

The Responsibility to Protect under International Law with reference to the Afghan Crisis



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The Responsibility to Protect

The responsibility to protect is an international norm which has developed to ensure that states struck by mass atrocities, such as genocide, crimes against humanity, war crimes and ethnic cleansing, are not being ignored by the community of states. Rather the responsibility to protect their citizens should be equally borne by the community of states, if and when the states facing such devastating times are unable to do so. The principle was introduced by the International Commission on Intervention and State Sovereignty (ICISS) in 2001 as a response to the international community's inaction in the Rwandan genocide and atrocities in Former Yugoslavia.

The responsibility to protect is a broad concept based on sovereignty. The concept of sovereignty has been widened to include the duty (responsibility) of the state to protect its own citizens, and when the state is not in a position to, that is, not able to or not willing to protect its own people, the responsibility shifts to other neighboring or more powerful states. According to the ICISS Report, "sovereign states have a responsibility to protect their own citizens from avoidable catastrophe- from mass murder and rape, from starvation- but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of

states”[1]. The principle reflects the importance of the protection of human rights by shifting responsibilities from the state of nationality of people to other states primarily for the protection of their human rights. The protection of human rights is one of the purposes of the United Nations as mentioned in Art. 1 (3) of the UN charter.

The Responsibility to Protect was further adopted by the UN World Summit, a large gathering of Heads of State and Governments, in 2005. The Outcome Document of the World Summit[2] made specific reference to the said Principle in paragraphs 138 and 139. The principle has been reiterated by the General Assembly and re-affirmed by the Security Council but has not become law since it is not yet part of any international treaty or accepted as an international custom.

The Responsibility to Protect as initially introduced by the ICISS, does approve of taking military action in case the responsibility shifts to the international community where peaceful means to protect the citizens from mass atrocities do not work. The same has not been endorsed by the World Summit in the Outcome Document, which only approves of collective action through the Security Council acting under Chapter VII of the UN charter.

In comparison to the principle of humanitarian intervention, Responsibility to Protect is less controversial because it respects the sovereignty, territorial integrity and political independence of a state and recognises the responsibility of the territorial state which is engulfed by disturbances and/ or strife to protect its citizens. Furthermore, the principle comes into operation only in case of the failure of the administration of government to maintain law and order and protect its citizens, whereupon it imposes this responsibility on the community of states.

The responsibility to protect as per the ICISS Report[3], comprises three responsibilities, i.e., the responsibility to prevent, the responsibility to react and the responsibility to rebuild. It is thus much wider than humanitarian intervention which permits any state to intervene in the internal matters of a state on humanitarian grounds and which often resulted in armed intervention without any responsibility to rebuild. [4]

The ICISS report specifies that the responsibility to prevent is the first element of the responsibility to protect; it would address the direct and indirect cause of internal strife or insurgency and prevent the development of a crisis situation. The second element – the responsibility to react – would allow the third state acting under the principle of responsibility to protect, to respond to a crisis situation that has already occurred. This may include imposing sanctions, international prosecutions and any use of force or military intervention to protect people from human rights abuses and other harm to their life and liberty in extreme cases.

As stated above, the military action by the intervening state as part of its Responsibility to Protect is proposed only by the ICISS whereas the same has no mention in the Outcome Document which only permits collective action by the Security Council as per Chapter VII of the UN charter. This proposition gets diluted in the event of veto power of the Security Council making the whole concept of responsibility to protect redundant in case of action being stalled by the Council. The veto retained by the permanent members has been detrimental to the creditability of R2P and Syria has been testament to this[5].

The justification can be drawn from the natural law theories, according to which when the state collapses or becomes itself the perpetrator of massive human rights violations, others have the right and perhaps a duty/ responsibility to intervene. Therefore, the intervention without the authorization of the Security Council can be legal according to this theory. According to the realist constructivist theory, the formal breach for humanitarian purposes of the UN charter provisions by members of the international community acting as trustees of the general interest, also legalizes intervention to fulfil *erga omnes* obligations and to stop international crimes, even without the authorization of the Security Council.

