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In this Issue

"My Brother's Keeper?"
Sovereignty's Missing Moral Imperative and the "Responsibility to Protect"*

Ian Townsend Gault and C.G. Bateman†

The Problem

"Am I my brother's keeper?" According to the Old Testament,[1] this was the defiant reply of Cain when asked by God as to the whereabouts of his brother Abel. [2] Through the centuries, if not millennia, it has been an abiding question for humankind. The world's major religions would give an emphatic "Yes" to it, but this has not necessarily translated into mores or norms guiding their adherents and indeed others. When British Prime Minister Neville Chamberlain professed astonishment that his fellow countrymen were preparing to dig trenches in Hyde Park "in the cause of people of whom we know nothing" – he was referring to the Czechs, who were confronting unmistakable Nazi aggression at the time [1938]. And yet within a year, that same Prime Minister declared war on Germany because of Nazi aggression towards yet another people of whom Britons knew nothing, or next to it – the Poles. This was not, however, a humanitarian exercise on behalf of those peoples so much as respecting treaty provisions which required United Kingdom and France to come to the assistance of Poland were it to be invaded.

More recently, the members of the international community and their citizens have been obliged to confront similar "Brother's keeper" questions with depressing regularity. Protecting South Korea from aggression from the North, supported by Beijing. Countless examples in Africa beginning with the bloody road to independence taken by what was the Belgian Congo, starvation in East Africa, the Nigerian Civil War, East Timor under Indonesian occupation,[3] Rwanda, Kosovo, the aftermath of cyclone Nargis in Burma, and the Arab Spring (which, arguably, seems likely to have a happier outcome than the Prague Spring of 1968). All of these examples, and others, raise the same questions. Is it any business of ours what happens in other countries? If there is no spill-over adversely affecting other states, surely the guarantee of non-interference in matters essentially within the domestic

* Aspects of this article were first introduced in C.G. Bateman, "Sovereignty's Missing Moral Imperative," *International Zeitschrift* 8.2 (2012): 30-41.

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[1] "I do not know: am I my brother's keeper?" Genesis 4.9, *Bible: New Revised Standard Version*, eds. Bruce Metzger et al. (National Council of the Churches of Christ in the United States of America, 1989).

[2] Cain knew well enough, having recently murdered his brother, hence "the mark of Cain", "raising Cain", and so on.

[3] Opposition to the Indonesian occupation was more or less universal, and supporters of the Timorese were extremely vocal in a variety of fori, and in the popular media. In the early 1990s, One of us was asked by a young and rising Indonesian diplomat why the West was so concerned with East Timor, and not what was going on in the province of Aceh in northern Sumatra, where the human rights situation was very much worse. The assumption on the part of people like himself was that Western countries were more concerned about the overwhelmingly Catholic Timorese, as opposed to the Muslim Achenese. The response was that the international community accepts that Aceh is an integral part of Indonesia, while East Timor is not. The Indonesian diplomat remained unconvinced.

jurisdiction of the state means precisely what it says.[4] That is to say, a state is sovereign within its land territory, meaning that there is no power superior to it there. The adherents to the strict line on this way of thinking would concede that outsiders have every right to wring their hands in despair, or call on the state to reconsider its actions, but further than that they cannot go. And as for military intervention: out of the question. The alternative view is that states which commit egregious human rights violations against their own people have violated the implicit compact between them: protection in return for loyalty.[5] We are suggesting that physical and material intervention engaged against a state in the face of intrastate human rights violations of a systemic and ongoing nature is not only reason for suggesting that the 'Responsibility to Protect' doctrine[6] is worthy of consideration by the international community of states, but that it should be incumbent upon the rest of the international community to expect a cessation of absuses on a *prima casu* basis and that there needs to be a right enshrined in a convention or other legal instrument that would suspend the sovereign borders of the impugned state and make it incumbent on the international community under the auspices of the United Nations to intervene in whatever way was necessary to arrest the human rights violations being carried out. We here argue that such a concept is central to the conceptual basis of law itself, which itself refers to the ideal of human kind[7] – in groups large or small – that governance of people ought to be fair, transparent, etc., and offer a stabilizing matrix facilitating the complex relations between citizens[8] such that the latter can take ownership of their loyalty to the system because it happens to be in theirs and all others' best interests.

While the notion of R2P is on the table in terms of being considered in cases of human rights abuses by the United Nations, it remains a dead letter unless there comes a strengthening of its legal status before the international community. Similar to what G.R. Dunstan once wrote, our "…hope is that when we recognize a little more clearly the moral imperatives by which, without much explicit or self-conscious use of moral language, we live together, we shall realize more the importance of these imperatives in the life of a community and may indeed wish to strengthen them."[9] So it goes without saying, then, that if we respect the rights and property of a neighbor because we understand ourselves to be part of connected whole who depend on one another's cooperation in order to enjoy life to its fullest, then the wish of many in recent years to see an end to human rights abuses – front and center

[4] The modern iteration of this principle, derived from the spirit of the treaties which comprised the Peace of Westphalia (discussed below), is contained in Article 2(7) of the Charter of the United Nations, June 26 1945, available at http://www.un.org/en/documents/charter/index.shtml. It is important to note that this paragraph specifically exempts duly authorized enforcement measures taken pursuant to Chapter VII of the Charter (e.g. to deal with threats to international peace and security).

[5] The notion that there was a compact between an individual professing loyalty to another in return for protection and its ultimate flowering in the feudal system which permeated Mediaeval Europe. Under it, everyone in the land had an overlord – except for the monarch – to whom they were tied in some form of vassalage and received protection in return. One of the concepts under examination in this paper is the breaking of that compact on the part of the overlord, in this case the state which, far from protecting the citizen who owes it loyalty, is the source of persecution or worse. This raises the question, why should an individual profess loyalty to an entity that is prepared to disregard inherent human rights, including the right to life itself?

[6] Gareth Evans and Mohamed Sahnoun *et al.*, 'The Responsibility to Protect,' *Report of the International Commission on Intervention and State Sovereignty*, December 2001. See also, United Nations General Assembly, *2005 World Summit Outcome* 138-139 (2005): 31-32.

[7] C.G. Bateman, "Law as Referent," *Journal Jurisprudence*, vol. 10: *Jurisprudence Today* (Trinity Term, 2011): 225-270.

[8] We argue, similar to F.H. Hinsley, that sovereignty has essentially to do with a state's ability to facilitate the complex relationships within their own society. I use the phrase 'stabilizing matrix' because it keys in on sovereignty's ultimate marker of genuineness and effectiveness, stability. See F.H. Hinsley, *Sovereignty* (New York: Basic Books, 1966), 233-234.

[9] G.R. Dunstan, *The Artifice of Ethics: The Moorhouse Lectures, 1973* (London: SCM Press, 1974), 5.

the R2P boys – and the idea of strengthening such a concept by making it law is not as much a sui generis response as merely a logical one which follows naturally.

