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A Comprehensive Inquiry into the Tenets of the Responsibility to Protect (R2P): A Thorough Scrutiny of its Application within the Context of the Russo-Ukrainian Conflict

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ABSTRACT

This article delves into the concept of Responsibility to Protect (R2P) as a transformative international norm designed to address mass atrocities within states, encompassing genocide, crimes against humanity, war crimes, and ethnic cleansing. Originating from the International Commission on Intervention and State Sovereignty (ICISS) in response to global inaction during the Rwandan genocide and atrocities in the Former Yugoslavia, R2P represents a paradigm shift in redefining sovereignty. The tripartite structure of R2P, focusing on prevention, reaction, and rebuilding, surpasses traditional humanitarian intervention, respecting state sovereignty. The article then examines the application of R2P in the Russo-Ukrainian scenario, where Russia's incursion into Ukraine challenges the norm. Despite the Security Council's limitations, the General Assembly's resolution condemning Russia highlights indirect acknowledgment of R2P principles. The article assesses R2P's role in the context of other international norms and contends with its imperfections, especially when faced with powerful actors. Legal justifications for intervention are explored, drawing from natural law theories and realist constructivism, while considering the challenges posed by Security Council dynamics, as evident in the Ukrainian crisis. The analysis extends to the prudential criteria for military intervention, emphasizing the balance of consequences and the universal applicability of these criteria. The conclusion acknowledges the ongoing development of the R2P paradigm, emphasizing the need for unwavering advocacy and support from policymakers. It underscores the judicious balance required between legal justifications and prudential sensibility in evaluating military force deployment. Despite challenges, the article affirms the continued relevance of R2P through various coercive measures, including military support, and highlights the norm's success in fostering global consensus and normative acceptance in addressing mass atrocities.

Keywords: ICISS, UN Charter, NATO, Humanitarian Intervention.

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I. INTRODUCTION

The doctrine of Responsibility to Protect (R2P) stands as a pivotal international norm meticulously developed to address the grave predicament of states beleaguered by mass atrocities, encompassing but not limited to genocide, crimes against humanity, war crimes, and ethnic cleansing. This doctrinal evolution aims to preclude the abandonment of afflicted states by the community of nations. Instead, it posits that the onus of safeguarding citizens facing such catastrophic circumstances must be collectively shouldered by the international community when the afflicted state proves incapable of fulfilling this duty. The genesis of this principle can be traced to the seminal work of the International Commission on Intervention and State Sovereignty (ICISS) in 2001, conceived as a direct rejoinder to the global inertia witnessed during the Rwandan genocide and the atrocities in the Former Yugoslavia. At its core, the Responsibility to Protect hinges on a nuanced reinterpretation of sovereignty. Traditionally, sovereignty encompassed the exclusive authority of a state over its domestic affairs. However, the concept has been expansively redefined to include the corollary duty of a state to shield its own citizens.² In instances where a state, due to incapacity or unwillingness, falters in discharging this responsibility, the mantle shifts to neighbouring or more potent states within the international community.

The ICISS Report articulates this paradigm shift, asserting that sovereign states bear the obligation to shield their populace from avoidable catastrophes, such as mass murder and rape, and when they falter, the broader community of nations assumes this responsibility. This reflects a recalibration of human rights protection, transferring responsibilities from the state of nationality to other states, aligning with the United Nations' overarching goal of safeguarding human rights, as enshrined in Article 1(3) of the UN Charter. The UN World Summit in 2005 endorsed the Responsibility to Protect, as evidenced in paragraphs 138 and 139 of the Outcome Document. Despite subsequent reaffirmations by the General Assembly and the Security Council, it remains uncodified in international law, lacking incorporation into treaties or establishment as a customary norm. Diverging from the contentious nature of humanitarian intervention, the Responsibility to Protect is a less contentious paradigm as it respects state sovereignty, territorial integrity, and political independence. It manifests when the governance of a state falters in maintaining law and order, necessitating the intervention of the community of nations.

