Operationalising Responsibility to Protect

(Legitimacy & Efficiency)

Chapter 2 - Responsibility to Protect through the eyes of Human Rights

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Abstract

The Responsibility to protect doctrine, accepted unanimously, by nature was drafted from the victim's perspective and the necessity to protect the human rights of the civilian victims and therefore establish peace. This was a landmark doctrine, which re-established the importance of human rights and the responsibility of the state and the international community to do so in any instance. This doctrine was an output of the call by the UN Secretary General Kofi Annan, who insisted on the necessity to clear the confusions and arguments between sovereignty and human rights to establish peace, at a point, when the world was witnessing mass violations of human rights nationally and regionally, which made it complicated to enforce authority to protect the victims inside a sovereign territory. Responsibility to protect gives substantial support to the dispute resolution methods for the new wave of war and conflict, dominated by civil war, regional conflict, ethnic cleansing and mass atrocities. However, it has been a very complicated discourse of humanitarian intervention, because of the questions of legitimacy and efficiency in operationalising it.

Since the Westphalian principles, post major colonial rules and post Cold War, the world nations have been very particular with the importance of national integrity, sovereign authority and the principle of equality in world affairs, where intervention is always disputed. The main reason for the dispute in humanitarian intervention is the question of legitimacy and efficiency of interventions. The question of legitimacy for the doctrine should be directly integrated into the evaluation of regulating authority through sovereignty and the importance of protecting human rights internationally. The question of maximising efficiency should be focused upon successfully institutionalising positive peace as a universal goal, evading operational challenges, influence of biases in decision making, etc. Studying the patterns of legitimacy with the role of Human rights and sovereignty and the patterns of efficiency in institutionalising peace through the approach of universality and its scope of measures, this series of papers on operationalising R2P through maximising the legitimacy and efficiency of this doctrine. Therefore, strongly contributing to the debates of improvising and regulating the norm of humanitarian intervention for peace, the most needed improvisation of this century's peace and conflict literature.

List of Abbreviations

AMIS - African Union Mission in Sudan

EUFOR Tchad/RCA - EU Military operation in Easter Chad and North Eastern Central African Republic

EULEX KOSOVO - European Union Rule of Law Mission in Kosovo

EUTF - EU Emergency Trust Fund for Africa

ICISS - International Commission on Intervention and state sovereignty

IDF - Israeli Defence Force

IHL - International Humanitarian Law

IMF - International Monetary FundAU - African Union

MINURCAT - Mission Des Nations Unies en République Centrafricaine et au Tehad

NATO - North Atlantic Treaty Organisation

R2P - Responsibility to Protect

UDHR - Universal Declaration of Human Right

UN - United Nations

UNAMID - African Union - United Nations mission in Darfur

UNGA - United Nations General Assembly

UNHRC - United Nations Human Rights Council

UNMIK - United Nations Interim Administration Mission in Kosovo

UNPK - United Nations Peacekeeping

UNSC - United Nations Security Council

WSOD - World Summit Outcome Document

Methodology

R2P was called upon due to the violation of mass human rights and the need for efficient humanitarian action. This humanitarian action was obstructed due to the confusions amongst security dilemmas and sovereignty in international affairs due to the question of legitimacy, which further impacts efficiency. These debates and dilemmas are also caused due to the difference in theory and reality while practising. Liberal notions while making soft laws in order to achieve maximum unanimity, often are too disruptive and difficult to operationalise with complete legitimacy and efficiency.

Discourses and debates even after decades of humanitarian intervention, peacekeeping, human rights measures and R2P, revolve around the question of - what legitimacy does that specific actor have to take humanitarian action under R2P and how is it efficient? Here again we reach a point that the two factors which influence R2P as a humanitarian action is its legitimacy and efficiency.

