

Enforcing human rights through the Doctrine of Responsibility to Protect

By: Ana Estrada Sierra

Abstract

The happenings of the last 30 years have brought the International Community to seek a solution to avoidable human catastrophes through the doctrine of Responsibility to Protect. This article seeks to give insight into the cases that lead up to the creation of said doctrine, as were the events of Somalia, Bosnia and Kosovo. Afterwards, the basis and leading documents of Responsibility to Protect are examined as they shed a light to need of the actions by it permitted. However, as the doctrine permits the use of force, the Charter of the United Nations is later examined in order to conclude that the doctrine of Responsibility to Protect should be permitted under the Charter as it seeks to protect human rights, one of the corner stones of the UN. Finally, the conclusion reached in the article is that by practicing the doctrine the opening phrase of the UN Charter is put into practice.

If, in those dark days and hours leading up to the genocide [in Rwanda], a coalition of states had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, should such a coalition have stood aside and allowed the horror to unfold?

Kofi Annan

“Never again” we said after the Holocaust. And after the Cambodian genocide in the 1970s. And then again after the Rwandan genocide in 1994. And then, just a year later, after the Srebrenica massacre in Bosnia. And now we’re asking ourselves, in the face of more mass killing and dying in Darfur, whether we really are capable, as an international community, of stopping nation-states murdering their own people.

Gareth Evans Co-author, *The Responsibility to Protect*

During the last 30 years the World has observed how atrocious crimes have been committed against a portion of its population. As if Second World War left no teachings, violations of human rights have been once again occurring in a large scale, affecting millions of people. In some cases, like Somalia, Kosovo and Darfur, there was a humanitarian intervention, but in others, for example Ruanda and Cambodia, there was none. Even though there is consensus that the International community cannot remain a spectator to such violations, the respect for the sovereignty of each State is more important in the scale of principles that govern International relations.



Until recently, the world's leaders were concerned with other problems, like international terrorism, nuclear proliferation, Islamic extremism, nationalism and energy. Today that hasn't changed, but they have become increasingly concerned with security issues, for instance genocide, mass killings, ethnic cleansing and other crimes against humanity, as the leaders of some countries apparently do not seek to protect the people that they rule.

The question now faced by the International Community, and International Organizations is whether there should be a response, if any, to situations of catastrophic human rights violations within States, where the State in questions claims that there can be no intervention based on the longstanding principle of sovereignty and if it is permitted to take a coercive action against another State for the purpose of protecting people at risk from these violations.

1. Background

The 20th century did not begin well. With the First World War commencing in 1914, the International Community witnessed immense suffering in the European continent. Thus they set up the League of Nations as a mean to restore collective security. Sadly, it did not work, and thus had to witness the biggest human slaughter in its history. On January 1942, 26 countries signed the Declaration of the United Nations. The foundation of this organization, and its subsequent Charter, explicitly recognized individual and group human rights. In the drafting of it during the Nuremberg Tribunal in 1945, the term "crimes against humanity" was first used. The prosecutors there indicated that according to this concept, a government could commit a gross crime against its own people during a period of apparent peace. However, the Charter also recognized, and greatly supported, the traditional view of State sovereignty, as is indicated in

article 2.7, given that founding members created the organization specifically to prevent another war.

Some time after, in 1948, the Genocide Convention was signed. This was an important cornerstone for the responsibility to protect (R2P) doctrine, as it explicitly overrode the non-intervention principle stated in the UN Charter when a crime against humanity of great magnitude was committed. However, as great as the convention sounds on paper, the reality is much harsher. The convention has never been invoked; an only one case has been brought forward to the international Court of Justice. In the Bosnia and Herzegovina v. Serbia and Montenegro case the International Court of Justice decided that Serbia did not commit genocide in Srebrenica, although it was guilty in failing to prevent it. Even though the decision was a big blow to the Genocide Convention as it showed that the definition of this crime was very narrow in scope, it was important for the formation of the R2P doctrine, as the Court recognized that a State could be found at fault for failing to prevent such crimes, even if they couldn't be punished for it.