The Response of the United Nations So Far

It has been clear to the international community and scholars for some time that given the tragic outcomes of the atrocities in Rawanda, Bosnia, and Kosovo that there was no such thing as a legal duty that 'sovereign state' A must intervene to protect citizens of 'sovereign state' B when crimes against humanity were committed in state B beyond any measurable threshold. Neither was there any legal duty that sovereign nations in general treat their own citizens with any standard of care. Such legal duties did not exist, and such legal duties still do not exist. In 2001 the report of the *International Commission on Intervention and State Sovereignty* (ICISS) introduced the doctrine of 'Responsibility to Protect' (R2P)[10] which attempted to lay principled and legally-grounded foundations for coming to the aid of an abused state population by other intervening states, military force being assumed as necessary with most situations under this rubric. In the *2005 World Summit Outcome*[11] (2005 WSO), R2P was given official approval by the General Assembly of the United Nations meeting in New York in paragraphs 138 – 140 of that document. The General Assembly basically agreed that as long as human rights abuses or atrocities were taking place, the UN Security Council could approve an intervention using military force to stop these abuses and restore some measure of order. The Security Council *could* approve, but there is nothing in this *Outcome* insisting the Security Council *would*.[12] In the case of the Libyan crisis in 2011, the Security Council did approve; in the case of the Syrian and ISIS crises going on as I write this, they have not. R2P in chapters 138 – 139 of the 2005 WSO is at worst a merely perfunctory mechanism allowing powerful states or groups of states to intervene militarily against states committing crimes against humanity only when the interests of the former coincide with the crimes of the latter; at best, R2P is a big step forward towards insisting on a moral imperative inherent in the idea of both internal and external sovereignty which demands that the citizens of one state are obligated to assist citizens of another state when the latter find themselves unable to control crimes against humanity. In a very real sense, R2P takes us back to the beginning and answers the age-old question in the affirmative, that in fact we *are* 'our brother's keeper.'

Whence Sovereignty?

Exercises in the evaluation or re-evaluation of state sovereignty – too many to count – show an increasing degree of divergence as to how this concept is understood, with Western commentators quite happy to point to the rise of supranational arrangements such as the European Union, the power of multi-national corporations, and all sorts of challenges such as the fact that many states are beholden to others for sources of energy, defense, water, food, and the like, and all this to demonstrate that the idea of a sovereign state is, at least, a fluid concept in international parlance.[13] In countries

[10] Evans and Sahnoun et al., R2P, 2005 WSO, 21-32. .

[11] 2005 World Summit Outcome, September 15, 2002, U.N. Doc. A/60/L.1, available at http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf.

[12] In this context it should be noted that Paragraph 4 of Security Council Resolution 1674 (April 28, 2006) specifically reaffirms that body's commitment to paragraphs 138-130 of the 2005 WSO.

[13] Alan Cranston, *The Sovereignty Revolution*, *The Sovereignty Revolution*, ed. Kim Cranston (Stanford, California: Stanford Law and Politics [Stanford University Press], 2004): 49-70: Alan Cranston sees a dire need for more aspects of nations' sovereignty to be willingly handed over to the United Nations, or other similar body, to ensure the legitimacy and strength of that body to act for the welfare of humanity with true effectiveness. Maryann K. Cusimano, *Beyond Sovereignty: The Rise of Transsovereign Problems. Beyond Sovereignty: Issues for a Global Agenda* (Boston: Beford/St. Martin's, 2000): 1-40: Maryann K. Cusimano points to the rise of what she uniquely calls 'transsovereign' problems, leaving aside the word 'transnational'

which emerged, acquired independence, or otherwise became members of the international community since the foundation of the United Nations, a very different view tends to prevail. This would deprecate attempts to posit anything superior to the power of the state within its territory, including inconvenient rules of international law. The notion that a corporate actor, especially one controlled from another country might pose anything amounting to a threat to the primacy of the state is viewed with particular abhorrence. These countries tend to adopt a broad view of the subject, and many of them with coastlines are attempting to push the boundaries of state power beyond the limits of the 12 nautical mile territorial sea and into the 200 nautical mile limit, which was previously seen as a zone within which states exercised sovereign rights for natural resource exploration and exploitation as well as some other economic activities. It was not, however, "part" of the state, nor subject to its sovereignty *per se*.

The European Union deserves special mention in this context because, according to a 1963 decision of the European Court of Justice, it derives its law-making powers from a "pooling" of the sovereignty of its member states within those areas of competence ascribed to it. It follows, therefore, that the member states have "surrendered" their unilateral legislative powers in those same areas, unless and until there is a Union–wide decision that this power should revert to the member states, or the country decides to leave the Union altogether.[14]

due to its culture-centric aspect. She cites environmental issues, refugees, diseases, drug trafficking, terrorism, nuclear smuggling, and international criminal activities as overcoming traditional ideas about sovereignty. Her basic thrust in the piece is that as democracy and open markets along with privatization move quickly in to sovereign states which have little experience with these realities, etc. Bruce P Frohnen, "A problem of power: the impact of modern sovereignty on the rule of law in comparative and historical perspective," *Transnational Law & Contemporary Problems* 20.3 (Winter 2012): 599-632: In this article the author is essentially arguing against the oftentimes too quick adoption of greater centralized sovereignty in federal systems where the diminution of democracy and distance from the citizens becomes the result with a blind embracing of an all-powerful sovereign body for reasons of expediency or often worse. Harry G. Gelber, *Responses: Structures, Institutions and Decision-making. Sovereignty Through Interdependence* (London: Kluwer Law International, 1997): 73-97: Gelber writes that the institution of the state is more than the sum of its parts and endures despite having both porous borders and giving over parts of its sovereignty to federal or other bodies. While states are not the only influence in global politics, all global politics revolve around states and their internal social facts. Paul W. Kahn, "The question of sovereignty," *Stanford Journal of International Law* Summer (2004): 259-282. Kahn borrows Isaiah Berlin's nomenclature of positive and negative liberty, the freedom *to* and the freedom *from*, respectively. The author claims sovereignty can be looked at in the same way, and that negative sovereignty, a very Christian idea in his estimation, is the right to not be interfered with (boundaries), as was the case with the beginning of the US as a nation. Positive sovereignty came in the revolutions of America and France, and thus there, not Westphalia, according to this author, is where the international system began. Stephen D. Krasner, *Sovereignty and Intervention. Beyond Westphalia?*, *State Sovereignty and International Intervention*, eds. Gene M. Lyons and Michael Mastanduno (Baltimore: The Johns Hopkins University Press, 1995): 228-249: This author sees interventions as a consistent element in the history of European power politics, continuing up to the present. He claims the most powerful motivation for intervention has always been and continues to be connected to state power. Louis W. Pauly & Edgar Grande, *Reconstituting Political Authority: Sovereignty, Effectiveness, and Legitimacy in a Transnational Order*, *Complex Sovereignty: Reconstituting Political Authority in the Twenty-first Century* (Toronto: University of Toronto Press, 2005): 3-21: The authors begin by establishing the fact that since the attacks on September eleventh on the United States by Islamic Terrorists led by Bid Laden, the erstwhile dreams of academics and policy makers of a new era of global governance of peace were gone. And with it any idea that states would continue to give up their sovereignty, in fact, just the opposite. The state is here to stay, at least for the time being.

