

The Status of Responsibility to Protect in the International Law and Whether Doctrine Advances Use of Military Force for Humanitarian Ends

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Abstract

This paper offers a delicate understanding of the responsibility to protect (R2P) principle and analyses the status of this significant principle within the international law. The place of the use of force is evaluated within R2P doctrine. The R2P norm and the pillars contained therein will be analysed to set out the legal responsibilities it contains towards member states and the international community, assessing the legality of the responsibilities held by states towards its population in addition to responsibilities owed by states to populations in other states and the obligation from the international community to intervene. Identifying the issues surrounding the principle of R2P in international law and the message it delivers with what it involves and what responsibilities it carries. It also illustrates the importance of the evolution of the concept, and the advances evolving around the principle including the use of military force for humanitarian ends.

Keywords: Responsibility to Protect, R2P, International Law, Military Force, Humanitarian Intervention, United Nations, Security Council.

1. Introduction

The so-called new norm to legalise humanitarian intervention, establishing the responsibility to protect as part of the 2005 Summit agreement. Despite the establishment of the new international legal norm, there still exists ambiguity as it has not appropriately been legalised. The issues surrounding the principle of R2P in international law and the message it delivers with what it involves and what responsibilities it carries. The R2P norm and the pillars contained therein, provide overarching, non-sequential guidance on matters in relation to the protection of vulnerable populations against acts of mortal endangerment and genocide, as agreed by the UN Member States. As noted above, the first pillar enshrines that a State has primary responsibility to protect its populations from genocide, however, when this responsibility is not upheld, the second and third pillars provide for assistance from the international community; firstly, by supporting the State to provide the necessary intervention (pillar 2) and further, when this assistance is not provided by the State in a meaningful way - or when a State is manifestly failing in its duty to protect - interventions will be delivered directly to the affected population via the international community, prioritising diplomacy and humanitarian means, and where a State

continues to fail in the delivery of its responsibilities, then via use of proportionate force consistent with the UN Charter (pillar 3) (UN, 2005 'Responsibility to Protect' A/RES/63/308).

2. Responsibility to Protect

Humanitarian intervention has long been controversial in both cases when it happens, and when it fails to happen in international law. The early 1990s sought a new era of humanitarian intervention, the Kosovo crisis and the Rwanda Genocide has led to significant developments within the R2P. The principle is conceptual; and practical tool developed by states, international organisations such as United Nations. The doctrine was formally introduced as an outcome of the 2005 United Nations World Summit. It is further formulated in the Secretary General's 2009 Report on Implementing the Responsibility to Protect. The doctrine carries three main responsibilities; the first pillar is the primary responsibility of the States to protect their populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement. The second pillar of the doctrine focuses on the responsibility for the international community to encourage and assist States in fulfilling this responsibility and the third pillar states that international community has a responsibility to undertake appropriate diplomatic action, humanitarian, and other means to protect populations from these crimes (Convention on the Prevention and Punishment of the Crime of Genocide 1948, Article 1).

The doctrine requires apportioning responsibility to and promoting collaboration among concerned States and the International community. The major issue regarding the principle of R2P is sovereignty. With the establishment of the R2P, sovereignty is no longer exclusively a protection from foreign interference. This principle is preserved in Article 1 of the Genocide Convention, where the concept of sovereignty as responsibility is found, where States are held accountable for the welfare of their people (Convention on the Prevention and Punishment of the Crime of Genocide 1948, Article 1). This is followed by the second foundation of the R2P principle is that, where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect (UN, 2005 'Responsibility to Protect' A/RES/63/308).

When considering the R2P principle in more depth, the three elements contained within the doctrine can be identified as to the responsibility to prevent, to address both the root causes and direct causes of internal conflict and another man –made crises putting populations at risk. Furthermore, the responsibility to react, this is when the responsibility to respond to situations of compelling human need with appropriate measures, which may induce coercive measures like sanctions and international prosecution, and in extreme cases military intervention. Finally, the element of responsibility to rebuild plays a great part in providing full assistance with recovery especially in cases of military intervention, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt. The three elements mentioned are found to be the foundation of the principle, though the priority concern remains with the most critical dimension of the R2P to be the responsibility to prevent. The prevention option of putting the population at risk is the first and most imperative dimension and must be exhausted before intervention is contemplated, and more commitment and resources must be devoted to it.