2. The cases that lead to R2P

2. 1 Somalia

On December 1992, US marines arrived on Somalian soil during operation "Restore Hope". The events that led to this are a product of the Cold War, as Somalia was a subject of great interest of the United States and the Soviet Union at the time because of the port of Barbera. After the fall of Somalia's dictator Siad Barre the situation of the country was difficult at best: different factions were struggling in a country that was full of weapons, refugees and starvation¹. The UN established UNOSOM² in an effort to monitor the cease of fire of the civil war and arrange an equitable and effective distribution of humanitarian assistance; but dismayed by the continuity of the conditions that impeded the delivery of humanitarian supplies the Security Council decided to accept the offer of the United States aimed at establishing a secure environment for humanitarian relief operations in Somalia in order to restore peace and stability in the country³. This was the first resolution of the Security Council that sanctioned the use of force to guarantee the delivery of humanitarian assistance⁴. It also made reference to the reports of violations of humanitarian law in Somalia, thus the member States who supplied troops were authorized "the use of the necessary means to establish a safe envi-



1. United Nations Department of Public Information, "*The United Nations and the situation In Somalia*" New York, april 1993.

2. SC Res. 751, UNSCOR, 1992, UN Doc. S/RES/751.

3. SC Res. 794, UNSCOR, 1992, 794, UN Doc. S/RES/794.

4. G.P Valladares, "Somalian Humanitarian intervention 1992-1993" [on line] available at: http://www.luisedruke.com/luiise/book_thess/valladares_621_667.pdf.

ronment to carry out the operations of humanitarian assistance and relief in Somalia as soon as it were possible, acting under Chapter VII of the UN Charter”

The importance of Somalian case for the R2P doctrine was that it presented the opportunity to show the International Community that foreign intervention is feasible for humanitarian issues. It also created an interesting question to be resolved by International Law: how far can a government legitimately commit its resources in international operations without a clear relationship to its national interest?

2.2 Bosnia

At the beginning of the 90's several countries of the Balkan region declared their independence. Bosnia also sought its independence and was so recognized by the European Union and the United States in 1992. However, this newfound freedom was not happily received by all, mainly the Serbs that lived there and thought that their land should be part of Milosevic's "Greater Serbia". The Serbs had just ended the conflict with Croatia where they bombed the country and committed mass murders in the pursuit of protecting the Serb minority. Now they sought to clean Bosnia, expelling all the Croats and Muslims that were in the country and that made about 60% of the population. The actions taken by the Serbian army was known as "ethnic cleansing", and even tough the media reported secret camps, mass killings, destruction of historical sights, rape camps, and the international community remained mostly indifferent.

The UN imposed economical sanctions on Serbia and deployed blue helmets to help the Muslim refugees, but no military action was taken against the Serbian military forces. Finally, in 1994, after a world broadcast showing the bombing of a marketplace in Sarajevo, NATO demanded that the genocide stop and that the Serbs withdraw their arms from Bosnia. However, the Serbs attacked the villages established as Save Heavens for Muslims and thousand others, in what was later known to be the biggest mass murder after World War II. The UN peacekeepers could do nothing, as they could not engage in action, thus in august 1995 NATO began a bombing campaign. Milosevic seeing that his forces were diminished, was forced into peace negotiations. But the damage was already done. Over 200,000 Muslims were systematically killed and 2 million more had become refugees. In the words of US Assistant Secretary of State Richard Holbrooke it was "the greatest failure of the West since the 1930s"

The world was shocked after the happenings in Bosnia were revealed. The International Court of Justice, and the International Criminal Tribunal for the former Yugoslavia both cataloged the events as genocide, as would also happen later with the Rwanda case. The international community now began to understand that they must intervene to prevent such actions, not just be an innocent bystander.