[14] The European Economic Community was established in 1958. The constituent Treaty (1957) provided for the free movement of goods, persons, the provision of services, and capital. All customs duties, quantitative restrictions and measures having equivalent effect between the members of the union were abolished, and there was a common external tariff against other countries, unless otherwise agreed. The Treaty also established a three powerful institutions: a Council (for ministers), a Commission (with powers to oversee monopolies and mergers, as well as policy development), and a Court: the Parliament was to become more powerful in time. As of 2013, what is now the EU has powers with respect to:

These thoughts are uniquely distressing to those who view the European Union askance, or with outright hostility. The obvious riposte to this is to point out that major areas of interstate activity are covered by international agreements which do not permit any degree of deviance (this is certainly the view from Brussels – the "level playing field" means that rules must be substantially equal for each member state, unless they had been allowed to opt out of a particular policy or provision). Maritime commerce furnishes a ready example of the need for internationally uniform rules, and more so with the legal regime governing the international airline industry. Put simply, it would be unthinkable for each country to have their own set of rules governing matters such as air traffic control. Such an arrangement would be wholly unworkable, not to mention highly dangerous for all concerned. Rules governing international financial transactions would also qualify, as indeed matters having to do with telecommunications and related topics. Viewed this way, the European Union merely takes the notion of the surrender of the right to act unilaterally to new heights, but does not really break wholly new ground.

Any word incorporating the concept of the "sovereign" denotes absolute power which cannot be gainsaid within the boundaries of a polity. Thus, the ruler exercises sovereignty, and it is noteworthy that when the International Law Commission was obliged to come up with a formulation to describe the rights of states with respect to natural resources beyond the limits of the territorial sea,[15] it coined the term "sovereign rights for the purposes of the exploration for and exploitation of" natural resources. The avoidance of the term "sovereignty" was quite deliberate: the Commission did not wish coastal states to claim absolute rights beyond the limits of the territorial sea, which would have amounted to enormous areas of such waters subject to the virtually untrammelled power of that state. This would have spelled disaster for the age-old concept of the freedom of the seas: and yet it was necessary to bring in the "sovereign" aspect to describe the nature of those powers, which meant – and this was amplified in Conventions the Commission went on to draft – such powers were virtually absolute, and did not depend on proclamation, claim or occupation.

Historical "Sovereignties"

> O Enlil, the lord who decides destinies, whose commands cannot be altered, who makes my sovereignty magnificent…
>
> King Hammurabi, *Code of Hammurabi* (18th c. B.C.E.)

Clearly, from this statement of Hammurabi, to have authority and power was something only based on the "decision" of his god. What is interesting is that 3300 years later in 1576, Jean Bodin would say essentially the same thing about sovereignty and his God.

Agriculture and Transport, Agriculture, fisheries and food, Business, Culture, education and sport, Customs and tax, Development and humanitarian aid, Economy and finance, Employment and social affairs, Enlargement of the EU and foreign affairs, Environment and energy, EU institutions, Health, Justice and citizens' rights, Regions and local development, Science and technology, and Transport and travel.

[15] This was with respect to the resources, mostly oil and gas, situated in the subsoil of the Continental shelf. The same formulation was used to describe coastal states rights in the 200 nautical mile exclusive economic zone, which included the living resources of the water column.

> Since there is nothing greater on earth, after God, than sovereign princes, and since they have been established by Him as his lieutenants for commanding other men, we need to be precise about their status (*qualité*) so that we may respect and revere their majesty in complete [212] obedience, and do them honor in our thoughts and in our speech. Contempt for one's sovereign prince is contempt toward God, of whom he is the earthly image. That is why God, speaking to Samuel, from whom the people had demanded a different prince, said 'It is me that they have wronged.'[16]

In other words, from Hammurabi to Hezekiah to Hadrian, and even on past to the Hapsburgs, the only affective benefactor of sovereignty was, at least in theory,[17] the deity. In societies where religion was the fundamental framework of daily life for all classes,[18] rulers, for the sake of legitimacy, had to acknowledge that it was the God or 'the gods' who had bequeathed their sovereignty. In this context sovereignty was never aggregately or individually understood as solely attached to either the will or skill of personages, it came from the deity.

If we move ahead from Hammurabi in time to the period of the Greek philosophers, the implicit inference that might fairly be made about Socrates' teaching (Plato) is that such weighty political power should only be awarded those citizens who kept the best interests of the state as a whole as their *raison d'être*. The all important consideration for this Greek philosopher was capacity. If men and women were the best candidates to lead, they should be compelled to do so. By this reasoning, state sovereignty would only rest in the hands of those disciplined enough to control the power that was concomitant with their rule. Besides bare efficiency, it is clear that Socrates and Plato, as well as Aristotle after them, were aiming their prescriptions so as to cause people to arrive as close to the "good" as they possibly could. Hence, there seems implicit in Socrates' strictures for the capacity to rule, a moral and deeply prescriptive element at its heart. For Socrates, it is not enough that kings or oligarchs, or even citizens, wield the largest share of political power in their states, it is whether that sovereign power is the product of the "good". As to the fountainhead of this notion of "good," like many of the theorists who ended up weighing in on sovereignty after Socrates, he appealed to God.[19] Aristotle, however, took the idea of sovereignty in another direction: a pointedly more demos centered one. He wrote

> [There is] one conclusion above all others. Rightly constituted laws should be [the final] sovereign; but rulers, whether one or many, should be sovereign in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.[20]

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[16] Julian H. Franklin, trans. and ed., *Jean Bodin: On Sovereignty, Four Chapters from the Six Books of the Commonwealth* (Cambridge: Cambridge University Press, 1992), 1.10.211-212, 46.

[17] Theory, meaning, for instance during the Middle Ages, if a king had to justify his rule the pope and bishops would do so on behalf of God. Theory here obviously cannot refer to theories *on* sovereignty, which did not appear until well after the turn of the first millennium.

[18] Augustine, *Concerning The City of God against the Pagans*, trans. Henry Bettenson (London: Penguin, 1984), 4.11, 149-152; see chapter four of *City of God* generally for similar evidences of the role of gods in the lives of Romans. See also, A.D. Lee, *Traditional Religions*, *The Cambridge Companion to the Age of Constantine*, ed. Noel Lenski (New York: Cambridge University Press, 2006); Keith Hopkins, *A World Full of Gods: Pagans, Jews and Christians in the Roman Empire* (London: Weidenfeld & Nicolson, 1999); Michael Lipka, *Roman Gods: A Conceptual Approach* (Leiden: Brill, 2009).

[19] Plato, *The Republic*, trans. Tom Griffith, ed. G.R.F. Ferrari, in *Cambridge Texts in the History of Political Thought*, eds. Raymond Geuss and Quentin Skinner (Cambridge: Cambridge University Press, 2000), 10.597d, 316; 2.379a, 64; 2.379c-379d, 64.

[20] Aristotle, *Politics*, 3.11, 111-112.

One can see with Socrates, Plato, and especially Aristotle, the beginnings of the Rule of Law tradition, which has informed almost every democratic experiment by nation states since.

Around the same time period as the Greeks were flourishing, we find one of the most important sources of the Western cultural tradition in the emergence of Jewish law and the beginning of the process of the collection of what amounted to "constitutional" documents, their scriptures. The idea of individuals with rights and duties appears for perhaps the first time.[21] As it turns out, the word "sovereignty" appears in the Jewish Scriptures only seven times, and only in the books of the prophets Daniel and Micah.[22] The book of Daniel, appearing just after the age of the aforementioned philosophers and just before the Christian era, cites the Aramaic/Chaldean word [23]וְשָׁלְטָנֵהּ which is now translated as "sovereignty" and means "and Dominion of Him" from a passage which reads, in English, "his sovereignty is from generation to generation." The root word is [24]שָׁלַט and is defined as "to rule, have dominion or power over." Essentially what this means is that the Aramaic/Chaldean translator is treating the idea of "dominion over" as meaning what they believe the English word "sovereignty" to mean. There is one necessary caveat here: it is God who is the holder of the sovereignty. If God is the holder and benefactor of this ancient example of "sovereignty," it makes one wonder if it is even reasonable that Western culture feels so comfortable importing, as a quality of secular nation states, what was originally an attribute of God? Are states in any way similar to the extant portrayals of a single all-powerful god? The fact that states rise and fall, inter alia, would seem to challenge this idea.

