

Legal Analysis of the “Responsibility to Protect” Concept in the Context of Globalization

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Abstract

In this article, the concept of “responsibility to protect” is considered as one of the aspects of legal globalization. According to this concept, sovereignty is not a right and not a privilege, but an obligation of the state, and if the state is unable to ensure its sovereignty, the international community has the right to intervene in the current situation. Such an approach completely changes the traditionally established ideas about the subject of state sovereignty, since the very possibility of other states interfering in the affairs of another state is a violation of the principle of sovereignty in its generally accepted understanding.

Keywords: globalization, international law, responsibility to protect, R2P, RtoP, sovereignty.

Introduction

The turn of the 20th and 21st centuries has become a serious challenge for the global security system and international law. The events related to this period and associated with egregious violations of human rights have completely changed the approach of international organizations to the settlement of national crises. One such event was the genocide against Tutsis in Rwanda. The horrendous scale of the bloodshed shocked the world community, but an additional outburst of indignation was due to the inaction of the UN. The most significant basis for criticism was the failure to strengthen the United Nations Assistance Mission for Rwanda (UNAMIR) and expand its powers. This mission was originally established to assist in the implementation of the Arusha Peace Agreement signed by the Rwandan parties on 4 August 1993. UNAMIR's mandate was to assist in the security of the city of Kigali; monitor compliance with the ceasefire agreement, including the establishment of an expanded demilitarized zone and demobilization procedures; monitor the security situation during the final period of the Transitional Government's mandate until

elections are held; assist in mine clearance and assist in coordinating humanitarian assistance in conjunction with relief operations. Following the resumption of hostilities in April 1994, UNAMIR's mandate was changed to allow it to act as an intermediary between the warring Rwandan parties to enforce the ceasefire agreement; to assist in the resumption to the maximum extent possible of humanitarian relief operations; and to monitor developments in Rwanda, including the security of civilians seeking asylum from UNAMIR. Following the further deterioration of the situation in Rwanda, UNAMIR's mandate was expanded to enable it to contribute to the security and protection of refugees and civilians at risk, through measures such as establishing and maintaining safe humanitarian areas and maximizing the security of relief operations. After the ceasefire and the formation of a new government, the tasks of UNAMIR were adjusted once again: to ensure stability and security in the northwestern and southwestern regions of Rwanda; stabilize and control the situation in all parts of Rwanda to encourage the return of displaced persons; provide security and support for humanitarian relief operations in Rwanda and, through mediation and good offices, promote national reconciliation in Rwanda. UNAMIR also contributed to the security of the International Tribunal for Rwanda and human rights officers in Rwanda and assisted in the establishment and training of the new Unified National Police. In December 1995, the Security Council again revised UNAMIR's mandate to focus on facilitating the safe and voluntary return of refugees. UNAMIR's mandate ended on 8 March 1996. The Mission's withdrawal was completed in April¹.

Since the start of the mission in October 1993, its commander, Major General Dallier, has been aware of the existence of the Hutu Power movement and plans to exterminate the Tutsi². His request for a raid to find weapons caches was denied by the Department of Peacekeeping Operations³. The peacekeepers were thwarted by President Habyarimana and hardliners, and by April 1994 the UN Security Council was threatening to revoke UNAMIR's mandate if it did not improve. After the death of the head of state and the beginning of the genocide, the general tried to persuade the crisis committee and the RPF to make peace and prevent the resumption of civil war, but to no avail⁴. Under Chapter VI of the UN Charter, the mission's military was forbidden to interfere with what was happening with weapons, in addition, most of its Rwandan employees were killed in the early days of the genocide, significantly devastating UNAMIR. Thus, for the most part, the peacekeepers were left only to observe what was happening. Dallaire later called the UN mission a failure. Its most significant achievement was the provision of shelter to thousands of Tutsis and

moderate Hutus in its headquarters at the Amahoro Stadium in Kigali and other places under the protection of peacekeepers, and assistance in the evacuation of foreign citizens. On April 12, Belgium, whose soldiers made up a significant part of the contingent, after the death of ten fighters defending Prime Minister Uwilingiyimana, announced the withdrawal of its own troops, which further affected the effectiveness of the mission⁵. At the suggestion of the UN Secretary-General, the size of the contingent was reduced⁶: if on April 20 it included 1705 people, then by May 13 - already 444. In mid-May, the UN finally acknowledged the likelihood of acts of genocide and ordered reinforcements to be sent to the country, dubbed UNAMIR-2. Its first fighters arrived in Rwanda only in July, but the functions of the new mission were limited to protecting and maintaining stability.