2.3 Kosovo

The events that led to NATO's bombing of Yugoslavia in 1999 date back to cultural dispute from long before, when the Serbian army lost to the Ottoman Turks in 1389. Since then there have always been disagreements between the Serbs and the Albanians, but in 1989 the last straw was drawn when the Government of the Federal Republic of Yugoslavia (FRY) terminated the political autonomy of the province of Kosovo, a region that had 1.8 million Albanians and just 200,000 Turks⁵. A group called the Kosovo Liberation Army, sought to expel all Serb authorities and establish an independent country. The Government, headed by President Milosevic attacked the liberation army and other Albanians, the prominent race of Kosovo. This generated extreme violence that made the Security Council pronounce itself in several resolutions⁶. However, the fighting continued and after failing to make the Serbs sign a peace settlement, and after Russia and China stated that they would not support the use of force to stop the attacks of FRY in Kosovo⁷, NATO commenced air strikes in FRY to stop the violence in the region⁸, under what was called Operation Allied Force.

The importance of the Kosovo case is that it was the first time a military intervention was justified on the basis of the concept of a State's R2P. Although the doctrine was not formed at the time, this case was the one that initiated the debate on whether such concept should be developed, and if so how. Furthermore, the Security Council seemed to tacitly endorse the actions of NATO, as it sanctioned the political settlement and the resolution of the conflict that NATO achieved, even though it never authorized the campaign.

Something similar happened in the case of the Congo in 1964, when the Popular Revolutionary Government took 60 Americans and 800 Belgians as hostages, as a shield to prevent the advance of the Democratic Republic of Congo's army into Stanleyville, the place where they were at. The Security Council was asked for a course of action, but could not agree on one, thus the problem was dumped on the OAU⁹.

5. Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law, Humanitarian Intervention in Kosovo", *American Journal of International Law*, vol. 93, 1999, p. 161.

6. SC Res. 1160, UNSCOR, 1998, UN Doc. S/RES/1160; SC Res. 1199, UNSCOR, 1998, UN Doc. S/RES.1199; SC Res. 1201, UNSCOR, 1998, UN Doc. S/RES/1203.

7. James Terry, "Response to Ethnic Violence: The Kosovo Model", *The Brown Journal of International Affairs*, 1999, p. 233.

8. The NATO executed Operation Allied Force on 24 March 1999. See Press Release, United Nations Security Council SC/6657, NATO Action Against Serbian Military Targets Prompts Divergent Views as Security Council Holds Urgent Meeting on Situation in Kosovo (Mar. 24, 1999).

9. Richard Lillich, "Forcible Self Help Under International Law", *Readings in International Law from the Naval War College Review*, vol. 62, p. 135.

This organization could not help much, thus the United States, Great Britain and Belgium organized an airdrop of paratroopers without the Security Council's authorization to rescue the hostages.¹⁰

3. The R2P doctrine

The 1990s was a decade characterized by civil war and massive internal violence, such as in Bosnia, Somalia, Rwanda and Kosovo. The International Community was faced with a great debate: to intervene, and in doing so going against one of the longest standing principles in International Law, or to do nothing and hope that the peaceful measures employed by the UN worked.

The debate that the International Community faced, was made public by Secretary General Kofi Annan in 2000 in his speech to the General Assembly: "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?"

The question was answered with the creation of the International Commission on Intervention and State Sovereignty (ICISS). This commission, presented a report titled "Responsibility to Protect" to the Secretary General in 2001, and through it the International Community developed the concept of R2P¹¹, as an answer to the rise in the recognition of Human Rights¹², the increasing number of Security Council resolutions on this matter¹³ and searching to avoid past catastrophes.