The R2P can be found to be the answer to the question of the Secretary-General Kofi Annan's Millennium report to the General Assembly as a reaction to the 54th session of the UN General Assembly in 1999, where he asked the question of *"if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?"* This was a frustration illustrated by the General Secretary to recall the failures of the Security Council to act in Rwanda and Kosovo and challenged the member states of the UN to find common ground in upholding the principles of the UN Charter and acting in defence of our common humanity (United Nations, 2000, K. A. Annan, "We the Peoples, The Role of the United Nations in the 21st century").

3. The Legality of the R2P

The legality of the doctrine is based on various guidelines of the international community. The main legal responsibility lies within the United Nations Security Council. Under Article 24 of the UN Charter, the Council

has the main responsibility to maintain international peace and security. In addition to the legal obligations found under human rights protection declarations, treaties, covenants, and international law. Starting with the 1945 UN Charter, committing the UN to 'promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion' (United Nations Charter 1945). The Universal Declaration of Human Rights 1948 further contains moral, political and legal consensus of human rights universally. The International Covenant on Civil and Political rights and the International Covenant on Economic, Social and Cultural Rights 1996 affirmed that human rights norm as a significant principle of international law and the great impact on the Universal Declaration of the protection.

Further developments can be found with international criminal tribunals been specially designed to deal with crimes against humanity and the establishment of the International Criminal Court as part of the Rome Statute, resulted in a benchmark and new means of standards for state conducts, inspirational provisions for national laws, and significant impact on international law. The universality of the ICC's Rome Statute has a significant impact on the enforcement of the R2P doctrine. Universal jurisdiction at its core is when the concept of extraterritorial jurisdiction is applicable, despite absence of robust link to the crime and this constitutes a way to end impunity when serious human rights violations are perpetrated and helps victims to obtain a remedy for their harm suffered. R2P is based on the obligation of states to protect their people from genocide, war crimes, ethnic cleansing, and crimes against humanity (Ministry of Foreign Affairs, Estonia, 2013 'The complex relationship between R2P and ICC'). The belief that the traditional view of security had left out the important element of protecting people or individuals, not just states and the matter of sovereignty. The matter of intervention and sovereignty was the main focus when introducing R2P. The fundamental components of human security involved the security of people against the threat to life, health, livelihood, personal safety, and human dignity.

Form a concept that was known as a fairy tale to an emerging legal norm. The R2P which was viewed as a moral responsibility and up until the end of the 2005 Summit Document some States have opposed the idea that it had a legal basis under international law to have such strong phrase such as the responsibility to protect as it only remains in the hands of the Security Council and the UN. Nonetheless, the 2005 Outcome Document, paragraph 138 and the 139 represent a mixture of political and legal considerations to the concept. Article 138 illustrates a very clear commitment in stating 'each State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity' this sentence reflects the traditional view of the bond of duty between the state and its citizens. Article 139 emphasises on the responsibility to react stating 'the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful mean, in accordance with Chapters VI and VII of the UN Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity' (UNGA Resolution A/60/1, 60th Session, 2005 World Summit Outcome, Article 138).

A systematic duty for the international community to engage itself in responding to mass atrocities committed. Although there is an idea-driven from the sentence above regarding guidelines for the authorisation of Collective Security when reacting. The text of the Outcome Document does not firmly state the UN collective security is the only means for responding to mass atrocities. The language of the Document can also be found leaving the door open to unilateral response through case-by-case vision of collective security a qualified commitment to act in cooperation appropriately. Meaning that it must be in accordance with the Chapter VI and VII of the UN Charter, in addition to the need for the General Assembly to consider the responsibility to protect remains within the principles of the Charter and international law.