The inaction of the UN in dealing with the Tutsi genocide has demonstrated that the international community, represented by intergovernmental organizations, is often unable to respond effectively to such human rights violations. First of all, this inability is due to the lack of legal grounds for more intensive intervention using means that meet the realities of the current situation. Thus, there was a need to change the international legal regulation in the field of countering mass violations of human rights.

The main obstacle to the intervention of the international community in this or that intrastate conflict, although associated with massive violations of human rights, is the principle of state sovereignty. That is, we are talking about a fundamentally different approach to the concept of state sovereignty, which in turn leads to a situation in which the scope of the internal jurisdiction of states is significantly narrowed. The judgment of one of the founders of the “responsibility to protect” theory, the former Minister of Foreign Affairs of Australia, G. Evans, seems significant. He argues that “the discussion about the need to interfere/non-interference in the affairs of a sovereign country on the basis of human rights violations there, even if it is purely the internal affairs of this country, needs to be conducted in a different direction”⁷. Evans then takes the initiative to change the wording “right to intervene” to “responsibility to protect”.

This quote vividly illustrates all the possible consequences of applying the “responsibility to protect” theory. The range of cases where the state has the right to decide on its own is sharply narrowing. Almost any acute issue related to the confrontation of various domestic forces can, if properly interpreted, become a pretext for the intervention of foreign organizations or states. At the same time, the

UN Charter and other international legal documents establish a fundamentally different approach to the problem raised. The UN Charter proclaims the principles of international cooperation in the field of respect and development of human rights and freedoms (paragraph 3 of article 1), the peaceful resolution of international disputes (paragraph 3 of article 2), refraining in international relations from the use of force or the threat of the use of force (paragraph 4, article 2). Separately, a ban is established on interference in matters that are essentially within the internal competence of the state (clause 7, article 2 of the UN Charter). There is only one exception to this rule, relating to cases of violation of rights and freedoms that create a situation “which threatens the peace or prevents the implementation of the provisions of the charter”⁸. Only these cases “cease to be the exclusive affair of each state”⁹. The rest of the time, the issue of ensuring and protecting the rights and freedoms of man and citizen belongs exclusively to the internal competence of each state, as evidenced by the wording of the principle contained in paragraph 3 of Art. 1 of the UN Charter in its original and current version.

Based on the above provisions, it can be concluded that the issue of securing and protecting the rights and freedoms of man and citizen belongs to the sphere of internal competence of each state and cannot, as a general rule, be the subject of foreign interference. The UN Charter fixes the goals that states should strive for but does not provide for the right of either international organizations or individual countries to interfere in each other's internal affairs based on a discrepancy between the real state of affairs in the state and the declared ideals.

The concept of “responsibility to protect” comes from a different basic setting. Human rights and freedoms come out of the internal competence of the state and become the object of international regulation. The legal status of a person, enshrined in international acts (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc.), becomes a legal requirement that applies to the entire world community. Non-compliance with these standards should lead to the direct intervention of the world community. The methods of such interference can be different, ranging from public criticism of the state, ending with direct military intervention. Moreover, international intervention can take place both after the occurrence of grounds, and in advance in order to prevent violations of human rights.

Thus, the UN's “responsibility to protect” initiative, introduced in 2005, is based on the idea that sovereignty is not a privilege, but a duty of the state. In accordance with

this concept, sovereignty not only gives states the right to control their internal affairs, but also imposes a responsibility to protect people living within the borders of these states¹⁰. In cases where the state is unable to protect people - whether due to lack of capacity or lack of will - the responsibility shifts to the international community¹¹.

The most important provisions of the “responsibility to protect” concept are the following:

Its applicability to the grossest violations of human rights (genocide, crimes against humanity, war crimes, ethnic cleansing);

Taking measures to protect the population at the national and international levels. At the same time, the main role in the prevention and criminalization of such crimes in the national criminal legislation belongs to the state;

The comprehensive nature of international protection, including both peaceful means enshrined in Chapter VI of the UN Charter, and coercive measures authorized by the UN Security Council in accordance with Chapter VII of the UN Charter, in interaction with the collective security systems of regional and subregional international organizations;

Emphasizing the need to use early warning measures for international crimes in the field of human rights through more active interaction of specially established UN institutional bodies (Human Rights Council, Office of the UN High Commissioner for Human Rights, Special Adviser to the Secretary-General on the Prevention of Genocide) with human rights organizations.

