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# Innovating National Sovereignty and the Just War Tradition

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# Innovating National Sovereignty and the Just War Tradition

## *The Responsibility to Protect, the Universal Declaration of Human Rights, and the Anticipatory, Interruptive, and Resiliently Empathetic Eleanor Roosevelt*

GARY M. SIMPSON

Eleanor Roosevelt was always an interruptive person in whatever environment she inhabited. Each evening, for instance, in her bedtime prayer she would interrupt God and plead for divine interruption, fully aware, and even expecting, that the one she addressed as “Our Father” might very well include her personally within the Trinitarian work of bringing about “a world made new.”<sup>1</sup>

It seems that God had finally solidified Eleanor’s interruptive reputation for good when in 1948 she midwived *The Universal Declaration of Human Rights* (hereafter simply the *Universal Declaration*) to its completion. I say, “for good,” as a double entendre. First, after 1948, no one could ever again deny the for-good difference she had made toward “a world made new.” Her long life lived resiliently

<sup>1</sup>Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). Eleanor’s nightly prayer: “Our Father, who has set a restlessness in our hearts and made us all seekers after that which we can never fully find, forbid us to be satisfied with what we make of life.

*The two-thousand-year-old just war tradition is now read anew in light of the more recent Universal Declaration of Human Rights and the Responsibility to Protect document. Eleanor Roosevelt played no small part in moving things in this new direction.*

against the grain of various dominant cultural, legal, and sociopolitical injustices and oppressions had mattered, and mattered immensely. Second, after 1948, people have naturally thought that with the *Universal Declaration* her contribution toward the human rights regime, as it's called, had reached its zenith. That is, that the *Universal Declaration* had finalized her reputation once and for all—"for good," in other words.

But has Eleanor's for-good difference run its course? Not likely. The *Universal Declaration* continues to stretch forth with global influence and, to the surprise of most everyone, is now casting its innovating impulse on the over two-thousand-year-old just war tradition. It seems that Eleanor's anticipatory nightly prayer continues to evoke interruption ever anew by "Our Father."

In this essay I will, first, offer a brief history of the mid-nineteenth and early twentieth century emergence of concerns for human rights. Second, I will summarize the three threads that Eleanor Roosevelt wove into the *Universal Declaration's* fledgling human rights regime. Third, I will explore how the United Nations' newest protocol, *The Responsibility to Protect* (hereafter *R2P* as it is affectionately often called), mobilizes once again the *Universal Declaration's* human rights regime on the way to innovating the twenty-first-century notion of nation-state sovereignty and thus also a key criterion of the just war tradition, the legitimate authority criterion. Finally, I will return with closing reflections on the spiritual wellspring of the anticipatory, interruptive, and resiliently empathetic Eleanor.

## THE CONTINUALLY EMERGING HUMAN RIGHTS REGIME<sup>2</sup>

While the quest for moral, legal, and political traditions regarding human rights goes back for over two millennia, the middle of the nineteenth century gave rise to increasing interest in international law regarding human rights across a spectrum of circumstances. In the West, for instance, both the increasing vulnerabilities of peoples and individuals under modern industrial conditions and the escalating episodes of devastating wars among nation-states presented unprecedented moral, cultural, social, political, and legal problems. Human rights became an increasingly urgent concern both within nation-states and among nation-states.

In 1901, the first Nobel Peace Prize was awarded to Jean-Henri Dunant (1828–1910), a Swiss businessman and social activist. Dunant had witnessed the Battle of Solferino (Italy), where, within ten hours, 5,500 soldiers were killed and over twenty-three thousand were wounded. He saw many wounded and incapacitated

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Draw us from base content and set our eyes on far-off goals. Keep us at tasks too hard for us that we may be driven to Thee for strength. Deliver us from fretfulness and self-pitying; make us sure of the good we cannot see and of the hidden good in the world. Open our eyes to simple beauty all around us and our hearts to the loveliness that men hide from us because we do not try to understand them. Save us from ourselves and show us a vision of a world made new" (202).