Though critics have stated that line of the sentence illustrates ambiguity of the responsibility to protect doctrine, the legality remains vague as to the General Assembly must consider the implementation and the implications when carrying out the responsibility to react, this is due to the different opinions and different means of mass atrocities and implications in reacting and preventing such act, there remains a challenge in addressing the most appropriate measure. Nonetheless, there was certainly a legal meaning behind the drafters of the Outcome Document in emphasising the importance of the emerging norm for the international community to prevent Rwanda, Kosovo, and Bosnia happening again. The Security Council has the 'primary' responsibility under Article 24 of the UN Charter to for peace and security. Though, it does not expressly state the Council has the sole or exclusive primary responsibility.

The second crucial qualification within the UN Charter can be found under Article 39 of the Charter. This allows the Security Council to take action when ‘determining the existence of any threat to peace, breach of the peace, or act of aggression’. When actions under Article 40 have failed, such as embargoes, sanctions and severance measures, Article 41 of the Charter can be considered, where measures enhance military intervention, such measures include actions by air, sea or land forces as may be necessary to maintain or restore international peace and security. Meaning, that it may resort to or permit the use of military force that’s promised under Article 42. It will not be possible to say that the framework of R2P falls outside what is known as the international norm. This is due to the comprehensive legal framework that is compromised within the UN Charter and other international legal documents such as Geneva Convention, Genocide Convention, and the Rome Statute of the International Criminal Court.

Furthermore, Resolution 1674 adopted by the Security Council in 2006 on the Protection of Civilians in Armed Conflict, the Resolution entails the first official Security Council reference to R2P. Paragraphs 138 and 139 of the World Summit Outcome Document are reaffirmed and states that the Security Council’s readiness to address gross violations of human rights. This was followed by a report released by the Secretary General Ban Ki-Moon focusing on ‘Implementing the Responsibility to Protect’. The report further focused great importance on the responsibility to protect people against atrocities, however, nothing was noted regarding the international acceptance of the doctrine.

On the other hand, it cannot be said that R2P could be considered as an international binding source. This is because it does not fall into the selected recognised sources of international law under Article 38 of the International Court of Justice Statute (Statute of International Court of Justice 1945). When considering customary international law., the scope of R2P must be exercised by the States on regular occasions, as an outcome, the *opinio juris* principle of international law will apply to the R2P doctrine.

Finally, the soft law that is known to be based on a consensus within the international community. Although, political language can be found upon the R2P. Nevertheless, there are certainly legal responsibilities involved within it, hence the international community agrees to the responsibilities involved with the doctrine as already found within international treaties, and conventions, therefore, results in creating customary norms of international law. Soft laws are viewed to interact with hard laws in complex areas. This is surely present about R2P, the legal responsibilities adjoining the doctrine and the sovereignty principle of States. Though, one of the big achievements of the R2P was to prevent the sovereignty principle to be used to remove immunity for those who have committed atrocities.

Soft laws are found to be a great contribution towards future binding sources in international law. It might be found to lack binding status. However, it offers a great contribution towards legal interpretation and informal judicial reasoning. To summarise the legality of the R2P doctrine, it is best to say that it is known as a form of soft law. The doctrine is fairly defined and shaped by existing international legal principles, and it can be said it has been significantly successful in undergoing a transformation in accurately applying the process in the future.

4. Does The Doctrine Advances the Use of Military Force for Humanitarian Ends?

It is plainly clear that the UN Charter under Article 2(4) states that all UN members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. Only under two exceptional circumstances use of force can be found lawful, the first one being self-defence under Article 51 of the UN Charter and the military measures authorised by the Security Council under Chapter VII in response to ‘any threat to peace, breach of the peace or act of aggression’. The second exception is found most relevant regarding the R2P principle. Article 42 of Chapter VII allows the Security Council to make a decision on military measures when necessary to maintain or restore international peace and security.