Nevertheless, it was the seventh century B.C.E. king Josiah (of Judah) and his watershed reforms which brought a nation together based on a single set of writings – a constitution of sorts – which would be the stabilizing and centralizing societal focus going forward.[25] This was further consolidated by the actions of the legal scribe Ezra in the fifth century on the occasion of the return of the people of Israel to Jerusalem following the Babylonian exile.[26] It was nine hundred years later that Constantine and the Christian Church were bringing a similar singular focus to culture and religion – itself based on sacred and singular scriptures – which would be consolidated as law by future Roman emperors within sixty years of the Council of Nicaea. The seventh century Bishop Isidore of Seville notes these accepted truths of his own age in his Book on Law within the larger work of his *Etymologies*.[27] The Jewish Scriptures, although modern translators have only imposed the word sovereignty on the text minimally, were the basis of early Christian religious doctrine and were also the primary source of

[21] See, amongst others, Israel Finkelstein and Neil Asher Silberman, *The Bible unearthed : archaeology's new vision of ancient Israel and the origin of its sacred texts* (New York : Free Press, 2001).

[22] Examples would include Daniel 4.3:
His kingdom is an everlasting kingdom, and his sovereignty is from generation to generation; and Micah 4.8:
And you, O tower of the flock, hill of daughter Zion, to you it shall come, the former dominion shall come, the sovereignty of daughter Jerusalem.

[23] See passage at footnote 10.

[24] D. Davidson, *The Analytical Hebrew and Chaldee Lexicon* (London: Samuel Bagster and Sons Ltd., 1848; 1972), 719.

[25] Finkelstein and Silberman, *The Bible Unearthed*, 2001.

[26] Ibid.

[27] Isidore of Seville, *The Etymologies of Isidore of Seville*, trans. eds. Stephen A. Barney et al. (Cambridge: Cambridge University Press, 2006), V.i, 117. Isidore notes that even though this is true, the laws were mixed and disordered all the same and not until Theodosius Augustus the Younger (401-450) did all these various written laws come together in a single code, the Theodosian Code.

written authority for the young religion until at least the late fourth century.[28] It is in this century that perhaps the most important political confluence in the history of Europe happens, the Roman Empire adopts the Christian Church. The Emperor Constantine's marriage of the Christian Church and Roman State would set a precedent for political authority which was imitated in Europe right up until, at least, the Peace of Westphalia in 1648. In brief, the Christian Church exchanged the sovereignty of God, an idea which they inherited from both the Jewish Religion and Scriptures and Greek culture, for supposed co-regency between the Emperor and God. Here in the fourth century was the beginning – call it Constantinian if you will – of a long period of the transfer of sovereignty from the God of the, then, two monotheisms to the state. Of course the nexus did not play out in Constantine's lifetime as completely as it would in later centuries with Popes like Gregory I, et al.[29] Constantine changed the fact that Christ was exclusively and self-admittedly only interested in participating in the sovereign rule of the Kingdom of God[30] to a Christ who would now vouchsafe the sovereignty of the Roman Empire. For the rest of Europe's history, sovereign rule and power would be something associated with both God and the state, and in time the notion of God would be separated out completely, so that a state could imagine itself as being sovereign: something originally only thought to be under the jurisdiction and control of God.

Ancient cultural records and laws give us only hints of what sovereignty might have meant to them had the term been part of their political nomenclature. First, it seems clear as if some kind of an *id dispono omni* was in their minds: an "it orders all" concept, whether that "it" was God, a King, or a combination of both. Secondly, and quite importantly, was a deep moral prescription, at least in theory, that the execution of sovereign power came with a responsibility to care in a shepherd-like way for those depending on you, [31] an *id custodit omni* of sorts. Here the meaning being to guard, protect, and

[28] The first author has written in detail on this subject in C.G. Bateman, *Origen's Role in the Formation of the New Testament Canon* (August 3, 2010). Available at SSRN: http://ssrn.com/abstract=1653073.

[29] Richards, Jeffrey, *Consul of God: The Life and Times of Gregory the Great* (London: Routledge & Kegan Paul, 1980), 127. R.A. Markus, *Gregory the Great and His World* (Cambridge: Cambridge University Press, 1997), 11. Since the time of Constantine churches had built up extensive land holdings. By the end of the sixth century they were the largest landowners in Italy. In Gregory's time the Roman Church must have been by far the richest. It had long had registers (*polyptycha*) of its lands and of the income it derived from them, which were kept up to date. Its possessions were concentrated in Sicily and in Campania; but the 'patrimony (of St Peter)', as these possessions were collectively known, included lands scattered over Southern Italy (Bruttium-Lucania and Apuia-Calabria), Tuscany, and elsewhere in Italy, Corsica and Sardinia, Dalmatia, Gaul, and North Africa. F.H. Dudden, *Gregory the Great: His Place in History and Thought* (London: Longmans, Green & Co., 1905), i, 296.

[30] Ernest Renan, *The Life of Jesus*, trans. Charles E. Wilbour (The Modern Library Publishers: New York, 1927), 159. To whom should we turn, to whom should we trust to establish the kingdom of God? The mind of Jesus on this point never hesitated. That which is highly esteemed among men, is abomination in the sight of God. The founders of the kingdom of God are the simple. Not the rich, not the learned, not priests; but women, common people, the humble, and the young. The great characteristic of the Messiah is, that "the poor have the gospel preached to them" [Matt. 6:5]. The idyllic and gentle nature of Jesus here resumed the superiority. *A great social revolution, in which rank will be overturned, in which all authority in this world will be humiliated, was his dream* [Emphasis mine]. See also pp. 154-155.

[31] Plato, *Statesman*, trans. J.B. Skemp, *The Collected Dialogues of Plato: Including the Letters*, eds. Edith Hamilton and Huntington Cairns, Bollingen Series 71 (Princeton: Princeton University Press, 1961; 1971), 275.e, 1041. Plato refers here to the ideal statesperson, a single human who is gifted in the art of "concern for" people.Ibid. "Surely 'concern' is available as such a class name; it implies no specific limitation to bodily nurture or to any other specific activity." 275.e, 1041; "…the class name has to be modified from 'nurture' to 'concern.' 276.e, 1042; Tendence of human herds by violent control is the tyrant's art: tendence freely accepted by herds of free bipeds we call statesmanship." 276.e, 1042; In this general section of Statesman, Plato has the Stranger, his protagonist, in an effort to try and convince his interlocutors of what a true statesman should be like, use the analogy of a shepherd who cares for his or her herd.

preserve. It seems clear that what Gareth Evans et al. of the ICISS were aiming at in their R2P doctrine was somewhere very near this kind of moral imperative.

