima facie justify something as extreme as military action); the motivation or primary purpose of the proposed military action; whether there

were reasonably available peaceful alternatives; the proportionality of the response; and the balance of consequences (whether more good than harm would be done by the intervention).

With the 2005 UN General Assembly resolution, R2P was finally, officially, born. The world seemed well on its way, at last, to seeing the end, once and for all, of mass atrocity crimes: the murder, torture, rape, starvation, expulsion, destruction of property and life opportunities of others for no other reason than their race, ethnicity, religion, nationality, class, or ideology. But words on UN paper are one thing, implementation something else. There were political rearguard actions to fight off, conceptual challenges to resolve, and practical institutional changes to make, and all this took time. It took three more years of often-tortured argument about R2P's scope and limits before the new norm first showed its bite in 2008 in Kenya, and another three before it seemed to have finally come of age with its application by the UN Security Council in the critical cases of Côte d'Ivoire and Libya in 2011.

The best demonstration to date of R2P at work in precisely the way intended (at least so far as its reactive dimension was concerned) has undoubtedly been the UN Security Council's Resolution 1973 of 17 March 2011 on Libya, specifically invoking R2P, which, by majority vote with no veto or other dissenting voices, explicitly authorised "all necessary measures," that is military intervention by member states, "to protect civilians and civilian populated areas under threat of attack." Acting under this authorisation, NATO-led forces took immediate action, and the massacre of tens of thousands of civilians feared imminent in Benghazi did not eventuate. If the Security Council had acted equally decisively and robustly in the 1990s, the 8,000 murdered in Srebrenica, and 800,000 in Rwanda might still be alive today.

The unhappy reality since mid-2011, however, is that this Security Council consensus has not been sustained. As subsequent weeks and months wore on, the Western-led coercive military intervention – which concluded finally only with the capture of Muammar Gaddafi and comprehensive defeat of his forces in October 2011 – came under fierce attack by the "BRICS" countries (Brazil, Russia, India, China and South Africa) for exceeding its narrow civilian protection mandate, and being content with nothing less than regime change, a criticism which had considerable justification. The U.S., UK, and France (the so-called P3) could have made something of the argument that the mandated civilian protection could, in practice, only have been achieved by completely ousting the regime, but made no serious attempt to persuade their Security Council colleagues at any stage – reigniting the old charge that if ever the P3 was given an inch it would take a mile.

This continuing dispute and all the distrust it engendered had, unfortunately, a major impact on the Security Council's response to Syria, where the one-sided violence by the regime was by mid-2011 manifestly far worse even than that which had triggered the Libyan intervention. In the face of vetoes from Russia and China, and continuing unhappiness by the other BRICS members, the Council found itself for many months unable to agree even on a formal condemnatory statement, let alone more robust measures like sanctions, an arms embargo, or the threat of International Criminal Court prosecution. And, save for a humanitarian access resolution negotiated

largely by Australia, that paralysis very largely continues to this day, with the result that some 200,000 people have lost their lives with still no end in sight to the conflict.

But just as any celebration of the triumph of the R2P principle would have been premature after the Libyan resolutions in early 2011, so too would be despair now about its future. There are three reasons for believing that the whole R2P project, with all its implications for the status of state sovereignty, has not been irreversibly tarnished, and that, even for the hardest cases, Security Council consensus in the future is not unimaginable

The first is that there is effectively universal consensus on the basic R2P principles, and a great deal of work going on in practice to give them operational effect, for example through the development in many states, and intergovernmental organizations, of early warning and response mechanisms. Whatever the difficulties being experienced in the Security Council, the underlying norm is in remarkably good shape in the wider international community. The best evidence of this is in the annual debates on R2P in the General Assembly since 2009, even those occurring in the aftermath of the strong disagreements over Libya.

In these debates, the old sovereignty language, which totally permeated the discourse of the global South in the 1990s, is simply no longer heard in this context. No state is now heard to disagree that every sovereign state has the responsibility, to the best of its ability, to protect its own peoples from genocide, ethnic cleansing, and other major crimes against humanity and war crimes. No state disagrees that others have the responsibility, to the best of their own ability, to assist it to do so. And no state seriously continues to challenge the principle that the wider international community should respond with timely and decisive collective action when a state is manifestly failing to meet its responsibility to protect its own people.

