

Sovereignty, Choice, and the Responsibility to Protect

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Abstract

It is commonly asserted that the chief obstacle to advancing acceptance of the responsibility to protect (RtoP) is the reluctance of developing countries to compromise their sovereignty. This paper argues, instead, that both developing and some of the more powerful developed countries have concerns about the implications of RtoP for their sovereignty. The former are more likely to be concerned about territorial sovereignty and the latter about decision-making sovereignty. Both sets of concerns were openly expressed during the debates leading up to the consensus at the 2005 World Summit on RtoP. That consensus was facilitated by the fact that the wording of the relevant provisions of its Outcome Document took both types of reservations about sovereignty into account. The paper argues that the recognition that countries of the North and the South tend to be more united than divided by their determination to preserve their sovereignty should facilitate efforts to achieve consensus on how to operationalise and implement the responsibility to protect.

Keywords

sovereignty, United Nations Charter, UN World Summit 2005, North-South debate, UN General Assembly, UN Security Council, Westphalian sovereignty, Non-Aligned Movement, RtoP Lite

Introduction

It has become a common refrain to assert that the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity presents a challenge to traditional conceptions of state sovereignty.¹

¹ It is not the place of this essay either to define the components of RtoP or to chronicle its development. These tasks are accomplished, however, in two recent RtoP volumes: Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution Press, 2008) and Alex J. Bellamy, *A Responsibility to Protect: The Global Effort to End Mass Atrocities* (Cambridge: Polity, forthcoming 2008).

This, it is said, is the chief reason that some smaller and developing countries have had reservations about embracing the concept. Their reservations, in turn, are widely seen as the primary obstacles to gaining global acceptance of a robust RtoP regime. Further, it is asserted that more developed states, less concerned about their sovereignty because they are more capable of defending themselves militarily or are part of a strong regional bloc, like the European Union, are more likely to accept the responsibility to protect without crippling reservations. This paper contends, on the contrary, that some major powers of the North have acute sovereignty concerns about RtoP as well, though of a different sort. Smaller and weaker states, particularly those that have suffered colonialism, are more prone to interpret sovereignty in territorial terms. Some powerful states, including most pointedly the United States, tend to see sovereignty in terms of freedom of policy choice and hence are reluctant to accept any interpretation of RtoP that implies an automaticity of response.

Rather than seeing sovereignty as the dividing line in a North-South debate over RtoP, this article argues that both sources of sovereignty-induced ambivalence – that affecting the North and that affecting the South – were largely addressed in the formulation of RtoP contained in the Outcome Document from the 2005 World Summit. Otherwise, there could not have been a consensus outcome. Though RtoP has yet to achieve status as a norm in terms of being the product of a legally binding convention, there is no open dissent to the pledge in paragraph 138 of the Outcome Document that the assembled heads of state and government accept the responsibility to prevent the four crimes and their incitement and “will act in accordance with it”. The General Assembly subsequently endorsed the Outcome Document unanimously. The areas of continuing divergence relate to how to operationalise and implement those agreed provisions. In moving forward on that front, the UN Secretary-General and UN Member States need to bear in mind both sets of sovereignty concerns if they are to avoid an unnecessary and caricatured North-South debate over a principle that is well grounded in existing international law and that has broad geographical and political appeal. Sovereignty remains an issue, of course, but one that should guide the approach to RtoP doctrine and practice, not one that should divide the membership and doom the concept to the world of wishful thinking.

Types and Sources of Sovereignty

Steve Krasner identifies four distinct ways in which the term sovereignty is commonly used, as follows:

- domestic sovereignty, referring to the organization of public authority within a state and to the level of effective control exercised by those holding authority;
- interdependence sovereignty, referring to the ability of public authorities to control transborder movements;
- international legal sovereignty, referring to the mutual recognition of states or other entities; and
- Westphalian sovereignty, referring to the exclusion of external actors from domestic authority configurations.²

Sovereignty, he underscores, involves both authority and control, with the mix varying among the four types.³ In his view, Westphalian sovereignty and international legal sovereignty are all about authority, whether to exclude external actors or to make international agreements with them. Interdependence sovereignty, he argues, relates to the control of movements across borders, something that is especially challenging in an era of the internet, persistent migration, and globalization. Domestic sovereignty, in his scheme, requires both authority and control.