The third element within the ambit of responsibility to protect adds value to it i.e. the responsibility to rebuild. This responsibility must be borne by the broader community of states to help the state suffering from strife to come out of the harmful and after-effects of internal disturbance. Full assistance needs to be provided with reconstruction, recovery and reconciliation to help the state to sustain itself after the catastrophe ends. This third element is an important distinguishing feature of the Responsibility to Protect principle as compared with humanitarian intervention, where the intervening state does nothing to rebuild the state that has undergone devastation. It needs to be highlighted here that when this third element of the principle i.e. to rebuild is ignored, there is always a chance of the state going back to the situation from where it had struggled to come out.

The Afghan Crisis

The recent strife in Afghanistan has shown how the situation can revert if the third element of responsibility of protect, i.e. the responsibility to re-build as mentioned in the ICISS report, is ignored. The US took control over Afghanistan in 2001, which was initially justified by the US as war against terrorism. In its efforts to authorize the use of force, US formed a joint resolution called 'Authorisation for Use of Military Force' which legitimized the President to use 'all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001[6].

In November 2001, the UN Security Council passed a resolution[7] calling for a "central role" for the UN in establishing a transitional administration and inviting member states to send peacekeeping forces to promote stability and aid delivery. On December 9, 2001, an interim government was formed in Afghanistan which ended the Taliban regime. Although there is no consensus among the legal authorities as to when exactly this occupation ended, yet there are five possible dates, including December 2001, January 2002, January 2004, October 2004 and 2005[8]. But, the US played an important role and took upon itself the responsibility to protect Afghanistan and its people from the oppressive rule of the Taliban. This was initially under the pretext of war against terrorism but it ultimately led to the US taking responsibility for restoring peace in Afghanistan, thereby de facto applying the principle of the responsibility to protect.

The US presence in Afghanistan could be seen to amount to de facto acceptance by the US of the R2P doctrine in its entirety, then constituting state practice in application of the responsibility to protect. This de facto acceptance is shown by the clear picture of US management of the Afghan situation since 2001. Indeed, the US remained in Afghanistan for a lengthy period of time to – unsuccessfully – prevent the recurrence of the Taliban threat in an attempt to restore peace while ensuring respect for human rights. Such an instance of state practice in support of R2P would have an important significance for its development as a rule of international law.

In 2019, US-Taliban Peace Talks started in Doha where the Afghan Government was not invited. In 2020, the US and the Taliban signed a deal on Path to Peace which paved the way for intra Afghan peace talks between the Taliban, the Afghan government and civil society. The US announced troop withdrawal by September 2021 but as they started withdrawing the troops, the Taliban started occupying different strategic areas in Afghanistan. On August 15, 2021, the Taliban took over Kabul by coercion after engaging in strife with Afghan armed forces. The locals in Afghanistan were terrified after Taliban took control. Innocent civilians were killed, women were told not to come out of their houses and human rights were being violated with impunity. Taliban are using child soldiers to commit atrocities and other human rights violations. Sadly, Afghans have been left to fend for themselves and fight for their survival in a tragic state.

Conclusion

In the last 20 years, the US while trying to bring about peace and rebuilding Afghanistan has practically showcased the principle of responsibility to protect through its forces which contributed in the responsibility to prevent and then responsibility to react by taking action and equipping the Afghan forces in such a way that they would be able to defend themselves as against Taliban. The US government spent \$ 145 billion in 20 years trying to rebuild Afghanistan, its security forces, civilian government institutions, economy, and civil society.

In June 2021, the US announced that it is providing more than \$ 266 million as additional humanitarian assistance to help the people of Afghanistan, whose lives were impacted by ongoing conflict and who were facing extreme food insecurity. This funding includes \$157.5 million through the US agency for international development (USAID). Total US humanitarian assistance for Afghanistan is more than \$ 543 million since the year 2020. USAID has helped increase access to education for 3 million Afghan girls since 2008, many for the first time in their lives. Student enrolment grew from 900,000 male students in 2001 to more than 9.5 million students, 39% of whom are girls, in 2020. Through the Afghanistan Reconstruction trust fund, USAID helped make education more accessible to students by improving school infrastructure in rural areas in 17 provinces. To increase the pool of female teachers and extend learning opportunities to girls in rural areas, USAID provided two years scholarships to nearly 11,500 women. USAID is helping them pursue higher education and vocational training opportunities that will equip them with the knowledge and skills they need to meaningfully contribute to the workforce.