² Samuel Totten and Henry.C. Theriault, *The United Nations Genocide Convention: An Introduction* (1st ed, University of Toronto Press 2019)

The tripartite structure of the Responsibility to Protect, delineated in the ICISS Report, underscores its comprehensive nature. Comprising the responsibilities to prevent, react, and rebuild, this doctrine surpasses the narrower scope of humanitarian intervention. Prevention addresses the root causes of internal strife, while reaction empowers third states to intervene, employing measures from sanctions to military force in the face of crises. Crucially, the third element, the responsibility to rebuild, distinguishes R2P from humanitarian intervention, emphasizing post-crisis assistance for reconstruction, recovery, and reconciliation. However, the ICISS' advocacy for military action in R2P has not found unanimous acceptance, particularly evident in the World Summit's Outcome Document. The document sanctions collective action through the Security Council, primarily under Chapter VII of the UN Charter. The potential obstruction by veto-wielding Security Council members, witnessed notably in the Syrian context, casts a shadow over the viability of R2P in such scenarios.

Legal justifications for intervention, irrespective of Security Council authorization, draw from natural law theories and realist constructivist perspectives, positing that the imperative to halt massive human rights violations or prevent state collapse supersedes formal UN Charter provisions. The Responsibility to Protect, born out of a historical vacuum in international responses to atrocities, embodies a transformative paradigm in the discourse on state sovereignty and human rights. Its threefold responsibilities seek to address crises comprehensively, but challenges persist in its codification and acceptance in the realm of international law.

II. THE RUSSO- UKRAINIAN SCENARIO

On the precipice of 24th February 2022, Russia brazenly transgressed the sovereign boundaries of Ukraine. Initially cloaked in the garb of a purported 'Peacekeeping' endeavour, this incursion metamorphosed into a 'Special Military Operation,' thereby precipitating a cascade of legal ramifications. The Kremlin proffered a myriad of legal pretexts in an endeavour to sanctify its military interventions within the territorial confines of Ukraine. Regrettably, these proffered justifications have found scant favour within the purview of international law, eliciting a resounding disapproval from the majority of the global community of nations.

In the sphere of legal discourse, Moscow's assertions falter conspicuously, failing to secure the imprimatur of legitimacy accorded by prevailing international legal norms. An exhaustive examination, as conducted by Alonso Gurmendi, a luminary in the realm of International Law and a distinguished professor at the Universidad del Pacífico Law School in Peru, revealed a staggering consensus among the international community. Of the 197 entities scrutinized,

encompassing 193 United Nations member states, Taiwan, Palestine, and the Holy See, a decisive 143 entities, constituting 72.59% of the collective, unequivocally denounce Russia's actions as nothing short of an 'act of aggression.'

In this crucible of legal scrutiny, it becomes manifestly apparent that Moscow has been unable to garner the coveted mantle of international legitimacy for its proclaimed 'special military operation.'

Initially, scrutiny is directed towards the Responsibility to Protect (R2P) paradigm, contending against the idealistic notion of it being an immaculate mechanism that should unfailingly operate under all circumstances. Critics posit that any lapse in its efficacy signifies a categorical failure. However, proponents of R2P acknowledge its inherent imperfections, particularly in instances such as the Ukrainian crisis, where the vested interests of a permanent member of the United Nations Security Council impede its seamless operation. The Council, entrusted with executing Pillar 3 of R2P when a state egregiously neglects its responsibilities, confronts impediments due to the invocation of the Russian veto, thereby impeding direct action. Despite a desire for more decisive action by the Council, the constraints dictated by the UN Charter render it incapable of responding directly. Ukraine's endeavour to challenge Russia's role within the Council further accentuates this predicament. Paradoxically, the Council has adhered to a course recommended in the original 2001 report of the International Commission on Intervention and State Sovereignty, referring the matter to a UN General Assembly Emergency Special Session via the "uniting for peace" procedure.³ This culminated in a resolution demanding Russia's immediate withdrawal, garnering support from 141 countries, with only five in opposition.

Nevertheless, some may hastily assert that this course of action diverged from explicitly invoking R2P. Such a perspective, however, appears to signify a narrowing of the actual purview of the Responsibility to Protect doctrine. As posited elsewhere, R2P intricately interweaves existing norms related to atrocity crimes—genocide, war crimes, crimes against humanity, and the ambiguous concept of ethnic cleansing—while introducing additional norms that delineate distinct state and international responsibilities to safeguard populations. Moreover, it establishes a specific norm recognizing the authority of the UN Security Council, exclusively, to respond to such crises.