The concept of the “responsibility to protect” was first proposed in scientific and practical circulation in 2001 in the report of the International Commission on Intervention and State Sovereignty, appointed by the Government of Canada and consisting of prominent scientists, politicians, diplomats and representatives of non-governmental organizations¹². The proposed concept obliges the international community to intervene in the affairs of other states in order to prevent humanitarian catastrophes. According to the report, “national political authorities are accountable to their citizens internally and to the international community through the UN,” moreover, representatives of states are responsible for their actions and “may be called to account both for their actions and for omissions.” In the understanding of the commission, the “responsibility to protect” is an obligation not only for states, but also for the international community as a whole. Thus, initially the responsibility to protect its citizens lies with the state authorities, but in case of failure to fulfill it, the

responsibility for protection falls on the entire world community, acting through the UN, even if this requires a violation of state sovereignty.

At the same time, the commission considers it necessary to¹³:

establish clear rules, criteria and procedures for determining the need for intervention and how to implement it;

determine the legitimacy of military intervention only after all other approaches have failed;

ensure that military intervention is carried out only for declared purposes, is effective and at the same time the number of human losses and damage to the state is minimal;

try to eliminate the causes of the conflict, when it is possible.

The main theses of the concept were confirmed in the report published in December 2004 by the “High-Level Panel”, created by Kofi Annan in 2002. This report proceeds from the premise that “the principle of non-intervention in internal affairs cannot be used to cover up acts of genocide or other atrocities, such as widespread violations of international humanitarian law or mass ethnic cleansing, which can reasonably be regarded as a threat to international security and therefore be considered the basis for action by the Security Council.” At the same time, the report emphasizes that it is not a matter of “the right of any state to intervene”, but of the responsibility to protect that lies with each state, and only in cases where they are unable or unwilling to provide such protection, the responsibility for this must be assumed by the international community, and this responsibility involves a whole series of measures, including preventive measures. “High-Level Panel” notes that the question of the use of force should be decided only by the UN Security Council¹⁴.

In September 2005, during the United Nations World Summit, all Member States formally recognized the principle of the responsibility to protect¹⁵. Subsequently, the Security Council reaffirmed the provisions of paragraphs 138 and 139 of the Summit Outcome Document in paragraph 4 of resolution 1674 (2006) on the protection of civilians in armed conflict¹⁶.

Paragraph 138 of the 2005 World Summit Outcome establishes the following: “Each state has the obligation to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity. This obligation entails the need to prevent such crimes, including incitement to them, by taking appropriate and necessary measures. We recognize our responsibility in this regard and will act in accordance

with it. The international community must take appropriate action to assist and assist States in fulfilling this responsibility and must support the efforts of the United Nations to build early warning capabilities”¹⁷.

The paragraph about considers the adoption by states of international obligations to protect the population from the listed international crimes. According to a number of researchers, politicians and diplomats, such a wording also provides for the international responsibility of a country that does not comply with the established norm. Moreover, paragraph 138 directly provides for the possibility of foreign interference under the pretext of “assistance” to other states. At the same time, this rule does not provide for the personal responsibility of persons guilty of international crimes. It is enshrined in the Rome Statute of the International Criminal Court of 1998, which also defines the offenses specified in paragraph 138 of the Outcome Document of the 2005 World Summit: with this Statute” (Part 2, Article 25)¹⁸. In view of this, the provision of the Declaration of the UN General Assembly on the principles of international law concerning friendly relations and cooperation between states in accordance with the UN Charter is being reinterpreted: “Each state is obliged to promote, through joint and independent action, universal respect for and observance of human rights and fundamental freedoms in accordance with Charter”¹⁹.

Paragraph 139 of the 2005 World Summit Outcome develops the provisions enshrined in the previous paragraph: “The international community, acting through the UN, is also obliged to use appropriate diplomatic, humanitarian and other peaceful means in accordance with Chapters VI and VIII of the Charter in order to promote the protection population from genocide, war crimes, ethnic cleansing and crimes against humanity. In this regard, we are ready to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including under Chapter VII, taking into account specific circumstances and in cooperation with relevant regional organizations, if necessary, if peaceful means will prove insufficient, and national authorities will clearly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress that the General Assembly must continue to consider the duty to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and the implications of this duty, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as and when necessary and in appropriate circumstances, to assist States in enhancing their ability to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assist those under stress before crises and conflicts”²⁰.