These two characteristics – authority and control – are, in turn, deeply intertwined with notions of and perceptions of legitimacy. Domestically and internationally, legitimacy, though a subjective concept, is a cornerstone of power, what Ian Hurd calls one of the ‘three currencies of power’.⁴ However, it does not necessarily follow that domestic and international conceptions of legitimacy always coincide. They have distinct sources, embedded either in local or in global values, cultures, traditions, and legal, political, and constitutional structures. These will overlap in some respects and diverge in others. The degree of convergence is likely to be higher if the global norms were produced through extensive negotiating and bargaining processes among the representatives of diverse states in multilateral and global fora and if they have been sustained through practice. In such cases, global norms will reflect, more or less, the common elements of local values from different regions and cultures. Over time, global norms should be integrated into local laws, customs, and practices. When the process is flawed, conditions change, or the process of integration and absorption is incomplete, so that local and global values clash, then the latter are likely to give way if, in fact, the state is perceived by

² Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, N.J.: Princeton University Press, 1999), p. 9.

³ *Ibid.*, p. 10 and *passim*.

⁴ Ian Hurd, ‘Legitimacy and Authority in International Politics’, *International Organization*, vol. 53, no. 2 (Spring 1999), pp. 379–408.

its people to be legitimate and representative. As this author has detailed elsewhere, this helps to explain, for instance, the rocky relationship between the United States and international institutions.⁵ The same could be said for other societies that organize their political and economic affairs in quite different ways, but that manage to sustain broad public support without coercion.

But what does the notion of domestic sovereignty tell us about the responsibility to protect and attitudes toward it in different countries and parts of the world? It helps to explain why limiting RtoP to the four crimes and violations listed in the Outcome Document from the 2005 World Summit – genocide, war crimes, ethnic cleansing, and crimes against humanity – was critical to gaining consensus support for it.⁶ Three of the four – all except ethnic cleansing – had been included five years earlier in the Constitutive Act of the African Union (Article 4(h)). It declared “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”. As in the UN’s subsequent Outcome Document, this right was reserved for the Union, to be decided on a high-level inter-governmental basis, of course, not for individual states or ad hoc groupings of them. These three crimes, moreover, are well established in international law and no state would claim the right or authority under the cloak of domestic sovereignty to commit such acts. There is no caucus for genocide or the other three crimes and violations either in the United Nations or in any regional or sub-regional body, whether populated by developing or developed countries.

As is often asserted, RtoP in some respects is a relatively new and novel concept. Yet it should also be recognised that it has deep roots not only in human rights, humanitarian, and refugee law, but also in the very notion of sovereignty.⁷ Even Thomas Hobbes’s seventeenth century masterpiece, *Leviathan* – often portrayed as the ultimate ode to absolute unadulterated

⁵ See Edward C. Luck, ‘The United States, International Organization, and the Quest for Legitimacy’, in Stewart Patrick and Shepard Forman, eds., *Multilateralism and US Foreign Policy* (Boulder, CO: Lynne Rienner for the Center on International Cooperation, 2001), pp. 47–74 and *Mixed Messages: American Politics and International Organization, 1919–1999* (Washington, D.C.: Brookings Institution Press for the Century Foundation, 1999).

⁶ Jean Ping, President of the General Assembly during the period when the language of the Outcome Document was negotiated, cites the suggestion of the “Ambassador of Pakistan” to “link” RtoP to these specific crimes as the breakthrough step in the negotiation. H.E. Mr. Jean Ping, Chairman of the African Union Commission, Keynote Address, Roundtable, High-Level Meeting of Experts on “The Responsibility to Protect in Africa”, October 23, 2008, Addis Ababa, Ethiopia. Available through the International Peace Institute (IPI) or the African Union.