In March 2002, the World Bank wrote that Afghanistan's humanitarian, reconstruction, and development needs are immense. Its economy is in a state of collapse, its infrastructure destroyed, its formal state institutions severely undermined or non-existent, and its social indicators the worst in the world. They had no experience in participating in elections or administering them. There was no independent media and life expectancy was quite low. Women and girls were officially banned from schools. To help Afghanistan come out of that condition, the US government spent two decades and billions of dollars by running programs to train, equip and pay the salaries for hundreds of thousands of Afghan soldiers and police; build a credible electoral process by funding elections; educate more Afghans particularly girls and women; develop the private sector by training entrepreneurs; reduce rampant corruption in the Afghan government; improve the quality and accessibility of healthcare, so on and so forth. USAID also funded the project of Ring Road. In 2002, the US established its first inter agency provincial reconstruction team (PRT) to expand programming outside Kabul. The number of PRTs had increased to 22 in the year 2006.

The US tried to carry on the reconstruction of Afghanistan alongside its political agenda of eliminating al-Qaeda and denying the terrorist groups safe haven in Afghanistan. The US troops withdrew finally in 2021. The question is – should the US be expected to keep donning the mantle of protector and builder for all times? What the US did in 2001 was no doubt a reaction to the 9/11 attacks and a war against terrorism. However, by driving Taliban out of their stronghold, the US arguably preempted such attacks on other parts of the civilized world, thereby amounting to defacto application of bearing upon themselves the responsibility to protect. Thus, now, if the US decides to return, should not the community of states take over from where the US has left instead of keeping a safe distance from Taliban to honour non-intervention or self-serving interests.

The maintenance of international peace and security is the avowed purpose of the UN and there will be no better time than this for the UN to act. It is the duty of the community of states to rise up and ensure that the UN takes steps for what it stands for and is not reduced to a defunct organization. The Security Council was never envisaged to be subservient to permanent members; rather it was expected that the permanent members would be subservient to the needs of maintaining international peace and security. The UN belongs to the community of nations and so it must rise collectively towards enforcing the principle of protection in Afghanistan. The responsibility to protect is the shared responsibility of the international community. States including India, Russia, China and the like should take this responsibility to rebuild and restore peace in Afghanistan, whether individually or collectively, in a time-bound project under the supervision of the UN Security Council in its role of maintenance of international peace and security. It is important that other states realize their shared responsibility under international law and act accordingly.

[1] Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre (December 2001) page VIII available at <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>

[2] General Assembly Resolution, A/ RES/ 60/1. 2005 *World Summit Outcome*, page 30 available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf

[3] ICISS Report, p. 17

[4] E.g. the UK intervention in Sierra Leone in 2000 and the French intervention in Côte d'Ivoire in 2003 were based on the consent of the territorial state and/or authorisation of the United Nations. By contrast, the US invasion of Dominican Republic in 1965, intervention in Grenada in 1983, military actions in Panama in 1989 and in Haiti in 1994 were justified as humanitarian interventions to protect US citizens abroad and under collective self defence as part of regional security treaties. The US intervention in Iraq in 2003 on humanitarian grounds was the ultimate interpretation by the US which was condemned by the international community.

[5] A. Smith, *Thirld World Approaches to International Law: The Responsibility to Protect and Regional Organizations: An Overview* Conference Paper (2019). See also S. Adams, *Failure to Protect: Syria and the UN Security Council* (March 2015) Global Centre for Responsibility to Protect available at https://reliefweb.int/sites/reliefweb.int/files/resources/syriapaper_final.pdf

[6] Joint Resolution, US Congress (2001). See also Leoni Connah, *US intervention in Aghanistan: Justifying the Unjustifiable?* South Asia Research at <https://journals.sagepub.com/doi/metrics/10.1177/0262728020964609>

[7] S/ RES/ 1378 (2001)

[8] A. Bellal, G. Giacca & S. Casey- Maslen, *International Law and Armed Non-State Actors in Afghanistan* International Review of the Red Cross Vol. 93 (No.881) 2011, p. 52



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