<sup>2</sup>The bibliography is immense. For a good historical overview, see Micheline R. Ishay, *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present*, 2nd ed. (New York: Routledge, 2007).

tated soldiers merely bayoneted by the opposing armies, and he himself took care of hundreds of wounded survivors.

In 1863, Dunant organized “The Committee of Five,” which included himself and the representatives of four other leading families of Geneva, Switzerland. These five families organized an international conference in October 1863 attended by thirty-six representatives, including official representatives of eighteen European countries. This was the founding of the International Committee of the Red Cross (ICRC), as it has been known since 1876. The ICRC now includes the Red Crescent, the Red Lion and Sun, and the Red Crystal emblems in order to institutionalize its expanding nondiscriminatory and international character as the first modern human rights organization. The ICRC remains the official human rights monitor for the United Nations.<sup>3</sup>

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At the insistence of “The Committee of Five,” the Swiss government in 1864 invited all the European nation-states as well as the United States, Brazil, and Mexico to attend a convention in Geneva where twelve states and kingdoms adopted the first Geneva Convention “for the Amelioration of the Condition of the Wounded in Armies in the Field” (though invited, the United States did not attend). This was the first time that modern Western nation-states ratified a written law of war that recognized the human rights of both soldiers and noncombatants. Already in 1863, the United States within the context of the Civil War had instituted *General Orders No. 100*, usually called the Lieber Code. This was the first codified law in the West to protect the human rights of soldiers and noncombatants. It helped to inspire an international movement of human rights within the conditions of war and this movement spurred the convening of the Hague Conventions of 1899 and 1907. These international conventions reconfirmed the import of Hugo Grotius’s forthright, seventeenth-century combination of *ius ad bellum*—the justification for going to war—with *ius in bello*—the moral obligations of fighting justly within war. Below, we will note how *R2P* innovates the just war moral tradition also by including *ius post bellum*—criteria of justice after war—within this moral tradition.

The Hague Conventions adopted, and thus grandfathered in, the 1864 Geneva Convention, which the United States and many other nations eventually came to ratify. Among other things these initial conventions of international law recognized and protected the basic human dignity and civil rights of prisoners of war

<sup>3</sup>For a fuller account of the rise of human rights and international law within the contexts of war, see Gary M. Simpson, *War, Peace, and God: Rethinking the Just-War Tradition* (Minneapolis: Augsburg Fortress, 2007).

and of noncombatants; limited and prohibited the use of certain gruesome weapons technology, including chemical weapons of mass destruction; and established International Humanitarian Law for maritime and aerial warfare. In 1949, the United Nations convened four Geneva Conventions. Presently, 194 nation-states have ratified the Geneva Conventions along with their three Additional Protocols. Five key features make up the Geneva Conventions and the Additional Protocols: the recognition of the basic human dignity and legal rights of prisoners of war; the principle of noncombatant immunity; the recognition of the basic human dignity and civil rights of civilians within occupied territories; the principle of the use of proportional means of weapons that minimizes the unnecessary loss of life or excessive suffering of soldiers; and the fiduciary and protective role of the ICRC.

### THREE THREADS OF THE *UNIVERSAL DECLARATION*

On July 26, 1945, in San Francisco, California, fifty nation-states gathered and signed the United Nations Charter. The Charter's Preamble affirms the emerging human rights regime up until that time. It reads,

We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom...have resolved to combine our efforts to accomplish these aims.<sup>4</sup>

While the Charter's Preamble makes this gesture toward human rights, the Charter itself makes no provisions for such rights. Truth be told, human rights were not much on the minds of the five "Great Powers" (United States, United Kingdom, France, China, and the Soviet Union) who gathered in 1944–1945 to structure the UN. Rather, the Great Powers focused the Charter around nation-state security matters and located these matters within the Security Council. Article 2 of the UN Charter confirms the Westphalian principle, going back to the 1648 Treaty of Westphalia, which established the normative Western notion of sovereign, equal, and inviolable nation-states. "The Organization is based on the principle of sovereign equality of all its Members."<sup>5</sup> We will return to this Westphalian principle.