Western Sovereignty

From the Western perspective, it is possible to trace how the concept evolved in such a way as to define the absolute nature of the powers exercised by rulers. Until the time of the Reformation, the medieval concept of kingship held that while a ruler might derive the right to rule by reason of birth, conquest, or at the request of the elite of a given state, his or her position was subject to the veto of the Pope as the Vicar of Christ. In other words, the power of the monarch was conditional on the consent of Rome.

One of the objectives of the Reformation was to modify, if not destroy, Papal ecclesiastical authority: the policies of successive popes had previously managed to encompass this authority both politically and militarily over the course of time. Scholars tend to point to the Peace of Westphalia, 1648, which comprised two treaties and put an end to the Thirty Years war, as marking the beginning of the process which would lead to the development of the modern sovereign state. And if the state was indeed "sovereign," there was no longer automatic recognition of the power of the Papacy to remove a ruler of which he disapproved.

But one of the first cracks in the seamless web binding the allegiance of the subject to the monarch, and through him to the authority of Rome, was a much overlooked plea from the monks of a monastery in Arbroath, Scotland. In 1320, the Abbot of the monastery dispatched a missive to the Pope for papal assistance in securing the release of the King of Scots, then held captive by the English. The document is remarkable because it makes the point that while subjects owe allegiance to the monarch, this is conditional on the behaviour of the latter, and in particular the protection and support he is able to give to his subjects. Absent this, that allegiance can be terminated. This was hardly representative thinking in the 14th century, and indeed would have been regarded as rank treason by most rulers, who regarded themselves as being divinely appointed, and their position not open to challenge by their subjects for any reason whatsoever.[32]

The Declaration was to languish in considerable obscurity for some time. Just over 200 years later, as England was embarking on its breach with Rome by Henry VIII, who would establish himself as the Head of the English Church and had as his chief counsellor, Thomas Cromwell. While drafting the Preamble to the Act of Appeals (1533), Cromwell crafted a most remarkable sentence, beginning: "This island of England is an empire..." As a declaration of independence from any form of external authority, it could not have been bettered.[33]

[32] Reference to…Neil Ascherson

[33] Cromwell has not had a good press until the English novelist Hillary Mantel published the first volume of her trilogy on his life and career, *Wolf Hall* (Fourth Estate/HarperCollins, 2009). More than most authors, Mantel makes it clear that while Henry felt obliged to set aside his Queen, Catherine of Aragon, because his union with her had not produced a son (or one who had survived for more than a few short weeks), this was no trivial act of male vanity on the king's part. He believed in all sincerity that only if he were to be succeeded by another king could a reversion to the civil war which had plagued England for 200 years be avoided, especially given the somewhat shaky claim the Tudors had to the throne. Seen this way, the English Reformation seems to be more dynastic than doctrinal in character. It helps, of course, that Cromwell was able to paint an attractive financial future for his master once monastic properties – and the rents attached thereto – had been seized by the Crown.

Westphalia

It is generally accepted that the foundation for the modern independent sovereign state, a self-governing polity which has [virtually] complete sovereignty within its boundaries, and is therefore not obliged to take account of the wishes of other states, and by the same token prohibits such states from interfering in the internal affairs of any others, was laid in the treaties that comprise the Piece of Westphalia, 1648.[34] As is so often the case, these events have taken on a life of their own. It is far from uncommon to see references to the "Westphalian system," meaning the process whereby modern states conduct their relations. The cynic would say that the notion of the modern state had to have its origins somewhere, and perhaps Westphalia is as good a point of departure as any other. The more balanced view is that, despite what the parties to the treaties making up the Westphalian settlement intended, it is seen as a pivotal point in the political history of, first, Europe, and then of the world. The notion was that the independent self-governing polity called the state can transcend the traditional notion of the nation. But even the latter term has problems, as was demonstrated by Benedict Anderson in his brilliant study, *Imagined Communities*.[35]

For present purposes, the best place to start might be to consider who the parties were to the Peace of Westphalia, and why. To do this, it is necessary to consider what the geopolitical map of Europe looked like in 1648. This was a time when a number of seismic shifts were taking place in Europe. Looking at her contemporary map, we see that large parts of the continent has started to take the shape they have today. England, Scotland, Wales and Ireland are clearly defined. Having said this, it should not be forgotten that England and Wales had been merged [politically] since the 14th century, England had colonized Ireland to all intents and purposes by the end of the 16th century, and England and Scotland had been united by having a common sovereign as of 1603. The death of the childless Queen Elizabeth I led to the accession of the son of her cousin, Mary Queen of Scots. Thus James VI of Scotland now became James I of England. The Union of Crowns was to be followed by the Union of Parliaments by the Act of Union 1707. It is this Anschluss which the Scottish Nationalist Party attempted to overthrow by means of a referendum in 2014.

The political map of the Iberian Peninsula was clear, and the liniments of present-day France more or less so. In Scandinavia, the taking and losing of territory between Denmark, Sweden and Norway was in train, and would be until the early years of the 20th century. The Baltic states appear to have a size and importance not reflected today. One part of the Netherlands seemed to have achieved a degree of independence, but the "Spanish Netherlands", between the purportedly independent territory and France was much more problematic. The Swiss Confederacy had been established, but appeared to be a very minor player on this particular map. The largest question concerned the status of the Holy Roman Empire – the incredibly complex network of principalities, dukedoms and the like, which made up the greater part of modern Germany.

[34] The Peace of Westphalia was comprised as follows: First, the Peace of Münster, concluded by the Dutch Republic and the Kingdom of Spain on January 30, 1648, and ratified at Münster on May 15, 1648. This was followed on October 24, 1648, by the Treaty of Münster (Instrumentum Pacis Monasteriensis, IPM), concluded between the Holy Roman Emperor and France and their respective allies, and the Treaty of Osnabrück (Instrumentum Pacis Osnabrugensis, IPO), between the Holy Roman Emperor, the Empire and Sweden and their respective allies.

[35] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, Revised Edition 1991, London, Verso.

The treaties that comprise the Peace of Westphalia had numerous objectives. First, to put an end to the 30 Years War, and second, the larger conflict, extending over 80 years, whereby the inhabitants of the Low Countries sought independence from the Holy Roman Empire. Various parties to the settlements of 1648 had another urgent requirement – that they be allowed to pursue whatever religion they wished, whether this was determined by their ruler, or in some other way. The point was that other sovereignties which disapproved of this religious choice would no longer have the right to intervene to "persuade" the recalcitrants to change their mind; and indeed, they had the obligation to respect that choice, whether they liked it or not, and whether or not they felt divinely inspired to intervene.

Westphalia was, therefore, a profoundly anti-Imperial project, and one which also rejected the notion of the universality of Christendom. There would no longer be any question of Europe coming under the sway of Rome, unless the component parts of the continent wished to do so. Seen in this way, Westphalia appears to be a profoundly nationalistic project, one which rejected claims to sovereignty based on divine intervention or inspiration. The parallels to the thinking of Thomas Cromwell 100 years previously are striking and inescapable.

This brings the discussion, inescapably, to the consideration of nationalism. In particular, the notion of the "nation-state". Examining this concept from the viewpoint of the second decade of the 21st century C.E. is far from easy. For one thing, the essential difference between the concept of the "nation" and "state" have been blurred, possibly beyond repair. To some, it seems that the former connotes a grouping based largely on ethnic kinship – Thais live in Thailand, Japanese in Japan, English in England, Scott's in Scotland, and so on. The concept of the state, on the other hand, is predominantly political. The United Kingdom of Great Britain and Northern Ireland is a political entity, an independent sovereign state which comprises numerous nationalities and ethnicities. The problem is, for writers such as Anderson, that there are more nationalities and ethnicities than might at first appear, or which might be thought acceptable by some.