Second, the Security Council itself continues to endorse the R2P principle and use its language. For all the continuing neuralgia about the Libyan intervention and the impact of that in turn on Syria, the Council has, since its March 2011 decisions on Cote d'Ivoire and Libya, endorsed not only nine presidential statements, but nineteen other resolutions directly referring to R2P, including measures to confront the threat of mass atrocities in Yemen, Libya, Mali, Sudan, South Sudan, and the Central African Republic, and resolutions both on the humanitarian response to the situation in Syria and recommitting to the fight against genocide on the 20th anniversary

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The Genocide Museum at Tuol Sleng prison, Phnom Penh, Cambodia.

of Rwanda. There were just four Security Council resolutions prior to Libya using specific R2P language, but there have been nineteen since. While none of these have authorized a Libyan-style military intervention, together they do confirm that the rumours of R2P's death in the Security Council have been greatly exaggerated. The kind of commitment that has been shown to supporting robust peacekeeping operations in Mali and Central African Republic in particular is very different to the kind of indifference which characterized the reaction to Rwanda and so many other cases before it.

Third, for all the division and paralysis over Libya and Syria, it is possible to see the beginning of a new dynamic in the Security Council that would over time enable the consensus that matters most – how to react in the Council on the hardest of cases – to be re-created in the future. The ice was broken in this respect by Brazil in late 2011 with its proposal that the idea be accepted of *supplementing* R2P, not replacing it, with a complementary set of principles and procedures which it has labelled "responsibility while protecting" or "RWP."

There were two core elements of the RWP proposal. First, the kind of prudential criteria to which I have referred should be fully debated and taken into account before the Security Council mandates any use of military force. And second, there should be some kind of enhanced monitoring and review processes which would enable such mandates to be seriously debated by all Council members during their implementation phase, with a view to ensuring, so far as possible, that consensus is maintained throughout the course of an operation.

While the response of the P3 to the Brazilian proposal has so far remained highly skeptical, it has become increasingly clear that if a breakthrough is to be achieved – with unvetoed majorities once again being possible in the Council in support of Chapter VII-based interventions in extreme cases – they are going to have to be more accommodating. There were some intriguing signs late last year (evident in official roundtables held in Beijing – which I attended – and in Moscow) that the two BRICS countries that matter most in this context, because of their veto-wielding powers, China and Russia, may be interested in pursuing these ideas further. Tensions between the major players are too high at the moment – not least between the Western powers and Russia over Ukraine – for early further progress to be possible, but there is a reasonable prospect of movement over the longer term.

There are bound to be acute frustrations and disappointments and occasions for despair along the way, but that should not for a moment lead us to conclude that the whole R2P enterprise has been misconceived. There is effectively universal consensus now about its basic principles – that there are now unequivocal limits to what sovereign states can acceptably do, or allow to be done, to their own populations. The only disagreement is about how those principles are to be applied in the hardest of cases. Given the nature of the issues involved, it is hardly unexpected that such disagreements will continue to arise, and certainly to be assumed that only in the most extreme and exceptional cases will coercive military intervention be authorised by the Security Council.

R2P is going to be a work in progress for some time yet. But it is my genuine belief that no one now really wants to return to the bad old days of Rwanda, Srebrenica, and Kosovo, which would mean going back to either total,

disastrous inaction in the face of mass atrocity crimes, or – alternatively – action being taken to stop them but without the authority of the UN Charter (i.e., with the consent of the state concerned; with legitimate self-defence being invoked; or direct authorisation by the Security Council). And if all that is so, at least in this particular human rights context, then the proper limits to state sovereignty are very much better understood and accepted now than was the case even just two decades ago.

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Notes

[1] This article is based on an address to the Australian National University's Research School of Asia and the Pacific Symposium, Landscapes of Sovereignty in Asia and the Pacific, Canberra, 22 October 2014.

[2] Gideon Rachman, "The Strange Revival of Nationalism in Global Politics," Financial Times, September 22, 2014.

[3] The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December, 2001.

[4] Luke Glanville, Sovereignty and the Responsibility to Protect: A New History, University of Chicago Press, 2014.

[5] Kofi A. Annan, We the Peoples: the Role of the United Nations in the 21st Century, New York, 2000.

Photos

Page 2 photo by Freedom House. Dec 2012. *Syrian boys, whose family fled their home in Idlib, walk to their tent, at a camp for displaced Syrians, in the village of Atmeh, Syria, Monday, Dec. 10, 2012* From https://www.flickr.com/photos/syriafreedom/8309708775 licensed under the Creative Commons **Attribution 2.0 Generic** license. https://creativecommons.org/licenses/by/2.0/ Photo cropped and flipped from original.

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Page 9 photo by Adam Jones http://adamjones.freeservers.com. 2009. *Tuol Sleng - S21 Genocide Museum, Phnom Penh, Cambodia. In the upper-level cellblock, where prisoners were kept in narrow wood-partitioned cubicles.* From http://commons.wikimedia.org/wiki/File:Tuol_Sleng_-_S21_-_Phnom_Penh_-_07.JPG licensed under the Creative Commons **Attribution-ShareAlike 3.0 Unported** license. http://creativecommons.org/licenses/by-sa/3.0/legalcode. Photo reproduced unaltered.