The concept was further developed in the report of the UN Secretary-General to the General Assembly in 2009 “Implementing the Responsibility to Protect”²¹. The report is devoted to the problem of clarifying the concept, determining its exact nature and content, as well as the role of the UN in its implementation. However, discussions about the concept are still ongoing. Thus, the international community has not yet reached a consensus on the need to enshrine the concept in the UN Charter and thereby amend it as to what situations are legitimate grounds for international intervention.

In the words of UN Secretary-General Ban Ki-moon, “the responsibility to protect does not change its nature, but, in fact, requires Member States to more strictly comply with their legal obligations regarding the non-use of force, except as provided for in the Charter”²². In the 2009 Report, the UN Secretary-General identifies three components of the responsibility to protect concept.

The first component is the assumption by the state of the international obligation to protect the population from the crimes listed in paragraph 138 of the 2005 World Summit Outcome Document. It is emphasized that this obligation arises not only from the new norms, but “operates by virtue of the nature of state sovereignty”. That is, the very approach to the definition of state sovereignty is changing. Now it includes the responsibility of the state for the situation in the country to the international community, which actually violates the first principle of this concept. “The rule of the state within the country” ceases as soon as the decisions and actions of the state are brought under the control of the international community.

The second component is “the commitment of the international community to assist States in fulfilling their respective obligations”²³. At the same time, the UN Secretary General draws attention to the fact that the term “international community” includes a very wide range of actors: UN member states, international organizations, civil society and the private sector.

The third pillar entails the duty of Member States to take collective action in a timely and decisive manner when a State clearly fails to provide such protection. Moreover, according to Ban Ki-moon, an early response allows you to apply a much wider range of means of influence than a response to existing crimes, where, as noted, you have to “choose the lesser of two evils: either inaction or use force”²⁴.

The Security Council has been actively implementing this concept in the last decade. A vivid illustration of such activities of the Security Council are the resolutions on the situation in Côte d'Ivoire and Libya in 2011.

A. D. Ouattara won the 2010 presidential election in Côte d'Ivoire. The incumbent President L. Gbagbo refused to recognize the election results and leave his post. The country split into two camps, the situation quickly deteriorated and led to armed clashes. The Security Council, in resolution 1975 (2011) on the situation in Côte d'Ivoire, strongly condemned the serious abuses and violations of international law, including humanitarian law, human rights law and refugee law, and reaffirmed the responsibility of every State to protect its civilian population, and also the responsibility of Côte d'Ivoire to promote and protect all human rights and fundamental freedoms, to investigate reports of violations of human rights and international law, and to hold accountable those responsible for such acts. The Council called on all parties to respect the will of the people, imposed sanctions on individuals and condemned all violence committed against the civilian population and other human rights violations and abuses, in particular enforced disappearances, extrajudicial killings, killing and maiming and rape of children and others forms of sexual violence²⁵.

In resolution 1973 (2011), in connection with the massive anti-government protests in Libya that escalated into a military clash, the Security Council also declared the responsibility of the Libyan authorities to protect the Libyan population, condemned the gross and systematic violations of human rights, recognized the situation in the Libyan Arab Jamahiriya as a threat to international peace and security. The Council required the Libyan authorities to comply with their obligations under international law, including international humanitarian law, international human rights law and international refugee law, imposed a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to protect the civilian population, and authorized Member States to take all necessary measures to enforce the flight ban²⁶.

The international protection measures applied by the UN bodies together with the regional international organization the League of Arab States (LAS) to stop the grossest violations of human rights are demonstrated by the situation in the Syrian Arab Republic. The crisis in Syria, which began in 2011, led to the escalation of peaceful demonstrations into armed clashes with government security forces, and then into a protracted armed conflict involving government forces, opposition armed groups and other militant groups, which continues to this day, accompanied by

thousands of civilian casualties. The commission of international crimes in the field of human rights by the warring parties required an immediate response from the international community, expressed both in the adoption of institutional measures by the UN bodies and in the use of peaceful means aimed at unblocking the armed conflict.