These issues arise with even greater force in the context of the political identity of countries such as Canada and the United States of America. The present authors are residents of the former, and hear the terms "nation" and "state" used as if they were absolutely interchangeable. In fact, the former is preferred over the latter. This is presumably because it conveys warm feelings of kinship based on affinity, as opposed to the fact that a certain number of people share a common citizenship and the same passport, but little else. Indeed, the two countries have rather different policies with respect to notions of assimilation. Canada likes the notion of the cultural mosaic – the hyphenated Canadian, where everyone can share equally in festivals such as Diwali , Dragon Boat Racing, and so on. In the United States, the tendency has been, at least until recently, to emphasize assimilation – the melting pot. Both are keen to welcome newcomers to their respective folds. The ethnic, religious and racial background of would be Canadians or Americans is irrelevant, provided always that they will declare allegiance to their "new country" when granted citizenship. Anyone born in Canada or the United States automatically becomes a citizen: they are free to make their choice to embrace that nationality or repudiate it at the age of 18. This is in sharp contrast to the approach in countries such as Thailand and Japan, where citizenship is absolutely impossible unless the demands of ethnicity are satisfied. This is not unlike accepted procedures in "tribal" societies, where the ethnic focus is much narrower. For the ethnic minorities of countries such as Laos, for example, being labelled as "Lao" is not

acceptable, while membership in a minority community depends entirely on parentage, either that of the father, or the mother, or both.

The Westphalian approach would attempt to sidestep this by adopting a broad brush approach to who is a citizen and who is not. Problems arise, of course, when the name of the country advertises a certain ethnic affiliation which some citizens cannot accept. The ethnic minorities in Laos, for example, denying most emphatically that they are "Lao" in any way, shape or form, and of course they are right – ethnically speaking, but not otherwise. If they wish to travel outside the country, they will require a passport identifying themselves as a citizen of the Lao Peoples Democratic Republic. This is the name of the political – Westphalian – unit to which they belong, as identified and accepted by other members of the international community, themselves the product of the "Westphalian System".

Benedict Anderson's problem with this is a certain distrust for the way in which he sees notions of nationality as being artificial constructs – imagined communities. He gives the example of the Olympic Games to illustrate his point. During the 2012 Summer games in London, and we can expect the same phenomenon to be manifested in the winter games in Sochi, Russia in 2014, there were lusty cheers on the part of the inhabitants of, say, the United kingdom for athletes representing "Great Britain". According to Anderson, this sort of allegiance is the product of the "imagined community". Very few of those cheering for "British" athletes knew them, or who they were, or indeed anything about them. The only thing they could recognize was that they all wore a Union Jack on their kit.

Anderson's analysis is largely formed by his experience in Southeast Asia, and in Indonesia in particular. Here we have a perfect sample of a modern Westphalian state. It may happen that a country is subjugated by another, and reduced to colonial status, only to regain its independence in the course of time. This is not the case with Indonesia. There was no "Indonesia" prior to the declaration of independence pronounced by Sukarno at the end of the second world war. By "Indonesia", Sukarno was referring to a collection of mostly Dutch colonies, with one or two Portuguese additions [such as East Timor], but not a viable state which had existed before the colonial period. What Sukarno wanted to do, in which endeavour he was joined by liberation leaders such as Kenyetta in Kenya, Nyrare in Tanzania, Nehru in India, and Jinnah in Pakistan, was to create a modern country from what had been a ragbag of sultanates, principalities, rajahdoms, and the like, just as Bismarck had forged modern Germany from the tail ends of the principalities which formed the Holy Roman Empire by the mid-19th century. This, they thought, was how to move forward: the new states would take their place with the other more established sovereignties. To this end, it did not greatly matter where international boundaries were drawn. The whole point, at least in theory, was to deny the claims of ethnicity, which brought with it notions of dominance and subjugation, the majority of whom were minorities. In the modern state, these concepts would surely be anathema.

As we know, it was not to be. The boundaries between the different, and often contending ethnicities did matter, and continue to matter to this day. There is no other way of explaining the tortured situation which exists today in central Africa and the Middle East. The Westphalian concept did not prove strong enough; how could it? What hold could possibly have taken in the minds of the people concerned? So far as their ambitious leaders were concerned, those who saw themselves as "fathers of independence", there was no alternative. It has to be said that the more established states did not contradict this notion. They knew exactly how to deal with other "Westphalian" states: different

models posed problems that they had perhaps forgotten how to deal with, and were not eager to relearn.

Other Models?

Westphalia was not merely a western construct, it was wholly European, crafted to address the western part of the continent's multiple problems which had arisen by the second half of the seventeenth century, and which were not going to be resolved or imposed by force of arms. But what of the rest of the world? How was sovereignty, understood in all its meanings, understood and manifested?

The Tribal Society

One of the most vivid illustrations of the difference between a tribal or ethnic area and the Western state is to compare a map of Africa as it was prior to colonialisation with the political map of the country today. It is very easy to emphasise the word "political", because the various tribes and ethnic groups still exist, living sometimes harmoniously together, but often not. There is virtually no comparison between the two. This is not to say that the precolonial ethnicities and tribes were equal or sovereign, in the way in which current First Nations groups of North America, and especially Western Canada, would claim to be. But there were "boundaries" between African ethnic and tribal societies, and their location would have been known and respected, except of course if conflict ensued.

The various colonial powers, as was their wont, took an extremely different view, often running boundaries between them in a way which divided tribal areas, or groups which had affinities of one sort or another. They also created either strange and sometimes wholly incompatible bedfellows: modern Rwanda and countries like it bear this out. Grouping the Hutu and Tutsi first in a single colony, and then a single sovereign state was simply madness. The colonial powers did not care.

So the question is this: what happened after the colonial powers departed? One answer is surely that the existence of these much larger entities presented unrivalled opportunities for power both to would-be rulers and, of course, the new states themselves. Why would you not wish to be Nigeria, for example, as opposed to a grouping of individual and much smaller polities. In other words, those who were primarily responsible for leading the fight for independence and the departure of the colonial masters wanted to establish Westphalian states, possibly because this is how the rest of the world was organised, and equally possibly, because of the lure of becoming President (and all that that implied). To be fair, the new African rulers and their supporters were only following the example set in South America with the departure of the Spanish. Here, the former colonies became modern states, and colonial boundaries became internationalised. This is the application of a concept called *uti possidetis juris*, an assumption that a colonial boundary would become internationalised unless there was agreement to the contrary. The new rulers of the Latin American states would also have seen marked geopolitical advantage in the creation of states the size of Bolivia and Argentina. There were of course a number of cases where the creation of a state of such a small size was simply impossible as with Guyana and Suriname. The colonies were simply too small, and there were many reasons why unity to form a larger entity were simply impossible.

The Mandala

During the period known in the West as the Middle Ages, the history of East and Southeast Asia was marked by the rising and waning of contending empires. Their rulers were entrenched in their various fastnesses: Ayutthaya in the case of the Siamese (modern Thai); Angkor, the Phnom Penh for the

Khmers; the Cham in what is now southern Viet Nam; the Viets in the flood plain of the Red River, not far from modern Hanoi; and the Lao in Luang Phabang, though the latter proved to be minor players. These empires came and went. At its height, the Khmer empire – what modern Cambodians call Kampuchea Krom – included modern Bangkok, Vientiane, and Saigon.

