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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

SOVEREIGNTY, SUBSIDIARITY, AND R2P: WHOSE RESPONSIBILITY TO PROTECT?

AUTHORED BY - ARCHANA P RUPWATE

Abstract

The Responsibility to Protect (R2P) is a modern concept in international law that seeks to balance state sovereignty with the international community's duty to prevent mass atrocities, including genocide, war crimes, ethnic cleansing, and crimes against humanity. While R2P lacks binding legal status, it is rooted in established legal principles, including human rights law and international humanitarian law. This paper explores the evolution of R2P, analyzing its relationship with the traditional Westphalian notion of sovereignty, the principle of subsidiarity, and its application in international interventions. The study examines R2P's legal standing, its role in shaping international responses to humanitarian crises, and the challenges posed by its selective enforcement and dependence on political will. By evaluating key cases such as the Libya intervention and the limitations of R2P in Syria, this paper argues that while R2P has advanced international human rights protections, its effectiveness remains constrained by geopolitical interests and the absence of a clear enforcement mechanism. The paper concludes that for R2P to be a viable tool in preventing and addressing mass atrocities, it must be further institutionalized within international law while maintaining a delicate balance between intervention and respect for state sovereignty.

1. INTRODUCTION:

The concept of the responsibility to protect (hereinafter referred as to R2P) is comparatively new and has no legal standing yet in international law but it has been elaborately explained in ICISS Report¹ and in Resolution.² Although, out of the four grave crimes such as genocide, war crimes, crimes against humanity, and ethnic cleansing mentioned under the resolution, the first three of them already have specific legal standing in international law and have legally binding treaty laws. Such as The Genocide Convention, International Humanitarian Laws (the

¹ The Responsibility To Protect Report of the International Commission on Intervention and State Sovereignty, December 2001

² Resolution A/RES/60/1 of the UN General Assembly, 2005.

Hague and Geneva Conventions), The Rome Statute of the ICC, and international customary law.³ However, the crime of ethnic cleansing is not yet recognized as a separate offense under international law.

The concept of R2P under resolution seeks to reconcile two principles of international law: the protection of human rights and the preservation of state sovereignty.⁴ These two principles may clash when a state fails to protect its citizens' human rights and fundamental freedoms, but instead manifestly, severely, and systematically violates those rights,⁵ or, if the state itself is the perpetrator who is directly or indirectly responsible for crimes against humanity or genocide then it is the responsibility of the International community to act at the stage of the state concerned. However, the international community can intervene with prior sanctions from United Nations (UN). Consequently, the intervention of the international community becomes the subsidiarity to the state for the protection of the human rights of the population of that state. However, in the case of Humanitarian Intervention, it is possible that the sovereign power of the state may be compromised even if it is authorized by the UN. For instance, in the case of Libya, It was the first case of the implementation of the concept of R2P where UN-sanctioned military intervention of the international community ultimately failed.⁶ In this essay, we will explore how the relatively new concept of R2P has advanced the traditional meaning of the principle of sovereignty which turns states' power into its responsibility to protect. In addition, in case the state fails to protect its population, who is responsible to protect the populations of that state, and how the intervention of the international community become a subsidiary of the state?

2. The Concept of Sovereignty:

The UN charter contains no definition of sovereignty, despite the fact that the UN charter is based on the idea of sovereignty, Article 2(1) is referred to as the principle of equal sovereignty for all states and non-interference is one of the cardinal principles of international law.⁷ The concept of sovereignty is the foundation of international law. It refers to the most extensive and comprehensive form of jurisdiction recognized by international law and granted to every single

³ [The Responsibility to Protect: A Background Briefing - Global Centre for the Responsibility to Protect \(globalr2p.org\)](http://globalr2p.org)

⁴ Marboe, I, All Human Rights for All, Vienna Manual on Human Rights, 503

⁵ Ibid

⁶ Adams, S, Libya and the Responsibility to Protect, Global Centre for the Responsibility to Protect.