⁷ One of the key contributions to the intellectual development of RtoP in this regard is the idea of “sovereignty as responsibility” developed in Francis M. Deng, Sadikiel Kimaro, Terrence

sovereignty – recognized that the sovereign power had an obligation to protect the people under its rule. Sovereignty was, and remains, a two-way street through which loyalty is offered by the population in return for order and protection. In a recent article in *Policy Review*, Peter Berkowitz put it well:

Hobbes's political theory shows why sovereignty, though absolute and indivisible in its proper sphere, is in the end limited by the power that brings it into being and maintains it, namely, each individual's natural and inalienable right to self-preservation. And this limitation illuminates both the good reasons that states have for respecting the claims of national sovereignty, and the conditions under which rulers surrender the right to govern their people and other nations become free to intervene.

In Hobbes's political theory, the individual's natural and inalienable right to preserve himself by all means necessary both justifies the erection of a sovereign power and sets firm limits on it. Only an agreed-upon sovereign with absolute and indivisible powers, argues Hobbes, can protect subjects from each other and from threats. But in the end, the subject's obligation to obey runs no further than the sovereign's capacity to protect.⁸

Thus, RtoP seeks to reinforce one of the essential elements of statehood and sovereignty: the protection of people from organised violence. It does not, in fact, challenge the sovereign authority of states to do something that any of them would admit to wanting to do in the first place. The principle of state responsibility, what the Secretary-General calls the bedrock of RtoP, is both politically and legally legitimate and consistent with the core claims of sovereignty. RtoP has been championed, as well, by civil society the world over. Questions concerning domestic sovereignty would only come into play if a state were to claim the right to commit such crimes against its people, a claim that would readily be seen as illegitimate domestically and internationally. Domestic sovereignty, therefore, need not pose a barrier, legally or politically, for RtoP.

Lyons, Donald Rothschild, and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, D.C.: The Brookings Institution, 1996). For broader discussions of the diverse intellectual traditions that added to this foundation, see S. Neil MacFarlane and Yuen Foong Khong, *Human Security and the UN: A Critical History* (Bloomington, IN: Indiana University Press, 2006), and Edward C. Luck, 'The Responsible Sovereign and the Responsibility to Protect' in Joachim W. Müller and Karl P. Sauvant, eds., *Annual Review of United Nations Affairs 2006/2007*, vol. 1 (Oxford: Oxford University Press, 2008). For a useful bibliography, see *The Responsibility to Protect: Research, Bibliography, Background*, Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty (Ottawa, Canada: International Development Research Centre, December 2001), pp. 225-336.

⁸ Peter Berkowitz, "Leviathan Then and Now", *Policy Review*, Iss. 151 (October/November 2008), p. 18.

Interdependence sovereignty, with its emphasis on control not authority, has relatively little to do with global norms or perceptions of legitimacy. The realities of the global marketplace and of the uncaring side of globalisation may affect a weak state's capacity for fully implementing its responsibility to protect, for example by undermining government capacity, by exacerbating ethnic divisions, or by reducing the government's ability to exercise control over its territory and to overcome any armed groups intent on intimidating segments of its population by committing RtoP crimes. But it seems unlikely that the state would oppose the adoption of global RtoP principles simply because it was unhappy with the terms of trade or its inability to resist foreign cultural influences. Indeed, under Secretary-General Ban Ki-moon's approach to RtoP, supporting the state, including through military assistance, in such circumstances would be part of the second (assistance and capacity building) pillar of his strategy for operationalising the concept.⁹

On the other hand, if RtoP advocates were to neglect its African roots or to highlight only its more coercive, militarist, and interventionist dimensions, then those developing (or developed) countries most concerned about interdependence sovereignty might be tempted to see this as part of a larger and darker effort to overwhelm traditional cultures and local values. But such a presentation of RtoP would be a serious distortion of the responsibility to protect as it was agreed at the 2005 Summit and described in the Outcome Document (paragraphs 138-140). Properly understood then, RtoP, as accepted by the world's heads of state and government, would not impinge on interdependence sovereignty and might even bolster it when the state lacks capacity or is under siege by armed groups ready to ignore their own protection responsibilities.