The ICISS was the one to first use the term R2P and stated that sovereignty must be seen as responsibility rather than control. States are the first responsible of the protection and security of its citizens, but if the individual State is unable or unwilling to do so this burden shifts to the International Community to ensure the population is protected.¹⁴

The most important contribution of the Commission was that it stated that the problem was not whether the states had the right to intervene, but that they had the responsibility to do so. R2P, as articulated by the ICISS did not refer just to military intervention, it also covered other obligations, like the responsibility to prevent and address the causes of internal conflict, the responsibility to react and to respond to situations of compelling human need with appropriate measures and the responsibility to rebuild and to provide assistance with recovery, reconstruction and reconciliation.

10. James Terry, "Rethinking Humanitarian Intervention after Kosovo: Legal Reality and Political Pragmatism", *The Army Lawyer*, August 2004, p. 36.

11. Carsten Stahn, "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?", *American Journal of International Law*, vol. 101, 2007, p. 99. .

12. Justin Brown, "A Question of Right Authority: Moving The Responsibility to Protect from Soft to Hard Law" *Ilsa Quarterly*, vol. 17, 2008, p. 2; UN Charter at art. 1(3).

13. A Question of Right Authority, ibid.

14. International Commission on Intervention and Sovereignty, Report on the Responsibility to Protect, (2001).

In September 2003, Secretary General Kofi Annan announced to the General Assembly the creation of the High Level Panel on Threats, Challenges and Change. The members of this panel were to study the global threats and provide an analysis of future challenges to peace and security. They were also to recommend the changes necessary to ensure collective action. This panel included the R2P concept in its 2004 report. Afterwards, the Secretary General made it part of his recommendations to the General Assembly in 2005.

The thesis presented by the Commission, the High Level Panel has become since then accepted by the International Community, as is shown in the 2005 World Summit Report where the heads of State that meet in New York agreed on the following outcome document:

“138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.

139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations



from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.”

This concept and the language that embodied it was later reaffirmed by the Security Council in a resolution passed on 28 April 2006.¹⁵

Furthermore, the High Level Panel Report complemented the concept by stating that the prevention of an avoidable catastrophe is an erga omnes obligation¹⁶. Moreover, former Secretary General Kofi Annan later asserted that this responsibility is to commit all nations to the rule of human security.¹⁷

The rule of R2P is opening the horizon for the enforcement of human rights, because it implies, above all, the responsibility to react to situations where there is a need to protect human beings. When all preventive measures fail, and when the State is unwilling or unable to address the situation the International Community must act, be it in a political, economical or judicial way. In extreme cases it can also take military action.

Several questions have arisen in regard to the military action, like who makes the final decision? Who has the authority? What constitutes an extreme case? The only matter in which there has been some consensus has been in the six criteria, forged by the ICISS, that after being filled allow military intervention under the rational that it's the only way to prevent atrocious acts. These criteria are just cause, right intention, proportional means, last resort, reasonable prospects and right authority.

3.1 How R2P operates under the UN Charter

The founding fathers of the UN were mostly preoccupied with the problem of war, thus the main purposes of the Charter are the maintenance of peace and security. But the preamble also states as a purpose the protection of Human Rights. The same passage also indicates that the use of armed force can only be used when there is a common interest at stake. In other words, States have to maintain peace and security except when there is a common interest, such as the preservation of fundamental Human Rights. Later on, in article 2.1 the Charter states the principle of equal State sovereignty, that is, to be able to create the UN all members must keep their own sovereignty and thus all states are equal under the law.

15. Protection of Civilians in Armed Conflict, SC Res. 1674, 5430th Sess., UN Doc. S/1674 (2006) at 4.

16. A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN GAOR, 59th Sess., UN Doc a/59/ 565 (2004) at 201.

17. Report of the Secretary-General, UN GAOR, 59th Sess., UN Doc a/59 (2005) at 16-22.

Article 2.7 also develops the concept of sovereignty by stating the prohibition of intervention in the internal affairs of another State. However, this does not necessarily contradict the application of the measures indicated in Chapter VII in case of aggression, given that main purpose of the UN is to maintain international peace and security. Hence, the UN will have to take efficient and collective measures to prevent and eliminate a threat to peace and to suppress any act of aggression or any other breach of peace.