The mandala concept was simple. If a ruler held sway over a territory, it was deemed to be subject to his sovereignty. If that territory was lost to another power, then such rights were lost, and reinvested in the new sovereign. In this way, the land areas of the various empires of Southeast Asia – Cambodian, Cham, Siamese, and Vietnamese – grew or were reduced as a result of continuous warfare and conquest from the 13th to 16th centuries. Inevitably, there were, at the end of the day, winners and losers. The Vietnamese, for example, consolidated their territory within its present boundaries (more or less) by the early 17th century. In the process they absorbed the Cham Empire – all that remains of this former regional power are some picturesque ruins to the north of present day Saigon.

Colonies

Much has already been said about the phenomenon of colonialism. Today, it must seem incredible that a country of the size and population of the United Kingdom could have amassed the "Empire on which the sun never set". It seems reasonable to suppose that it was not done without the support of at least some local rulers. The British did not maintain their empire by continually going to war or using force against a colonial peoples, although there was of course some of that.

Equally striking from the perspective of the second decade of the 21st-century is the fact that the de-colonialisation process did not, in many cases, involve the active participation or consent of the peoples of the former colonies. This is not to say there would have been significant opposition: rather, formal consent was never requested. This is partly explained by the fact that, in many cases, the colonial power was only too happy to depart, especially when strong and apparently popular leaders would be in charge. Can this not have been said of India under Nehru (advised and supported by Mahatma Gandhi), and Pakistan under Jinnah?[36] The former was a predominantly Hindu state, the latter Moslem. A guarantee, then, of the protection of coreligionists.

Twentieth Century

The years leading up to the outbreak of the Second World War afford excellent opportunities to see how the "Brother's Keeper" argument might have served as the basis for policy decisions on the part of the countries confronting Nazi expansionism and aggression, but did not. As we approach the midpoint of the second decade of the third millennium CE, it is only natural that we should question the role of by-standing states as the horrors of Biafra, East Timor, Rwanda, and Kosovo unfolded and, as of 2013, those in Syria and Central Africa continue to do so. The Europe of the 1930s is sufficiently far in the past, but equally, sufficiently well-documented for those who care to do so to consider the rights and wrongs of the acts and omissions of the principal players in that drama.

Adolph Hitler's accession to power in 1933 was welcomed by many, especially outside Germany, because it seemed to promise a period of firm government and stability in contrast to the increasingly wild ride of the Weimar Republic. His reoccupation of the Ruhr Valley, and rearmament, both in flagrant violation of the provisions of the Treaty of Versailles 1919, were accepted as the natural

[36] Having said this, it appears to be true that a number of people in Indian villages had not heard of the departure of the British by the time which Attenborough came to the country to make his film on the life of Gandhi (released 1982).

inclination of a country to recover its self-respect after the humiliations heaped upon it by that agreement. Underpinning all this was, of course, a desire for a return to hostilities, which in turn gave rise to the policy of appeasement. The generally favourable view of Hitler and his regime in countries such as the United Kingdom was shattered in 1938 by Reichkristalnacht – Crystal Night, so called because of the vast amounts of broken glass from Jewish shops and businesses looted and burned by Nazi thugs and their supporters during the night of November 8 – 9. Synagogues were attacked and destroyed, graveyards desecrated, and any Jews unlucky enough to be caught by the mobs subjected to severe beatings.

This served to rip the veil away from what Hitler and his associates had been up to. Press condemnation in Britain, France, and the United States was uniform: there were expressions of horror and disgust on all sides – this was not the behaviour expected of a modern, advanced society, which had bequeathed countless cultural treasures to the world.[37] Not that the Führer and the said associates cared.

'Responsibility to Protect' as Moving Towards Morality yet with No Imperative

The most potent live option in international legal circles for the incarnation of any kind of moral imperative is the doctrine of *The Responsibility to Protect*.[38] This concept has been thought to have been widely accepted and successful because of the experience of Libya being liberated by NATO forces in 2011; but some scholars maintain that Responsibility to Protect has not been as transformative as thought, but is partly a misinterpretation of the interests which lay at the heart of any armed intervention. Our conclusion is that while the R2P doctrine is a laudable statement endorsed by the United Nations in their publications, it has no actual legal force at all. There is still no legal obligation or duty incumbent on states or groupings of states, or indeed of the UN itself, to intervene in a 'crisis of sovereignty' amounting to a variety of crimes against humanity, unless the will of the individual intervener states acquiesce. Because such decisions are, as with the recent tragedy in Syria, driven by the self-interests of potential intervener states, R2P as a doctrine has shown that unless such aims are given a binding legal force within the international community, they exist only as pitiful platitudes used by states at their will and discretion. A legally enforced moral imperative incumbent on states sovereign

[37] The Times: "No foreign propagandist bent on blaspheming Germany before the world could outdo the tale of burning and beating, of blackguardly assaults upon defenceless and innocent people, which disgraced that country yesterday". The News Chronicle: "A pogrom hardly surpassed in fury since the dark ages…". The Archbishop of Canterbury wrote to The Times "There is in this country a general desire to be on friendly terms with the German nation, but there are times when the mere instance of humanity makes out it's impossible. Would that the rulers of the Reich could realize that such excesses of hatred and malice put upon the friendship which we are ready to offer them an almost intolerable strain". These extracts are quoted by Professor Ian Kershaw in *Making Friends with Hitler: Lord Londonderry and Britain's Road to War*, Allen Lane, 2004. Londonderry, a descendent of Castlereagh, one of the leading lights of the Congress of Vienna of 1815, had held minor office in the years between the wars, but had been relegated to the political wilderness. He proceeded to do what he saw as his duty as a British aristocrat (and the descendent of Castlereagh): he did indeed make friends with Hitler, whom he met on more than one occasion, he went shooting with Göring at the latter's estate outside Berlin, and invited Ribbentrop to his country house just outside Newtownards, County Down in Northern Ireland. His role was not unlike that of Lord Darlington in Kazuo Ishiguro's novel *The Remains of the Day* (Faber and Faber, 1989). Unfortunately, it was equally unsuccessful, and like his fictional counterpart, Londonderry had to endure a certain degree of opprobrium both during and after the war. He wrote to the Nazi leaders after Crystal Night deploring what it happened, but perhaps more for the damage it had wreaked on Anglo – German relations than on the human rights abuses which were the focus of the extracts quoted above.

[38] Gareth Evans and Mohamed Sahnoun *et al.*, 'The Responsibility to Protect,' *Report of the International Commission on Intervention and State Sovereignty*, December 2001. See also, United Nations General Assembly, *2005 World Summit Outcome* 138-139 (2005): 31-32.

is the only guarantee that human rights can ever hope to be secured for all peoples. This research aims, alongside the work of many other scholars, to encourage this possibility into reality.