Krasner's third type of sovereignty, international legal sovereignty, should also not pose a significant obstacle to the full realisation of RtoP. In his lexicon, international legal sovereignty relates rather strictly to the matter of state recognition.¹⁰ Recognition and non-recognition, of course, have often been used as political tools, as a mean of signaling acceptance or rejection of a particular government or its policies. As a rule, such decisions are taken unilaterally, as recognition is a matter of one state recognising another. Lesser steps, such as withdrawing one's diplomatic representatives from a foreign capital or asking those of another country to leave yours, serve similar signaling purposes. From time to time, the Security Council and-or the General

⁹ Speech by Secretary-General Ban Ki-moon, Berlin, U.N. Document SG/SM/11701, 15 July 2008.

¹⁰ Krasner, *op. cit.*, pp. 14-20.

Assembly have urged UN Member States to take such diplomatic steps as a form of sanctions against a particular regime. Withdrawal of recognition or reduction of diplomatic representation could be ways of expressing the unhappiness of UN members over a state's failure to protect its population from RtoP crimes, but this remains an under-utilized tool.

Membership in the United Nations or other international organisations is not the equivalent of recognition, but it can hold high symbolic value, especially to states and governments seeking greater international legitimacy. Here the UN has some discretion. Under Article 6 of the UN Charter, "a Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council". Likewise, admission is decided by the Assembly upon the recommendation of the Council (Article 4(2)). According to Article 5, "a Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council". Again, these tools could be employed in cases of RtoP crimes and the violation of the pledge undertaken in paragraph 138 of the Outcome Document, but so far they have not been invoked to this end.¹¹ None of this, however, should pose conceptual or political barriers either to the acceptance of RtoP as a principle or to its implementation. Indeed, the possibility of utilising diplomatic sanctions in cases of RtoP crimes should reassure those concerned that military intervention is the only conceivable response to such violations. Weak states may feel vulnerable to the use of such measures by more powerful ones, of course, but they are unlikely to claim that states do not have a sovereign right to choose whom to recognise and at what diplomatic level representation will be set.

The relationship between RtoP and Krasner's fourth category – the notion of Westphalian sovereignty – on the other hand, is far more complex and consequential. It is here, in the related concepts of territorial and decision-making sovereignty posed in this paper, that questions arise for both developed and developing countries about how the implementation of the responsibility to protect could in some ways condition their sovereignty,

¹¹ Though the International Criminal Court (ICC) is not a UN body, the possibility of referral to the ICC of individuals accused of RtoP crimes can be a most helpful tool for discouraging or deterring the commission or incitement of such crimes.

depending on how it is carried out. Much of the rest of this essay is devoted to shedding light on the policy implications of these dilemmas and sensitivities.

Sovereignty Concerns, North and South

As Krasner notes, the Westphalian model of sovereignty ‘is based on two principles: territoriality and the exclusion of external actors from domestic authority structures’.¹² The well-established norms of territorial integrity and non-intervention in internal affairs are usually associated with the Westphalian conception of sovereignty. They are embodied, as well, in two of the UN’s founding principles. Article 2(4) declares that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”. According to Article 2(7), “nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”. Neither of these principles suggests that a state is free to do as it pleases within its borders or that sovereignty is absolute. The Charter’s provisions on human rights and on the Council’s authority to investigate “any situation which might lead to international friction or give rise to a dispute” (Article 34) underscore that there is a legitimate international interest in abuses of populations within states of an RtoP magnitude.