This paper analyzes legitimacy and efficiency of R2P on the basis of content analysis[7], where the contents of R2P and its composition in theory and practise are analysed to be maximised. Content analysis is a method where materials such as documents, texts, literature, conversations, verbal and symbolic mentions, etc from both theory & practise are interpreted in different contexts. R2P is an international humanitarian doctrine, which has originated through dialogues and exists in value through documents from UN and governmental practises. This provides R2P with a strong significance of both theory in the documents of its values and in practise of its use. For the purpose of our research we shall use documents from the UN, Governments, academical writings, theories etc, to analyse its nature of existence and the authority it powers as the birth of R2P lies in this above. This paper shall also use materials from practical happenings such as decision making documents from organisations, governments, historical actions and case studies from reports, comments and interviews to research on its nature of use and effectiveness R2P holds.

Another significant point to notice here is that, there exists a gap between theory and practise of R2P, which has caused issues in achieving the right legitimacy and efficiency, as mentioned by the UNPK Leader upon interview - "there is no or less communication between academia and practitioners".

This has guided the paper to take a method in approaching the research through a bridging perspective between both academia or theory and practical reality. Therefore, the following is the methodology of this paper using the content analysis methods and tools in answering the research question of maximising legitimacy and efficiency of R2P :

- Researching literature, theories, output documents and resolutions of R2P under theoretical perspective through evaluative assertion analysis8 as a method of content analysis provides us with the understanding that the concept of legitimacy for R2P is driven by the concepts of Human rights and Sovereignty. The evaluative analysis guides our understanding of how states, conflicting stakeholders and organisations interpret R2P and authorise legitimacy.
- Researching through comments, interviews, historical actions, case studies, interpretations, etc under the practical perspective of R2P through contingency analysis as a method of content analysis has provided us with the understanding that R2P lacks universality and the vagueness in defining the efficient scopes of measures for R2P. This leads this paper to the point of "what if" strategy using universality and the right set of methods to maximise efficiency. This helps the research in reaching recommendations as a result of analysis of the contingency from the present and the past.
- Analyzing the theoretical perspective and practical perspective using the tools of content analysis, this paper also tried evading the point of mislead or gaps in between the both. Bridging the theory and practise is achieved by using the methods of content analysis through interviews of academicians and practitioners.

According to the above methodology used to analyse the research materials and resources, this whole series of papers are structured beginning with (a) : the analysis of legitimacy using evaluative assertion with two of R2P's main concepts - Human rights and Sovereignty. Following this, using the (b) : contingency analysis method, resources from the practise of R2P is structured in this paper using the two factors of R2P' efficiency - Universality and Scopes of measures. (c) : Bridging the theoretical and practical understanding of R2P follows to fill in the missing gaps of the above two sections. Analysing (a), (b) and (c) provides us with the end result of our research target, the recommendations to operationalise R2P with better legitimacy and efficiency.

Human Rights and the Responsibility to Protect Doctrine

Human rights is a major concept where global consensus stands unanimously strong. They are, as described in the Universal Declaration of Human Right (UDHR) are "inalienable rights of all members of the human family"[1]. Human rights has gone through centuries of understanding to evolve and stand where it stands today. Similar to that of evolutionary sciences, Revolutionary theories of Human rights never seem to exhaust, due to the constant change in the behaviour of human trends[2].

History of human rights building the base for R2P actions

As Cohen describes the three waves of Human rights, we must note that the international humanitarian action has travelled along with this discourse to where it stands now and could prevail into a stronger version for tomorrow. The first wave of Human rights, began when the countries and individual states where constituting their government began declaring the universality of human rights for their citizens. For example, the French government in its Declaration of the Rights of Man and Citizen of 1789 – considered by Cohen as the "progenitor and referent of modern human rights discourses"[3]. These declarations marked the beginning of the first wave of Human rights, which was by nature very much bound to a local and national level. It was the sovereign actors of every country, issuing these declarations and taking the duty to protect it. These declarations and mention of Human rights were structured in a such a way that the population relies on its government and not on any external governments or entities for the protection of their human rights. This created a very central view of human rights which was completely accumulated at the core of the national systems and had nothing to do with external responsibilities. However, this was a strong form of hard law, completely binding in nature.