While the vetoed UN Security Council resolution refrains from overtly referencing RtoP, its

³ Aidan Hehir, "The Responsibility to Protect: 'Sound and Fury Signifying Nothing' ?", 24(1) *International Relations*.218, 234-236 (2010).

explicit condemnation of "all violations of international humanitarian law and violations and abuses of human rights" underscores an awareness of the wrongfulness of war crimes. The UN General Assembly, surpassing this, employs even more robust language, condemning violations and abuses while explicitly safeguarding medical personnel, hospitals, and related facilities. This attests to the UN system's acknowledgement of violations of international humanitarian law.⁴ Simultaneously, other international measures are in progress, including an investigation by the International Criminal Court, a case before the International Court of Justice challenging Russia's alleged fabrication of a genocide claim in Ukraine, and the UN Human Rights Council's establishment of an Independent International Commission of Inquiry. Each initiative tacitly recognizes Russia's perpetration of atrocity crimes, indirectly underscoring the influence of R2P.

A secondary concern arises in tandem with critiques levelled by Hehir, contending that if R2P fails to serve as a deterrent due to a lack of fear regarding "international opprobrium," akin criticisms may be levied against the Geneva Conventions, frequently violated with insufficient global repercussions. Notably, Russia's airstrike on a maternity hospital in Mariupol is deemed a war crime, echoing a pattern observed in its bombing of hospitals in Syria with limited consequences.

The final facet of consideration revolves around the relative importance of R2P in relation to other international norms. While an ideal scenario envisions prioritizing responses to atrocity crimes, the initial focus in the Ukrainian crisis gravitated towards Russia's blatant violation of Article 2(4) of the UN Charter. The failure to overtly invoke R2P may signify a strategic prioritization by states, accentuating the gravity of this violation over R2P. The underlying rationale appears grounded in the belief that halting Russia's illegal invasion inherently precludes the commission of atrocity crimes. The contemplation of military force, irrespective of its application, necessitates a nuanced examination of two distinct facets: legal entitlement and prudential sagacity. The matter of legality remains unimpeachable, even in the absence of Security Council concurrence under Chapter VII of the United Nations Charter—a prospect rendered unattainable due to the inevitable exercise of a Russian veto. Presuming external intervention to be consensual with Ukraine, Article 51 of the Charter unequivocally asserts not only the individual but also the collective right to self-defence. The more intricate inquiry resides in the prudential cogency or, phrased differently, the moral legitimacy of such

⁴ Jhon Lloyd, 'Update Announcement from The Nautical Institute- Ukraine' (2022) The Nautical Institute <<https://www.nautinst.org/resources-page/updated-announcement-from-the-nautical-institute-ukraine.html>> (last visited 27 November 2023)

intervention.

Though bereft of formal endorsement by the United Nations, five prudential criteria have permeated the international discourse over the past two decades, representing benchmarks that transcend cultural or religious specificity. First and foremost is the gravity of the threat, demanding an evaluation of whether the impending harm to the state or human security is of a nature, clarity, and seriousness that ostensibly justifies the use of force. Secondly, the criterion of proper purpose necessitates a discernible demonstration that the principal objective of the proposed military endeavour is the cessation or prevention of the identified threat, regardless of other incidental motives. The third criterion introduces the last resort test, mandating an exhaustive exploration of non-military alternatives to address the imminent threat, coupled with reasonable grounds to believe that less forceful measures would prove futile. Fourthly, the principle of proportionality obliges an assessment of whether the envisaged military action's scale, duration, and intensity represent the minimal requisites to counteract the identified threat. Lastly, the balance of consequences, arguably the most pivotal test, queries whether there exists a reasonable prospect of the military action achieving success in mitigating the impending threat, with the fallout of such action deemed not more deleterious than the consequences of inaction. In essence, will military intervention yield a net positive outcome?