Nevertheless, the concern among many states that RtoP principles might be misused by powerful states or groups of states to justify coercive interventions undertaken for other reasons is eminently understandable. This is particularly so on the part of those who have been subject to colonialism, which was itself often justified by appeals to moral and humane principles. These concerns featured prominently in the debates leading up to the 2005 World Summit. Indeed, judging by the tone expressed by many developing countries at that point, there was little reason to be optimistic about the prospects for achieving the Summit’s endorsement of RtoP. In April 2005, for instance, the Permanent Representative of Egypt to the UN, Ambassador Maged Abdelaziz, stated that ‘the “Responsibility to Protect” conflicts directly with such well established

¹² Krasner, *op. cit.*, p. 20.

principles enshrined in the Charter particularly those related to the use of force, sovereignty, territorial integrity and non interference in the internal affairs of states. . . . It would allow the strong to judge the weak'.¹³ Two months later, the Foreign Ministers of the countries in the Non-Aligned Movement (NAM) likewise noted the 'similarities between the new expression "responsibility to protect" and "humanitarian intervention"' and requested the NAM Co-ordinating Bureau to consider RtoP's 'implications on the basis of the principles of non-interference and non-intervention as well as the respect for territorial integrity and national sovereignty'.¹⁴

In the intensive negotiations leading to the inclusion of the RtoP section in the Outcome Document, these concerns were addressed in several ways in the evolving text. As noted above, then-President of the General Assembly Jean Ping has stressed the importance of the decision to limit the scope of RtoP to the four specific crimes and violations. Paragraph 139 underscores the centrality of United Nations processes and principles in making any decision to respond to situations in which "national authorities are manifestly failing to protect their populations" from the four crimes and violations. Rather than emphasising military intervention, the whole panoply of "diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter" are included in the RtoP toolkit alongside possible Chapter VII enforcement measures. The international community, moreover, is to "help," "assist," "support," and "encourage" states in meeting their RtoP obligations. The value of preventive measures is also stressed, as the international community is to help build state capacity and to assist "those which are under stress before crises and conflicts break out". The General Assembly, moreover, is "to continue consideration" of RtoP "bearing in mind the principles of the Charter and international law". Clearly, these provisions in the text made a real difference, for the RtoP section was included in the consensus document when other important and controversial issues, such as disarmament and non-proliferation, were dropped due to persistent differences of view.

The developing countries, however, were not the only ones to express some angst over the implications of RtoP for state sovereignty. Here, the second

¹³ Statement by Ambassador Maged Abdelaziz, Informational Thematic Consultations on Cluster III: Freedom to Live in Dignity in the Report of the Secretary-General entitled *On Larger Freedom: Towards Development, Security and Human Rights for All*, April 19, 2005.

¹⁴ Statement by the Chairman of the Coordinating Bureau of the Non-Aligned Movement, Ambassador Radzi Rahman, on behalf of the Non-Aligned Movement at the Informal Meeting of the Plenary of the General Assembly Concerning the Draft Outcome Document, June 21, 2005, <http://www.un.int/Malaysia/NAM/nam210605.html>.

dimension of Westphalian sovereignty, that related to ‘the exclusion of external actors from domestic authority structures’, to use Krasner’s words, came into play. The handful of states with major force projection capabilities were decidedly unenthusiastic – as were many other Member States as well – about allowing multilateral organisations to decide how, where, and when their forces would be deployed. The United States, with by far the largest military capacity and the longest history of dissenting from global decision-making processes, was most vocal and candid on this score, but its reservations were, in this case at least, widely shared among the ranks of relatively affluent and militarily competent countries. Where some feared the allegedly interventionist tendencies of the big powers, the latter have long tended to resist the calls to intervene in RtoP-type situations unless their strategic interests were also at stake.

John Bolton, then the US Permanent Representative to the UN, was typically blunt and to the point. With historical accuracy,¹⁵ he noted in a letter to the other Member States of August 30, 2005, the eve of the Summit, that “the Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action”.¹⁶ He cautioned against formulations that would appear to equate the responsibilities of the state and the international community for RtoP, as they are ‘not of the same character’. In his view, the obligation and responsibilities posited under RtoP are ‘not of a legal character’ and ‘we do not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law. We also believe that what the United Nations does in a particular situation should depend on the specific circumstances’. In other words, the US was not about to concede what it saw as its sovereign right of choice.¹⁷

China and the Russian Federation tended simply to stress, as most states did, the requirement that any enforcement action be decided by the Security

¹⁵ See, for instance, Edward C. Luck, ‘A Council for All Seasons: The Creation of the Security Council and Its Relevance Today’ in Vaughan Lowe, Adam Roberts, Jennifer Welsh, and Dominik Zaum, eds., *The UN Security Council and War: The Evolution of Thought and Practice Since 1945* (Oxford: Oxford University Press, 2008), pp. 62–85.