Taking Stock of R2P and Fixing a Point of No Return Pursuant to Intervention

Gareth Evans, one of the academic courtiers[39] who collaborated to create the *Report of the International Commission on the Intervention and State Sovereignty* has declared that the Responsibility to Protect has been proven a success, at least the title of his article in *Foreign Policy* "End of the Argument" seems to suggest this. [40] He writes that "an unholy mess was made of dealing with every major man-made human catastrophe from Cambodia in the 1970s to Rwanda and the Balkans in the 1990s"[41] despite all the "good intention conventions" – and we know where such roads can lead to – that followed the catastrophe of the Second World War. His major claim in this short piece was to announce that "[t]oday, the "responsibility to protect" doctrine, or R2P, has become a commonplace of international diplomacy, invoked in crises from the Congo to Kenya to, most notably, this year's struggle in Libya."[42] With Syria, though, as we are all painfully aware by now, it was and is a case where R2P showed perhaps its darker hues, as the Russian and Chinese veto on the Security Council resolution aimed at sanctions, initially, were not allowed to be enforced against the Syrian regime: at least from a Security Council perspective. Evans' admits this was regrettable and quotes the one step forward two step back proverb;[43] but what nature of a step back has this been for the people who have died in Syria as a result of veto powers in the Security Council?

Saira Mohamed argues that even to characterize the United States' intervention in Libya as a triumph of R2P ignores key aspects of the doctrine and some of the real motivations expressed by the United States for going ahead with the intervention.[44] Mohamed claims that identifying the Libyan intervention as an R2P success risks conflating any interests at stake in the intervention with a responsibility to intervene.[45] The author is willing to grant that R2P played some role in the decision to intervene in Libya, and that even in spite of having no independent legal force, the idea has come to a place of prominence in world politics and even engagement[46] – not to mention the ink spilled on this by the academy.

But what of the obvious need for a legal instrument, and for a suitable human rights violation threshold beyond which a state cedes its sovereign borders and status to the international community until such time as the state demonstrates the competence to once again take responsibility for its own citizens. In other words, ought there to be a point of no return regarding the suspension of sovereign

[39] Evans was a law professor for a few years only: he practised law (a mixed practice, but he was interested in human rights issues) before entering the Australian Parliament, but made his name there and especially as Foreign Minister, and his period in office received international acclaim: his (meaning Australia's) controversial recognition of Indonesian sovereignty over East Timor notwithstanding. This was the stepping stone to co-chairing the R2P Commission, and from there to be President of the International Crisis Group (in which he was fantastically successful), and his career since retiring from that position in 2009.

[40] Gareth Evans, "End of the Argument: How We Won the Debate Over Stopping Genocide," *Foreign Policy* magazine (1 December 2011).

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Saira Mohamed, "Taking Stock of the Responsibility to Protect," *Stanford Journal of International Law* 48 (2012): 319-339: at 320.

[45] Ibid.

[46] Ibid., 338-339.

borders and engagement of intervention which is not merely at the whim of the interests of the security council but instead is based on a legal instrument which applies equally to all states and must be undertaken under the auspices of the UN?

Clearly, these are considerations which are difficult to decide because of the very significant authority and power which would necessarily need to be both ceded and taken up in a case of intervention. And yet these are decisions on which the lives of humans will depend on in defense of them being carried out so that as many human lives as possible will be preserved in the face of an internal breakdown of sovereignty and order. While difficult, the international community must not balk at the opportunity of coming up with guidelines that would be reasonable to all the states in its membership; because if there are states who feel that human rights *abuses* can sometimes be justified, then how is it we accord them sovereign membership status in the first place?

What then would such a threshold or point of no return look like, what would be its constituent elements, and who would have the authority to engage the legal instrument and order the necessary intervention. The authority question seems really the easiest: if the member states of the UN all agree to a 'point of no return' convention, then one of the powers assigned in such a legal instrument would be the executive clause, stating clearly who or what entity would be responsible for making the order. As mentioned above with the social contract, which becomes in this case an international social contract, if a body of elected members was set aside for such a duty, and one would have to imagine the President of the UN being part of such a group, then there would be no need for a vote in the general assembly since it would have been an authority democratically assigned to the aforementioned corps. It seems to us that the primary concern in this engagement step has to be the celerity at which action is taken, since ongoing human rights abuses may continue otherwise.

The question of the threshold of human rights abuses that must be passed before such a swift and definite action could be taken is a difficult one, but not insurmountable. We think there are two central considerations which must be dealt with in constructing a threshold of this kind. First: Evidence of the alleged and unjustifiable abuses. It would seem clear that evidence of the abuses must be shown to be the case; in other words a proof amounting to a conviction of breach would be required to establish the need for the deciding body to meet and make a decision. Second: Time. Are these unjustified abuses the result of a rogue element in the state which that state can subdue quickly: or, are they the result of a state sponsored yet isolated event, or are they of an ongoing and continuous nature?

Conclusion

Sovereignty denotes two main tenets which support its legitimacy. First, there must be a political body or person with the capacity to exercise power over a specific community and place such that no higher authority exists within its jurisdiction. Second, sovereignty must insist that a positive moral imperative is placed on the person or body executing such power in practice. As was explained in an earlier part of the paper, the concept of the loyalty/protection compact dates back for centuries. We made reference to its essential role in the European feudal system, but in and of itself it is by no means a purely European notion. Sovereignty only really occurs when both these requirements are met; otherwise, without "capacity" a population is destined to be ruled by merely the strongest, which only brings us back to the experiences common in the dark chapters of human history. It is for this reason that absolutist authoritarian governments and rulers would like to remove the "protection" element

of the loyalty/protection compact. Without a "moral imperative," absolute capacity puts the well-being of the state into the dispositions of those in charge, whether it is a monarch, aristocracy, oligarchy, or democracy.

The whole trend of human rights discourse, certainly from the end of the Second World War (but actually much older than this), has been to insist on the notion that certain fundamental rights and freedoms inhere in individuals by virtue of their humanity. These are the principles which motivate those who urge a peaceful resolution of disputes coupled with a renunciation of the use of force except in cases of absolute necessity. We would suggest that R2P should be seen in the broader context of the evolution of human rights norms and the determination to avoid recourse to non- peaceful means of dispute settlement. As international law becomes more complex, universal, and comprehensive, it is tempting to confine one's thinking and researches to a particular body of norms (e.g. human rights law, law the sea, international environmental law, international criminal law, etc.), forgetting that this may induce a degree of "tunnel vision" which may lead the unwary to forget that the topic under consideration is part and parcel of something much larger: to whit, the law of nations as a whole.

Such considerations oblige us all to come to conclusions about the state of international law as regards the Responsibility to Protect applying the same standards of norm identification that would be used in other branches of the subject. In other words, we must be objective in determining the existence of a principle or norm, stating the law as it is, and not as we would like it to be. Since R2P is more likely than not to involve the violation of the territorial integrity of a state (and this post–Westphalian concept does not cease to be applicable merely because of the objectionable or reprehensible behaviour of its government), the temptation to blur the lines between reality and aspiration must be resisted at all costs. The Responsibility to Protect Report itself recognised this. Intervention cannot be justified simply by the fact that one government does not like the political complexion of another, although there have been all too many examples of this over the past half-century. We should strive for universally acceptable and principal standards justifying intervention, and it is perhaps appropriate that the international community moves with some deliberation in order to do this. The important thing, of course, is that some movement in this direction is discernible. The reports of high-level commissions, and resolutions from the General Assembly or the Security Council are a useful beginning, but that is all they are. International law is made by states, and it is their actions or inactions which give us the raw material for drawing conclusions as to whether or not the norm supporting the notion of the Responsibility to Protect is in the process of formation, or indeed whether or not it has emerged.