Human rights, however, was a central concern of many of the nations that had less military and economic power than the "Great Powers," beginning with several Latin American countries. Notably, there was little to no interest within any

<sup>4</sup>See the Charter of the United Nations at <http://www.un.org/en/documents/charter/index.shtml> (accessed August 2, 2014).

<sup>5</sup>Thus, the UN Charter. For the implications that the Westphalian principle of nation-state sovereignty had on the just war tradition's legitimate authority criterion, see James Turner Johnson, *Sovereignty: Moral and Historical Perspectives* (Washington, DC: Georgetown University Press, 2014) 9–27.

branch of the US government for the UN to take up human rights. Not until several American nongovernmental organizations brought sufficient pressure on the US Secretary of State did the United States finally favor a provision in the UN Charter for a Human Rights Commission (Article 68). The US support for a Human Rights Commission, which was initially quite tepid, gained momentum, however, with the great public shock produced by photographs of German concentration camps. These combined pressures finally drove the drafters of the UN Charter to actually feature “faith in fundamental human rights” in the Preamble and in Article 68. Still, the Charter strenuously protected the internal sovereignty of each nation to determine for itself the nature of such rights. Nevertheless, the gesture to human rights in the Preamble, even though unspecified, together with the provision for a Human Rights Commission remained “a glimmering thread in a web of power and interest.”<sup>6</sup>

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Even so, most of President Harry Truman’s Cabinet members remained uninterested in the Human Rights Commission. This disinterest led several Cabinet members to suggest to the President that he appoint Eleanor Roosevelt as the US representative to the Commission because they surmised that a woman would surely not have the capacities to see an international bill of rights through to completion. How *profoundly* mistaken they were!

At its first meeting in January 1947, the eighteen members of the Human Rights Commission unanimously elected Roosevelt to be its chair. The Commission was composed of representatives of the five Great Powers along with representatives from Australia, Belgium, Byelorussia, Chile, Egypt, India, Iran, Lebanon, Panama, Philippines, Ukraine, Uruguay, and Yugoslavia. The Commission’s assignments were to write an international bill of rights and to design a covenant for its implementation and enforcement; the covenant was eventually abandoned as unworkable at that point in time. Eventually these eighteen Commissioners elected a drafting committee with Roosevelt as the chair and seven other members from Australia, Chile, China, France, the United Kingdom, Lebanon, and the Soviet Union.

Quite obviously, within the Commission, Eleanor Roosevelt had established her formidable capacities for leadership. Through her many years as a journalist

<sup>6</sup>Glendon, *A World Made New*, 19. Frederick Nolde, an American Lutheran theologian of Christian education at the Lutheran Theological Seminary at Philadelphia, played a decisive role in taking the plea of the American nongovernmental organizations to the US Secretary of State. He also then drafted Article 18 of the *Universal Declaration*, regarding the right of religious freedom (*ibid.*, 17).

she had developed a keen habit of mind for being thoroughly prepared on the subject matter at hand. She had also honed a highly resilient character together with a disposition and practiced capacity for empathetic understanding of people quite different from herself, a practiced capacity that became itself quite contagious within the Commission and its drafting committee. With these personal qualities she hewed a deft strategy of bringing rivals together in informal gatherings to build the necessary trust that became the backbone of the drafting committee's capacities to understand one another's viewpoints and to co-generate enough solidarity and wisdom in order to negotiate the thicket of personal, cultural, geopolitical, and philosophical issues that could potentially derail the writing of such a document. The *Universal Declaration's* first thread would be this aspiration for an international consensus, for a "universal" declaration.

At the heart of Roosevelt's own thinking about an international bill of rights was the inextricable entwinement of two rights traditions, the long-established Anglo-American emphasis on political and civil rights and the newer economic and social rights accentuated by continental European states, which was shared also by China, the USSR, and numerous Latin American nations. Eleanor Roosevelt's long-standing conviction regarding the integration of both rights traditions was also shared by President Roosevelt as expressed in his now-famous January 6, 1941, "Four Freedoms" speech (freedom of speech, of religion, from want, from fear).<sup>7</sup> The *Universal Declaration* embodies this delicate, complex, and innovative two-sided panoply of rights. These three threads—political-civil rights, economic-social rights, and a cross-cultural, international consensus—represent Roosevelt's chief moral legacy to the continuing emergence of a global human rights and justice regime.