¹⁶ Letter from Ambassador John R. Bolton to UN Member States, August 30, 2005, <http://www.reformtheun.org/index.php/issues/100?theme=alt4>.

¹⁷ Ambassador Bolton’s views on RtoP have been echoed by writings produced by some of America’s more prominent conservative think tanks. See, for instance, Steven Groves, ‘The U.S. Should Reject the U.N. “Responsibility to Protect” Doctrine’, Executive Summary Backgrounder No. 2103 (Washington, D.C.: The Heritage Foundation, May 1, 2008) and Christopher Preble, ‘Missing the Point in the Bolton Debate’, appeared on cato.org (The Cato Institute), May 12, 2005, http://www.cato.org/pub_display.php?pub_id=3764.

Council and through well-established Charter rules.¹⁸ This, of course, would preserve the right of any of the five permanent members of the Council to veto any enforcement action of which they did not approve. On this, of course, states concerned about either decision-making or territorial sovereignty could agree.

As in the case of territorial sovereignty, the RtoP text in the Outcome Document accommodated these concerns as well. Paragraph 138, as noted above, underscores the centrality of state responsibility, with the international community playing a supporting role in assistance and prevention. Chapter VII responses to manifest state failure are to be decided “on a case-by-case basis”, according to paragraph 139. Cooperation with regional organisations is to be “as appropriate”. Again, the reference to Charter rules and principles reinforces the centrality of the Security Council and the veto power over forceful action.

RtoP Lite?

All of these caveats have led some RtoP advocates to term the outcome “RtoP lite”. Yet what more could have been expected from a gathering of the leaders of the world’s sovereign states? Have any of the human rights and humanitarian conventions of the past sixty years had any more robust enforcement mechanisms or any greater assurance of automaticity of response? In the nation-state era, there will be limits to both the practicality and the wisdom of formally breaching the proper boundaries of sovereignty. When not abused, sovereignty has permitted both some sense of order in international and domestic affairs and the growth of the very norms and institutions, like RtoP, that at times seem to challenge its legitimacy and redefine its limits.

The responsibility to protect has both operational and aspirational significance, informing current practices and policies on the one hand and affirming higher standards to be pursued over time on the other. Both tracks need to be pursued vigorously, for they are mutually reinforcing. RtoP has proven to be a politically powerful idea, whose time appears to have come. As such, its greatest contributions over time may lie less in setting rules and guidelines for inter-governmental mechanisms to follow and more in influencing the

¹⁸ On this, Ambassador Bolton dissented. In his letter, he argued that ‘we should not preclude the possibility of action absent authorization by the Security Council. There may be cases that involve humanitarian catastrophes [sic] but for which there is also a legitimate basis for states to act in self-defense. The text should not foreclose this possibility’. Interestingly, this claim would compromise US veto power in return for wider freedom to act outside of UN strictures.

conceptions of interest, doctrine and strategy within national capitals, and hence voting patterns in international bodies. If influential states do not reconsider their national interests and values because of the growing prominence of RtoP in public and political circles, then posting rules for the Security Council and other inter-governmental bodies to follow would make little difference. If national values and perspectives change because of RtoP, however, the rules and guidelines would hardly be needed. The first step toward achieving unity of purpose and real consensus in the UN, according to the argument in this paper, is to cast aside the easy characterisation that some states are hooked on narrow conceptions of sovereignty, while others have evolved beyond such constraints. One of the things that unites states in their approach to RtoP, not surprisingly, is that they are all concerned about preserving their national sovereignty, just in different ways. After all, they are all states and that is what states do.