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[1]"Universal Declaration of Human Rights: Adopted and proclaimed by UN General Assembly Resolution 217 A (III) of 10 December 1948 Text: UN Document A/810, p. 71 (1948)", in *Refugee Survey Quarterly*, vol. 27, 2008, 149-182.
[2]B Turner, "Outline of a Theory of Human Rights", in *Sociology*, vol. 27, 1993, 489-512.
[3]U Ram, "Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism. By Jean Cohen. Cambridge: Cambridge University Press, 2012, 453pp.", in *Constellations*, vol. 21, 2014, 432-433.

A second wave of Human rights came into the picture when international or regional activists started working on establishing treaties and passive agreement on the importance of Human rights. Passive agreements were acknowledgements of the necessity of the protection of Human rights and leaving it with the national governments to be propagated through activism into implementation. This did not talk or mention anything about the obligation, responsibility or the process of protecting human rights by national, regional or international actors. As Cohen believes, the Universal Declaration of Human Rights, acted as the most important turning point after the World Wars from the "First wave" to the "Second wave". This wave despite the fact it made Human rights legitimately claimable, whether the government embraces it or not, was still enshrining the responsibility to protect human rights at the national level. This marked the beginning of establishing soft laws in the matter of human rights, which were not binding in nature, serving no authority to the states.

This second wave was brought into more broad coverage when international actors started using methods such as "sanctions, military invasions, and authoritarian occupation administrations by multilateral organizations (NATO, UNSC) and/or states acting unilaterally under the rubric of "humanitarian" and even "democratic" intervention", with a call of protecting human rights. This established the need for responsibility by the international community on the indisputable protection of Human rights, without the consideration of the national government's enforcement or acknowledgement. This marked the "third wave" of Human rights with extraterritorial obligations[4]. Third wave started the question of the need for measures, which shall provide authority to the international actors under the existing soft laws to protect human rights universally.

Responsibility to protect human rights have taken a huge transformation from its establishment in the national level to its acknowledgement of universality and protecting it internationally.
An interesting fact out of the understanding of the third wave is that they are very specific and only function when there are severe violations of human rights, where there are mass atrocities

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[4]U Ram, "Globalization and Sovereignty: Rethinking Legality, Legitimacy and Constitutionalism. By Jean Cohen. Cambridge: Cambridge University Press, 2012, 453pp.", in *Constellations*, vol. 21, 2014, 432-433.

committed. Yet, the trickiest part is that the third wave, here the Responsibility to Protect doctrine, still exists as a soft law[5], which still holds disputes about the authority for the international community to intervene. This also according to the UNPK Leader and experts leaves an unanswered question - "when is the moment can other states interfere?".

Subject of human rights under R2P

The approach and defining the context of a norm or a practise lies in legal establishment of its nature and therefore approach. Such legal establishments through treaties, declarations, outcomes, doctrines, etc, help the framing of an approach by creating a structure and focus of approach for these organisations on their interests in responsibility to protect. These establishments are "ratione materiae" and/or "ratione personae"[6]. Human rights documents and its legal approach can be ratione materiae where they have a subject focus on a specific form of human rights either social, political, economical or etc, like the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, European Convention on Human Rights, European Social Charter (1961 and 1996), American Convention on Human Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1999). On the other hand, Human rights documents can be ratione personae, when they focus on a specific population or a demographic factor like - women, children, people with disabilities, refugees, etc under documents like the Convention on the Elimination of All Forms of Discrimination Against Women, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003), Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child (1990), Inter-American Convention on International Traffic in Minors (1994) and the Convention on the Rights of Persons with Disabilities. All the above establish procedural legitimacy for the organisations to take decisions built on the basis of sociological legitimacy with morality in Human rights. When an establishment has both "ratione materiae" and "ratione personae" the

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[5]R Reike & A Bellamy, "The Responsibility to Protect and International Law", in *Global Responsibility to Protect*, vol. 2, 2010, 267-286.
[6]E Brems, "Legal Pluralism As a Human Right and/or As a Human Rights Violation", in *Papers.ssrn.com*, , 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891284> [accessed 14 January 2021].

level of legitimacy is multiplied, giving the principle strong support for entirety in implementation, where disputes are lowered.