⁷ United Nations Charter, 1945, Art.2(1).

state. It implies that the state has complete and unassailable control over the territory and all of its population living on that territory. Internal sovereignty implies that states have the right to exert jurisdiction over all people living on their territory. From an external point of view, states have the right to act as subjects of international law, which means they can, for example, conclude a treaty with another state or form an international organization with other states. It entitles the state to operate under international law.

The Westphalian Sovereignty: States create a nation while accepting each state's Sovereignty. This Sovereignty is not contingent on the size or economic strength of the state. Domestic power is the only authority that exists over the state. As a result, external powers of other states are not permitted to intervene in the internal affairs of another state.

3. Overview of the concept of R2P:

After observing that the debate over humanitarian intervention was not progressing, the International Commission on Intervention and State Sovereignty (ICISS) shifted its emphasis to the concept of R2P. First, the ICISS report suggests that states are responsible for the lives and safety of their population. Second, it implies that national authorities are accountable to the population and the international community, and third, it implies that national authorities are responsible for their actions.⁸ Sovereignty is no longer defined as a control in the traditional Westphalian sense, but as responsibility in both internal and external functions. According to the commission's R2P includes the responsibility to prevent, the responsibility to react, and the responsibility to rebuild.⁹ The ideas of the R2P presented in the ICISS report had been changed and amended, concretized in the resolution.¹⁰ In comparison as per ICISS report the concept of R2P is related to severe human rights violations. According to resolution it is narrowed to four specific crimes i.e genocide, war crime ethnic cleansing, and crimes against humanity.¹¹

The R2P concept is founded on three pillars, as established in paragraphs 138 and 139 of the Resolution.¹² These pillars are also represented in the 2009 UN Secretary-General Ban Ki-Moon Report.¹³

⁸ Marboe, I, All Human Rights for All, Vienna Manual on Human Rights, 502.

⁹ Marboe, I, All Human Rights for All, Vienna Manual on Human Rights, 502.

¹⁰ Resolution A/RES/60/1 of the UN General Assembly, 2005.

¹¹ Resolution A/RES/60/1 of the UN General Assembly, 2005. Para 138.

¹² Resolution A/RES/60/1 of the UN General Assembly, 2005. Para 138,139.

¹³ Report of the UNSG to the UNGA A/63/677 of 12 January 2009 pg 8-28, para 11-66.

- i) Pillar one: The primary responsibility of each individual state is to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, which responsibility entails preventing such crimes, including their incitement, through appropriate and necessary means.
- ii) Pillar two: The international community must assist, encourage and help states in fulfilling their responsibility to protect and obligations towards its population as well as create an early warning capability through the UN.
- iii) Pillar three: When a state manifestly fails or is unwilling to protect, or is the perpetrator of the aforementioned human rights violations, R2P imposes a responsibility (which is a possibility to act, but not an obligation) on the international community to use appropriate diplomatic, humanitarian, and other peaceful means such as embargoes / freezing bank accounts, and coercive means as a last resort in a timely and decisive manner in accordance with the UN Charter.

4. Whose Responsibility to Protect?

As per the concept of sovereignty, it is the first and foremost responsibility of the states to protect its population, Secondly, it is the responsibility of domestic authorities and individuals, lastly, international community is responsible for the protection of human rights¹⁴ however, it is not an obligation. In context with the concept of R2P the intervention of the International Community is then become a subsidiary of the state.

a. Responsibility of State:

As stated in Pillar One it is the primary responsibility of each individual state to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and prevent such crimes, including their incitement, through appropriate and necessary means.¹⁵ In the twentieth century, a plethora of international treaties were signed, under which states voluntarily accepted obligations, including obligations to safeguard the human rights of their respective state populations which also included non-citizens. State sovereignty implies responsibility¹⁶ and it may be subject to certain limitations. Human rights, for example, are a limitation to the notion of sovereignty, if

¹⁴ Marboe, I, All Human Rights for All, Vienna Manual on Human Rights, 502.

¹⁵ Resolution A/RES/60/1 of the UN General Assembly, 2005, 138.