#### HUMAN RIGHTS, STATE SOVEREIGNTY, AND THE *RESPONSIBILITY TO PROTECT*<sup>8</sup>

The motivation for developing *R2P* goes back to the controversial concept of the so-called right to humanitarian intervention. The conceptual controversies were accompanied by certain historic failures of humanitarian interventions by the international community, first in Rwanda in 1994 and then in Bosnia in 1995. President Bill Clinton eventually called his lack of intervention in Rwanda his biggest failure as president.<sup>9</sup> The controversies, however, did not subside, even when President Clinton did undertake humanitarian intervention in Kosovo in 1999.

Two major problems have plagued the notion of humanitarian intervention.

<sup>7</sup>President Franklin Roosevelt's commitment to economic rights shows the influence on him not only of Eleanor but also equally of Frances Perkins. For Perkins's significant influence on the President, see Kirstin Downey, *The Woman Behind the New Deal: The Life and Legacy of Frances Perkins—Social Security, Unemployment Insurance, and the Minimum Wage* (New York: Anchor Books, 2009).

<sup>8</sup>For *The Responsibility to Protect* see <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (accessed August 2, 2014). For the International Coalition for *The Responsibility to Protect*, see <http://www.responsibilitytoprotect.org> (accessed August 2, 2014).

<sup>9</sup>David Remnick, "The Wanderer," *The New Yorker*, September 18, 2006, at <http://www.newyorker.com/magazine/2006/09/18/the-wanderer-3> (accessed August 2, 2014).

First, there is the United Nations' Westphalian principle of nonintervention in the sovereign affairs of another nation. Certain sovereign nations have failed to protect their citizens from atrocities of genocide, war crimes, ethnic cleansing, and crimes against humanity. Moreover, certain other sovereign nations have even carried out the above atrocities on their own citizens, on their resident aliens, or on their visitors or refugees within their borders. The second problem plaguing the notion of humanitarian intervention has been the absence of an international moral and political protocol that would guide the international community in such circumstances. Beyond these two conceptual problems there have also been motivational problems tied to the self-interest that a powerful state might—or might not—have regarding intervention in the affairs of another state even in the face of mass atrocities.

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*Two major problems have plagued the notion of humanitarian intervention. First, there is the United Nations' Westphalian principle of nonintervention in the sovereign affairs of another nation. The second has been the absence of an international moral and political protocol that would guide the international community in such circumstances.*

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In 1999, UN Secretary-General Kofi Annan challenged the UN's 54th General Assembly to resolve the problem. Under Canadian authority, Gareth Evans of Australia and Mohamed Sahnoun of Algeria responded to Annan's challenge and established the International Commission on Intervention and State Sovereignty (ICISS) in November 2000. In December 2001, the ICISS proposed *The Responsibility to Protect* and at the UN's 2005 World Summit the UN agreed to take action on it.

R2P's basic theme is that sovereign states have the responsibility to protect those within their borders from avoidable catastrophe. It is likely surprising to many, but the Westphalian principle of sovereignty enshrined within international law, including within the UN's Charter, lacks this basic responsibility to protect. Sovereignty in the Westphalian tradition is based only on de facto possession of territorial control without any other moral criteria.<sup>10</sup>

The first of three major accomplishments of R2P, therefore, is to remake or re-characterize the basic concept of state sovereignty, which is at the heart of the just war tradition's modern understanding of the criterion of legitimate authority. R2P inaugurates a shift "from *sovereignty as control* to *sovereignty as responsibility* in both internal functions and external duties."<sup>11</sup> R2P grounds sovereignty morally by

<sup>10</sup>For an extensive analysis of the difference between classical Western notions of sovereign authority and the Westphalian notion, see Johnson, *Sovereignty: Moral and Historical Perspectives*.