Thus, already in August 2011, the UN Human Rights Council, by resolution S-17/1, created an Independent International Commission of Inquiry in the Syrian Arab Republic, authorizing it to investigate and establish the number of crimes in the field of human rights, including crimes against humanity, to identify the perpetrators of the commission of such crimes with a view to developing recommendations for their prosecution by a national court or the International Criminal Court²⁷. In February 2012, by resolution 66/253 of the UN General Assembly and the corresponding resolution of the Arab League, a Joint Special Envoy of the UN and the League of Arab States for Syria was appointed, who proposed a plan for resolving the armed conflict, which called on all belligerents to stop violence in all forms, and the government Syria should not use heavy weapons in populated areas and begin the withdrawal of military forces and assets. The plan was approved by Security Council resolution 2042 (2012) and subsequently adopted by the Syrian government and opposition in March 2012. In April 2012, the Security Council adopted a resolution establishing the United Nations Observer Mission in the Syrian Arab Republic (UNMIS), tasking it with overseeing the cessation of all forms of armed violence and the implementation of the plan proposed by the Joint Special Envoy. However, despite the decrease in the level of severity of the armed conflict, it continued, which led to the cessation of UNMIS activities in order to ensure the safety of personnel²⁸. Moreover, the statement of the Special Adviser to the Secretary-General on the Prevention of Genocide in the Syrian Conflict stated that the Syrian government was clearly unable to protect its people and argued that the international community must fulfill the obligation enshrined in the 2005 World Summit Outcome, “to protect the population from genocide, war crimes, ethnic cleansing and crimes against humanity, including incitement to them”²⁹.

The situation in Syria worsened further due to the use of chemical weapons during the conflict on August 15, 2013. Moreover, the responsibility for this crime was initially assigned to the government armed forces, as a result of which a number of states demanded the use of coercive measures against Syria, up to military intervention. Subsequently, the United States, by agreement with the Russian Federation, came to an agreement on the need to create an international commission

to establish the fact of the use of chemical weapons. The establishment of the UN Mission to Investigate Allegations of the Use of Chemical Weapons by decision of the Secretary-General, its activities in Syria, with the consent of the government, shifted the course of events into the mainstream of diplomatic negotiations and the use of peaceful means to resolve the Syrian conflict. Currently, after Syria joins the Convention on the Prohibition of the Production, Stockpiling and Use of Chemical Weapons, inspectors from the Organization for the Prohibition of Chemical Weapons are eliminating their stockpiles in Syria. Joint Special Envoy P. Brahimi actively mediates to agree on the date and convene an international conference Geneva-2 with the participation of representatives of the Syrian government and the opposition.

However, the practical implementation of this concept by the UN Security Council has revealed a number of problematic aspects. The abstract nature of the provisions of the Security Council resolutions, some one-sidedness in resolving the issue of the responsibility of the conflicting parties for the violation of human rights and international humanitarian law in a situation of internal armed conflict (for example, the resolution on Libya) gave states the opportunity in their actions to go beyond the mandate of the UN Security Council. The doctrine also points to the abstractness of a number of formulations of the concept itself, set out in the World Summit Outcome of 2005. In particular, the expression “clearly unable” in relation to the behavior of national authorities raises questions, what is the semantic content of the term “clearly” and who will determine this? Different interpretations are caused by the wording “taking into account the specific circumstances” regarding the application of enforcement measures by the Security Council on the basis of Chapter VII of the UN Charter. Thus, the Dutch researcher K. Stahn concludes that a specific situation may allow the use of unilateral measures, for example, in self-defense³⁰. However, the greatest debate in the doctrine is the qualification of the responsibility to protect concept itself. In particular, some researchers call this concept a political slogan³¹. One cannot agree with such a position since the legal components of the named concept are obvious. First, in terms of content, it is based on the fundamental principles of international law (respect for state sovereignty, respect for human rights and fundamental freedoms) and the mechanism of collective security enshrined in the UN Charter. Secondly, the active implementation of the concept by the UN Security Council in modern internal armed conflicts, references to it in the reports of the UN Secretary General, resolutions of the UN Human Rights Council and the UN High Commissioner for Human Rights, the creation of special institutional bodies that

facilitate its implementation, allow us to qualify this concept as an emerging customary rule of international law.

However, the main problem with the concept of the responsibility to protect is a significant change in the key foundations of the state sovereignty principle. Since the state does not express the political will to overcome systematic violations of human rights, such a will must be shown by the world community. But what if the main actors of this community cannot reach a consensus on the fate of this state, as happens, for example, in Syria? It seems that the main driving force behind the concept should be precisely intergovernmental organizations as full-fledged subjects of international law, namely the UN. The situation in which the powers of the UN are limited to the issuance of a resolution authorizing certain states to apply certain measures of influence does not seem adequate, contributing to the settlement of the conflict. That is why the UN must have an independent will to solve emerging problems and apply the responsibility to protect. It is unacceptable to delegate this responsibility to one state or another. Issues of international security and violations of human rights are issues of the entire world community, and it is up to them to solve them. This is the manifestation of globalization in the context of international law.

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