¹⁶ The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001 (ICISS report).

a state is a contracting party to a human rights treaty, that state is required under international law to respect and protect human rights as agreed upon in that international human rights treaty. According to the obligations derived from this treaty, the state's sovereignty is then limited because it is not permitted to behave as a sovereign state with the result of violating human rights. Diplomatic privileges are another example of a restriction on sovereignty: every state is required to accept other states' diplomats on its territory and to give diplomats certain privileges as agreed upon in specific international treaties. All of these Sovereignty limitations are exceptions to the general idea of undivided, unchallenged sovereignty, and they are definitely established, particularly in international treaties. Apart from those exceptions, territorial sovereignty is absolute, unchallenged, and full.¹⁷ The exception is that because the state agreed to this treaty, it also decided to limit its sovereignty. It is a kind of waiver of sovereignty, so it is consistent with the general idea of sovereignty.

b. Responsibility of International community or international intervention:

According to the ICISS Report¹⁸ and Resolution A/RES/60/115¹⁹, R2P embraces three specific responsibilities:

- A. *Responsibility to prevent*: under pillar two it is the responsibility of the international community to prevent human rights violations before they occur, such as; early warning mechanisms and supportive measures to enable the said state to fulfill its duties and responsibility to protect and obligations towards its population.
- B. *Responsibility to react*: the 3rd pillar states that if the state fails or itself is the perpetrator of gross violation of the human rights of its population then is the responsibility of the international community to respond to situations with suitable measures, which may include coercive measures such as embargos, freezing bank accounts, weapons embargos should first be employed and that military intervention in extreme cases may only be undertaken as the last resort and only after it has been duly sanctioned by the UN Security Council.²⁰

THRESHOLD CRITERIA: JUST CAUSE “: According to the ICISS report, military intervention for human protection purposes is justified in two broad categories: to halt

¹⁷ United Nations Charter, 1945, Art 2(4).

¹⁸ The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001 (ICISS report).

¹⁹ Resolution A/RES/60/1 of the UN General Assembly, 2005, 138.

²⁰ Resolution A/RES/60/1 of the UN General Assembly, 2005, 139.

or avert:²¹

- a. large-scale loss of life, actual or suspected, with or without genocidal intent, that is the result of either deliberate state action, state neglect or inability to act, or a failed state situation; or
- b. Actual or suspected large-scale "ethnic cleansing," whether by killing, forcible expulsion, terror, or rape. However, for the use of military force five "precautionary principles" or "legitimacy criteria" have to be met to help guide potential military action under the UN Charter.²²²³
 - i. The severity of the damage: The threat of atrocities must be clear and extreme enough to support military action;
 - ii. Proper purpose. The primary goal of the intervention must be to avoid or alleviate suffering.
 - iii. Last option: Military force should be used only as a last resort after every other reasonable non-military alternative has been exhausted.
 - iv. Proportional methods: The scope and duration of military activity must be proportionate to the goals attained.
 - v. Consequences must be weighed: Is there a realistic possibility of averting the threat of atrocities without worsening the situation?
- C. *The responsibility to rebuild*: It means to provide complete assistance to the affected communities with recovery, reconstruction, and reconciliation or through court proceedings to hold perpetrators accountable, social programs, compensation schemes, and other mechanisms to rebuild the trust and livelihood of the population, especially after a military intervention, addressing the causes of the harm that the intervention was intended to stop or avert.

5. R2P, Sovereignty and subsidiary:

One of the purposes of the United Nations is to achieve international cooperation in solving international problems. This does not mean imposing the United Nations' aims or objectives, such as human rights, through interference, intervention, or use of force, but rather achieving

²¹ The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001, 4.18.

²² The Responsibility to Protect, Report of the International Commission on Intervention and State Sovereignty, December 2001, 4.18.