This authorisation overrides any prohibition about military measures when international peace and security is considered. Without having a concrete definition of what is a threat to international peace and security, the High Panel of the ICISS Commission pointed out the Security Council and itself and the international community have come to accept that when pursuing the emerging norm of an international responsibility to protect, the Council under Chapter VII can always authorise military action to redress the situation if recognised as a threat to international peace and security. The debate on the use of force is found to be at the heart of the

R2P principle. The questions arise about use of force when it is legal and legitimate to use military force as part of R2P. The issue is based on force been applied to a State without the presence of consent.

It is argued that R2P has been solely focused on the military use of force, hence loses its purpose in preventing and protecting rather reacting with the military use of force. Though, it is vital to note that coercive military force is only defensible in the most extreme and exceptional circumstances when multiple criteria have been satisfied in addition to considering the threshold for the seriousness of the threat to human security. When reflecting the shocking disastrous atrocities that have occurred in the past, and the advantage of using military force, could have saved thousands of innocent lives. Rwanda 1994 and Srebrenica in 1995 are examples of where the military use of force could have been used to protect innocent civilians. Due to the seriousness of the issue and the immediate risk of those under threat it makes it extremely challenging to have a set of rules regarding the legitimacy and stages of when the military use of force is appropriate. Concerning the legitimacy of the use of military force against the will of the state in question, the Security Council must adopt the guidelines set out by the ICISS Commission. One of the five criteria is known as Just Cause, where there is a serious and irreparable harm occurring to human beings or imminently likely to occur, examples of serious harm are known as genocidal intent or large scale of loss of life that is a product of deliberate state action or state neglect or inability to act. The bar military intervention for this is believed to set deliberately high and tight. Followed by the right authority criteria (Massingham, E. *“Military intervention for humanitarian purposes: does the Responsibility to Protect doctrine advance the legality of the use of force for humanitarian ends?”* International Review of the Red Cross, 91(876) 803-831. This refers to the question who should be authorising military intervention. The Commission have noted the Security Council, General Assembly and Sub-Regional Organisations have the right authority to authorise military intervention.

Right intention is the third guideline of the criteria. To have the right intention present for the proposed military action, i.e., to prevent human suffering. Last Resort, every non-military option must have been explored, all types of peaceful resolution must be considered, does not necessarily mean to have tried and failed every option before the military intervention. However, it does require a reasonable ground for believing that other measures would not have worked. The scale and the duration of the planned military intervention must be based on the minimum necessary basis to secure the defined human protection known as Proportional Means as part of the criteria. Finally, the Reasonable Prospects is known for the reasonable chance of the military action being successful in meeting the threat in question. The test of balance of consequences is applied where the consequence of action is not likely to be worse than the consequence of inaction.

It is argued that the existence of the criteria does not guarantee that the Security Council will adapt every time military use of force is involved, nonetheless, to an extent it does reflect on the nature of the Security Council's debate on achieving a consensus regarding when and what action to be taken when deciding military intervention is required. It was further noted by the Commission that although the first point of call must be from the Security Council, however, due to the past inability of the Council, General Assembly or Regional Organizations would have a high degree of legitimacy, this, however, must satisfy the 'right authority' criteria for military intervention.

Military intervention for humanitarian purposes has always been a heated debate. As it is found in the International Commission on Intervention and State Sovereignty report, military intervention has a case of 'both when it has happened as in Somalia, Bosnia and Kosovo and when it has failed to happen, as in Rwanda'. In addition to the three elements of the R2P doctrine, though it is understood as a last resort measure, military intervention is a crucial part as part of the responsibility to react. Once again, a challenging issue to the principle is to respect the sovereignty of the state in question. Though the R2P principle has made it plainly clear that the concept of sovereignty is to provide protection rather than territorial control.