According to a UN official upon interview, he mentioned that "R2P reinforces what is already well established in the IHL". "Ratione personae" has been quite clearly defined in the Responsibility to protect doctrine, which focuses on the "civilian" population, as its target populations. Yet, this doctrine needs more definition on the subject matter of which kind of Human rights it's talking about when protecting the civilians under "ratione materiae". Legal pluralistic approach for human rights, argues that Human rights is indivisible[7]. Indivisibility of Human rights[8] meaning that all rights are equal and come in a complete package without any hierarchy within these human rights, is an important factor, when we consider the question of R2P's ratione materiae. Our UNPK experts add on to this in a different perspective where she mentions "Human rights has different mechanisms of protection, it is different in war and in normal peaceful states". This being said, there are multiple layers of Human rights in a conflict zone, which leaves R2P with the burden of defining those layers to facilitate procedural legitimacy.

Dogmas of human rights for early intervention under R2P

Genocide, War crimes, ethnic cleansing and crimes against humanity, beyond just falling under the category of "mass atrocities", violates a broad spectrum of rights for a human being, from social justice to political identity and from economic sustainability to equal access to resources, etc. This broad approach of Human rights under the dogma of Indivisibility is highly necessary in any conflict resolution or development corporation.

Following up on the above argument of the necessity to take an indivisible approach in R2P measures, we need to give importance to the fact that R2P needs to develop a mechanism of "early reaction", instead of waiting for a saturation point of mass atrocities. Though arguments of

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[7]E Brems, "Legal Pluralism As a Human Right and/or As a Human Rights Violation", in *Papers.ssrn.com*, , 2021, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2891284> [accessed 14 January 2021].
[8]L HENKIN, "The Universality of the Concept of Human Rights", in *The ANNALS of the American Academy of Political and Social Science*, vol. 506, 1989, 10-16.

the international community about the respect for sovereignty are pressing, minor interventions at an early stage of mass atrocities can prevent the burden of the necessity for legitimacy to implement heavier R2P operations at an advanced stage of the conflict.

For example, taking cues from the 10 stages of Genocide by Dr. Gregory H. Stanton, R2P needs to develop prevention mechanisms to protect human rights. Genocides begins with stages of classification, symbolisations, discrimination, dehumanisation and reaches a point of organisation, where there is a high need for international community's responsibility. The organisation stage involves purchase of arms by states and militias, often in violation of UN Arms Embargos, to facilitate acts of genocide. This can be prevented through a preventive mechanism developed under the spheres of R2P. Imposing arms embargoes on governments and citizens of countries involved in genocidal massacres, and create commissions to investigate violations, as was done in post-genocide Rwanda, and using national legal systems to prosecute those who violate such embargos could be some of the measures.[9] Beyond the above humanitarian action, early non military humanitarian intervention through acts of political diplomacy and economic diplomacy into the internal matters of the state, when the state is unwilling to protect its civilians is important. To use authority here, legitimacy is provided by international agreements and documents such as illicit trade of arms. R2P therefore, must take an indivisible approach of human rights and act in preventive mode, instead of waiting for a saturation point of violation. Legitimacy here is less disruptive than major legitimacy violations at an advanced stage. The above measures are simply to operationalise early protection on the basis of human rights.

To facilitate this R2P, needs redefinition on the subject matter (ratione materiae) of human rights, with an indivisible approach, including specified preventive measures. Such a specific and strong definition can help the international community evade confusions and the question of legal association to the operations, providing legitimacy backed up by various other similar human rights documents. A clear vision of the R2P under legal terms and approach of a moral concept

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[9]"10 Stages of Genocide", in *Genocidewatch.net*, , 2021,
<http://genocidewatch.net/genocide-2/8-stages-of-genocide/> [accessed 14 January 2021].

of Human rights can multiply the legitimacy giving the actors the rights and authority to exercise R2P in the right needful manner.[10]

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[10]G Ooms & R Hammonds, "Global constitutionalism, responsibility to protect, and extra-territorial obligations to realize the right to health: time to overcome the double standard (once again)", in *International Journal for Equity in Health*, vol. 13, 2014.