²³ [The Responsibility to Protect: A Background Briefing - Global Centre for the Responsibility to Protect \(globalr2p.org\)](http://globalr2p.org).

them through international cooperation.²⁴ The concept of sovereignty, as reflected in Articles 1 (3) of the UN charter, we see that the principle of sovereignty is relatively strong in the articles of the UN charter, and from this perspective, the possibilities provided by the concept of responsibility to protect are relatively broad exemptions from the principle of sovereignty.²⁵

The idea of subsidiarity is not rigid or precise, and it is marked by internal tensions and intrinsic paradoxes that must be addressed, particularly its combination of intervention and non-interference. Subsidiarity has deep affinities with many of the implicit premises of international human rights norms when used in its original and most comprehensive sense, including presuppositions about the dignity and freedom of human persons, the importance of their association with others, and the role of the state with respect to smaller social groups as well as individuals.²⁶

When accounting for the increasing relevance of the subsidiarity principle in international human rights practice, where determining who has jurisdiction over whom and when is becoming a crucial problem, the ethical approach falls short. A statist perspective, on the other hand, will tend to use subsidiarity to preserve the will of the state, favoring the status quo and a Westphalian picture of the international system with little incentive for integrated progress in human rights protection.²⁷

6. Legal nature of R2P:

The legal basis of the R2P is a resolution of the General Assembly of the UN, we must recognise that resolutions of the General Assembly are not legally binding. The Security Council resolutions are legally binding; various Security Council resolutions alluded to the principle of responsibility to protect specific situations. However, the content of those resolutions is a reaction to a specific situation and cannot be interpreted as a generic approach to R2P. Accordingly, we cannot infer any general norm of resort from the Security Council's several resort resolutions. Resolutions of the Security Council can be viewed as signs of an

²⁴ United Nations Charter, 1945, Art.1(3).

²⁵ United Nations Charter, 1945, Art. 1(3).

²⁶ Paolo G. Carozza, Subsidiarity as a Structural Principle of International Human Rights Law, 97 Am. J. Int'l L. 38 (2003). Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/564/

²⁷ Marisa Iglesias Vila, Subsidiarity, margin of appreciation and international adjudication within a cooperative conception of human rights, *International Journal of Constitutional Law*, Volume 15, Issue 2, April 2017, pg. 401 of Pages 393–413, <https://doi.org/10.1093/icon/mox035>, <https://academic.oup.com/icon/article/15/2/393/3917610#90302218>

evolving international legal norm. That is, if the notion of R2P constituted its condition, its preconditions, and repercussions may be considered as peace of customer-law according to article 38 of the International Court's statute.²⁸ We cannot consider if this concept is already worldwide custom because the development of a regulation based on custom requires a general practise that is regarded as law. We must have international practice that is recognized as law. Given those two prerequisites, we cannot, in my opinion, argue that the concept of R2P is already a rule of international customary law. We have some examples of practice, but it has not been an uncontested practice, and there are just a few. Second, those practices have not been acknowledged as law by a relatively large number of states, therefore in my opinion, both the practice and its recognition as law are lacking, and thus we do not have international customary law when discussing R2P.

7. CONCLUSION:

R2P is an exception to sovereignty that allows the international community to intervene in a state's sovereign power if that state has significantly failed to meet its obligations to safeguard the human rights of its population. Some scholars consider this a violation of sovereignty, but Marboe believes that R2P adheres to sovereignty and merely shifts the definition of sovereignty to indicate state responsibility to the state population, rather than the traditional Westphalian concept of sovereignty. As we see the concept of R2P is not legally binding. Further, it does not provide the specific means to prevent the crime but it can only be applicable after the crime has occurred. Perhaps supposing it's not yet a genocide but it could become one the concept of R2P could be implemented to prevent the genocide. However, preventing the crimes mostly depends on the political will of the powerful nations it depends on the spotlights of the international community. However, military intervention by the international community may affect the sovereignty of the state though, under the concept of subsidiarity, the international community cannot take anything in return from that state since ethically it beneficiary-centered. I think it is too early to conclude the legality of the concept of R2P however, the concept has developed relatively faster than other human rights institutions. The implementation may not be as successful as it should be but I think in the future it will be a very effective tool to protect against human rights violations and to establish the purpose of UN for achieving international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental

²⁸ The Statute of the International Court of Justice, 1945. Art. 38.

freedoms for all without distinction as to race, sex, language, or religion.²⁹

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²⁹ United Nation Charter, art. 1 (3)