The allure of these criteria lies in their universality, transcending cultural or religious boundaries. While the first four criteria may arguably find satisfaction in the Ukrainian context, the decisive impediment is the fifth criterion: the balance of consequences. Any direct military action against Russia by NATO or its members would inevitably trigger a broader conflict, possibly escalating to a nuclear conflagration, resulting in a manifold increase in casualties and human suffering. This perennial dilemma arises when a significant power transgresses, diverging from instances such as Libya or Rwanda. Regardless of China's conduct in Xinjiang or Tibet, military intervention would inexorably precipitate a full-scale war, surpassing the scale of harm that such action seeks to prevent. This is not an assertion of double standards but rather a pragmatic evaluation of the equilibrium of harm.

Crucially, the preclusion of the direct military intervention option in Ukraine does not signify the termination of the Responsibility to Protect (R2P). Furnishing military support through the supply of weapons, ammunition, transport vehicles, and intelligence aligns with the second pillar of R2P—the responsibility to aid those grappling with mass atrocity crimes. Moreover, military support constitutes just one coercive element in the comprehensive R2P reaction toolkit, alongside sanctions, economic boycotts, ongoing international criminal law prosecutions, and diplomatic isolation. While the efficacy of these non-military measures

remains uncertain, their collective implementation presents a formidable response. The inception of the Responsibility to Protect concept aimed to engender a global consensus on responding to mass atrocity crimes within a sovereign state's borders, where none existed under the previous rubric of 'humanitarian intervention.' This consensus materialized by reframing the discourse from the contentious 'right to intervene' to the less contentious 'responsibility to protect' and broadening the focus from reaction to prevention. Importantly, it emphasized that military intervention was not the sole coercive recourse when responding to ongoing atrocity crimes. Normatively, the concept of 'the responsibility to protect' has attained global acceptance, supplanting the earlier notion of 'the right of humanitarian intervention.' While states may exhibit a preference for the first two pillars of R2P—states' responsibility to protect their citizens and assist others—the third pillar, involving timely and decisive collective action when prevention falters, encounters less dissent. The General Assembly's annual debates since 2009 and the numerous resolutions referencing R2P by the Security Council underscore this consolidated support.⁵

On the preventive front, R2P-driven strategies have yielded successes, curbing violence recurrence in various regions such as Kenya, Sierra Leone, Liberia, Guinea, Côte d'Ivoire, and The Gambia. Current crises, like the ongoing one in the Central African Republic, receive consistent Security Council attention. Robust civilian protection mandates are now customary in peacekeeping operations, and the preventive toolbox—encompassing long-term and short-term, structural, and operational measures—is more comprehensively comprehended.

III. CONCLUSION

Notwithstanding the foregoing observations, it is imperative to underscore that the Responsibility to Protect (R2P) paradigm is currently undergoing a phase of iterative development, with considerable endeavours yet requisite for the fortification of its efficacy. The sustained actualization of the responsibility to protect necessitates unwavering advocacy, particularly from the forthcoming cadre of policymakers. In the realm of transformative shifts in attitudes and conduct, whether within the confines of domestic jurisdictions or on the international stage, the impetus for change emanates from three cardinal vectors—top-down initiatives, lateral influence exerted by peer cohorts, and grassroots endeavours. The quintessence of success lies in the confluence of concerted actions and pressures emanating from each of these tripartite directions. The assessment of military force deployment

⁵ Gareth Evans, 'R2P: The Dream and the Reality' (2022) Global Centre for The Responsibility to Protect <<https://www.globalr2p.org/publications/r2p-the-dream-and-the-reality/>> (last visited 1 December 2023)

necessitates a judicious balance between legal justification and prudential sensibility. In the Ukrainian crisis, the legal right is underpinned by Article 51, yet the prudential criteria, notably the balance of consequences, pose significant challenges to direct military intervention. Excluding this option, however, does not diminish the relevance of R2P, which persists through the provision of military support and other non-military coercive measures. The evolution of R2P has fostered global consensus and normative acceptance, steering international discourse away from contentious debates to a more unified approach to preventing and responding to mass atrocity crimes. Preventive successes underscore the efficacy of R2P-driven strategies, emphasizing the importance of a comprehensive and nuanced understanding in navigating the complexities of contemporary international relations.