<sup>11</sup>International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001) 2.14. Emphasis in original. The PDF is available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (accessed August 2, 2014).

recognizing the most basic human rights cited in Article 3 of the *Universal Declaration*: “the right to life, liberty, and security of person.” Moreover, *R2P* recognizes these basic rights as equal and inalienable rights rooted in the fundamental human dignity of each and every human being, as cited in Articles 1 and 2 of the *Universal Declaration*.<sup>12</sup>

*R2P*'s second accomplishment follows thereon. When a sovereign state is either unwilling or unable to exercise the responsibility to protect, that responsibility must be borne by the broader community of states. This results in the principle of nonintervention yielding to the international responsibility to protect. *R2P* designates the UN Security Council as the proper venue for authoritatively implementing this yield.<sup>13</sup> States that fail to protect are often “failed” or failing states, but not always. In this way, *R2P* invokes the principle of publicity, or public accountability in certain “conscience-shocking situations crying out for action.”<sup>14</sup>

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***R2P identifies three core responsibilities that comprise the overarching responsibility to protect: the responsibilities to prevent, to react, and to rebuild***

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*R2P*'s third accomplishment is to identify three core responsibilities that comprise the overarching responsibility to protect: the responsibilities to prevent, to react, and to rebuild. The responsibility to *prevent* means to address both the root causes and the direct causes that put populations at risk. The responsibility to *react* means to respond to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions, international prosecution, and in extreme cases military intervention. The responsibility to *rebuild*, which applies particularly after a military intervention, means to provide full assistance with recovery, reconstruction, and reconciliation, and to address the causes of the harm that the intervention was designed to halt or avert. *R2P* accentuates the importance of the responsibility to *prevent*.

Along with identifying the moral criterion of sovereignty and clarifying when the Westphalian principle of nonintervention must yield to an international responsibility to protect, *R2P* recognizes the classical moral criteria of the just war tradition, like just cause along with the precautionary principles of right intention, last resort, proportional means, and the reasonable prospect for a better long-term outcome than the precipitating situation. Further, *R2P* stipulates certain operational principles for accomplishing the three core responsibilities to prevent, react, and rebuild.

<sup>12</sup>See *The Universal Declaration of Human Rights* at <http://www.un.org/en/documents/udhr/> (accessed August 2, 2014).

<sup>13</sup>See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (Washington, DC: Brookings Institution, 2008).

<sup>14</sup>*The Responsibility to Protect*, xiii.

## HERE COMES ELEANOR ROOSEVELT ONE MORE TIME

Look out, Westphalia, here comes Eleanor Roosevelt and friends one more time! Would she be surprised? Perhaps. But perhaps not. She didn't pray nightly for naught. Her concluding petition, "Save us from ourselves and show us a vision of a world made new," has hardly run its course or reached its promising horizon. It seems as pertinent today as ever, and so does she. In fact, *R2P* singles out the *Universal Declaration* and its history of effects.

The Universal Declaration of Human Rights (1948) embodies the moral code, political consensus and legal synthesis of human rights. The simplicity of the Declaration's language belies the passion of conviction underpinning it. Its elegance has been the font of inspiration down the decades; its provisions comprise the vocabulary of complaint. The two Covenants of 1966, on civil-political and social-economic-cultural rights, affirm and proclaim the human rights norm as a fundamental principle of international relations and add force and specificity to the Universal Declaration.<sup>15</sup>

Furthermore, and in the face of oodles of evidence to the contrary, *R2P* testifies to an ongoing struggle for the "transition from a culture of violence to a more enlightened culture of peace." There is surely no inevitability here.

International organizations, civil society activists and NGOs use the international human rights norms and instruments as the concrete point of reference against which to judge state conduct. Between them, the UN and NGOs have achieved many successes.<sup>16</sup>

Might we not in our time join with the ever-anticipatory, interruptive, and resiliently empathetic Eleanor Roosevelt? "Save us from ourselves and show us a vision of a world made new." ☩

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<sup>15</sup>Ibid., 2.16.

<sup>16</sup>Ibid., 2.18.