The Security Council is the body in charge of determining when there is a breach of peace and it has the responsibility of peacekeeping. Under article 39 of the Charter, this organ must recommend or decide what measures are to be taken in order to restore peace and security in accordance with articles 41 and 42. The measures that the Security Council can adopt are basically five: declaration of aggression (article 39), provisional measures (article 40), pacific measures (article 41) and use of force measures (article 42). Given the broad spectrum of actions that can be taken by the Security Council, States are compelled almost always to act according to the recommendations and decisions of it.



Besides the use of force authorized by the Security Council, there is also another exception to the rule of non-intervention: the Genocide Convention drafted in 1948. However, after 50 years of been ratified, the Convention as only been used twice and due to its broad language, its effects have not been great.

Another exception to the rule of non-intervention is R2P, as the result of the idea that human rights can be a legitimating reason for the use of force and also taking into account that the protection of human rights is one of the purposes of the UN, as is indicated in its preamble, where the focus is drawn to the rights of individuals. The proclamation here found is later reinforced by article 1(3) by stating: "to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion....". Furthermore, article 55 emphasizes the need to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

In light of the happenings of the last 30 years, the use of force cannot be considered a breach of the UN Charter when it aims to save people from gross human rights violations. Not changing this concept has

made the world a passive spectator to the Tutsi murders in Rwanda. The intervention done by a State, a group of States or a regional organization, acting independently but consistent with the purposes of the UN cannot be seen as wrong if it does not affect the territorial integrity or political independence, in the language of article 2(4), of the State on the receiving end of the actions.



4. Conclusion

The respect for every State's sovereignty and the commitment to non-intervention has been the center of the international legal order.¹⁸ But sovereignty isn't just a right, it's also a duty, as each State has the obligation to perform some basic functions such as distribution of resources, social welfare, political stability, civil liberties, human rights etc. States are accountable for their duties, as is the International Community. If it weren't, the Genocide Convention and the values preached by the UN Charter would be void, as it would fail to protect the ultimate sovereigns: the people, the prime obligation of each State and of the International Community.

The UN cannot be the one to always lead such initiatives. The Security Council was granted immense powers to deal with international peace and security. But this organ cannot always act given that ultimately, it is not a democratic organ, and the Council will be unable to act because of a potential veto, such as the case with Kosovo, where the threat of veto from China and Russia made an action from this organ impossible. This case, and the others previously commented make us reexamine the law of intervention in relation to the UN Charter.

The R2P is the first step in changing the perspective. However, there are three things that must be solved in order for the R2P doctrine to be fully effective: the lack of authorization by the Security Council, as this organ must be persuaded to embrace specific guidelines for the use of force, specifically in the context of R2P; the lack of operational capacity given that there should always be some resources allocated and available to react when needed, and the lack of political will to act.

Although R2P can help solve many problems such as genocide, ethnic cleansing, mass expulsions and other recognized breaches of International Law, the framework created can at some point legitimate interventions that do not really seek to prevent avoidable catastrophes but rather create them. The Iraq invasion brought these fears to reality, and it shows how the doctrine can be misused. Thus, it is clear the doctrine has still a lot of questions to solve and issues to address.

Ultimately what is sought after with this doctrine is to extend the age old virtue of good Samaritans from the roadside village to the global village¹⁹, and to put into practice the opening frase of the UN Charter "we, the peoples of the world" by protecting each other.

18. Malvina Halberstam, "The Legality of Humanitarian Intervention: 3 The Cardozo Journal of International and Comparative Law, vol. 4, num. 1, 1995, p.1.

19. Syd Baumel, "Making Atrocities History: Responsibility to Protect doctrine seeks to globalize good Samaritism", The Aquarian, fall 2005, [on line], available at: <http://www.aquarianonline.com/Values/R2P.htm>, accessed: june 1, 2009.

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