One of the arguments put forward to the co-chair of the Commission, Gareth Evans, was that the R2P is precisely another name given to humanitarian intervention. His response was that R2P is designed to be focused more on prevention, non-military forms of intervention and post-conflict rebuilding. With an integrated approach to prevent any conflict and avoid human rights abuses and mass atrocities. It is argued that the word protect has a very strong standing when understanding the phrase, and it leads to expectations. Intervention is then found lawful when failed states cannot deliver to protect the population from mass atrocities. Hence, military intervention for humanitarian ends can be added to the three main elements of the R2P. However, it

is vital to consider the UN Charter as previously discussed; it does not permit the use of force other than self-defence without the authorization of the Security Council.

As stated in the World Summit Outcome Document, the only operative military intervention is through the UN Charter, Security Council. The doctrine of non-intervention, therefore, remains the fundamental principle of the international legal system. From a legal perspective, there seem no other paths other than authorisation from Security Council, however, in practice the R2P doctrine and the responsibility to react element with military intervention for humanitarian ends may well take place outside the Security Council's authorisation due to the inactivity of the Security Council may well be illegal but morally legitimate.

There are many unanswered questions regarding the new international norm known as the R2P principle, though it is classified as a significant step forward for the international community for taking a holistic approach to protecting population from mass atrocities. Though every situation differs thus makes the doctrine extremely challenging when applying. However, R2P asserts that an inability to intervene in one situation should not be based as a justification for not intervening in another. Most importantly, the UN confirming the legality of the declarations by the Security Council in which they find Genocide, war crimes, ethnic cleansing, or crimes against humanity within the definition of what constitutes a threat to peace.

5. Conclusion – The Case of Syria

The Syrian conflict indicates no marks of abating. It has been observed that, the civil war has pulled on its violence has developed more extreme, systematic, and widespread. The dispute has also become more threatening and more intractable the stability and peace of entire Middle East. Already it had devastating outcomes for neighbouring Iraq and postures a permanent threat to Turkey, Jordan, and Lebanon. The R2P, the international commitment adopted at the United Nation 2005 World Summit, has been leading to the global discourse on how to react towards mass outrage crimes in Syria. On the other hands, in Libya in the year 2011, despite the bitter debate nearby the United Nations Security Council-mandated involvement regional organisations, individual states and UN agencies have writhed to discover ways and means of maintaining their R2P the Syria's people.

The responsibility to protect is the global norm; however, it does not have independent agency. The failure to protect civilian and to end atrocities in Syria is not a failure regarding responsibility to protect, but as of the imperfect institutions and actors charged with its execution. Afar from the main responsibility, three of the government of Syria to stop killing its inhabitants, responsibility rests with the one body mandated and trusted by the 193 UN members with the maintenance of global security. It has been observed that Syria has taken into unambiguous relief the realism of a twentieth century UN stressed to react toward twenty-first era challenges. The Security Council, without or with reform, is still obliged to assist crimes against humanity and end war crimes in Syria. Issues relate to the access of humanitarian, negotiating a political resolution and ending still complex and oppressed with political risk. However, the inability to resolve successfully after four years of disputes establishes a catastrophic historical in aid of the Security Council. The harsh truth is that there is no informal solution to the distress of the Syrian populaces, then that does not show that the Security Council has to select between inaction and invasion. As the civil war in Syria passes added bloody anniversary, this still is true now because it was when the dispute began (Stahn, C. *"Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?"* (2017) American Journal of International Law.

In Syria, there was the problem of responsibility for three years of bulk atrocity crimes. The Council of Human Rights Commission of Inquiry has issued various reports recording mass atrocities committed by all sides. They provide detail on how forces of government and their associated militias have been accountable for the gross violation, large-scale massacres, and war crimes of global humanitarian law as an issue of country policy. It was important for regional authorities including Turkey, Qatar, Saudi Arabia, and Iran to accept the necessity to military separate from the Syrian conflict and accept that a wider regional sectarian blaze was not in the strategic interest of anyone. The Arab league behind these powers, Russia and United States had a vital role to play as possible guarantors of any assigned settlement. It was also important for the Security Council towards single its willpower to castigate violations of any peace contract. It is therefore arguing that the primary organ responsible for maintaining peace and security – is impacted by realpolitik.

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