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Is Responsibility to Protect a Bane or Boon? The Case of the Russia-Ukraine War

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ABSTRACT

The legal dilemma surrounding humanitarian intervention is never-ending. The concept, even though has gathered moral and philosophical ramifications but failed to be justified on legal grounds and hence never gained prominence in the international field. The prevention of the use of force, as well as respect for sovereignty of the member states as laid down in the UN Charter, championed all the causes that could permit intervention on humanitarian grounds. However, for Annan, there was no dilemma; for him, the concern for the abuse of human rights should precede the fact that the UN Charter prohibits the use of force as he affirms: ‘the world cannot stand aside when gross and systematic violations of Human Rights are taking place. Intervention must be based on legitimate and universal principles. Annans seek for a response from the world community was eventually answered via a report named “Responsibility to protect”. In September 2000, the Government of Canada along with a group of major foundations announced the establishment of the International Commission on Intervention and State Sovereignty (ICISS), which was entrusted with the responsibility of establishing acceptance criteria for the purpose of humanitarian intervention. Since 2005, R2P has been applied in crises of the Central African Republic, Democratic Republic of Congo, Liberia, Libya, and Mali and in more than 80 UN Security Council resolutions. But they have been abused too. The US was the first country to manipulate the report to justify its invasion of Iraq. Similarly, we see Russia distort g the language of the report to legalise its military aggression in Ukraine. The paper show that these two distortions are setting a trend that would be taken up by the powerful states in the future to establish their power over the smaller states in the pretext of re[possibility emanating from the report.

I. INTRODUCTION

The dilemma surrounding the concept (The author would refrain itself from terming it as a theory) of humanitarian intervention is not unknown to all of us who have been researching the legal field of international humanitarian law. However, the concept was hardly debated prior to 1999, as the authority which authorised intervention on humanitarian grounds was validated by

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the international organization, entrusted with the responsibility of maintaining international peace and security-the Security Council. It was only when NATO authorised interventions in Kosovo in 1999 saning the authority of the Security Council, the international jurist realised that the legality of the concept ought to be identified. It raised their eyebrows making them realise that such a single event could readily repeat itself in the future. However, after a long debate, legal jurists have come to the conclusion that the illegality of humanitarian intervention is irrefutable. There is dissatisfaction in most sectors regarding the compatibility of the international legal norms concerning the use of force with commonly held conceptions of justice.² Some of the jurists tried to validate the concept by resorting to philosophy, ethics, politics, and fantasy norms but ultimately failed to back it up with absolute legal norms.³ The aforementioned jurist attempted to establish a threshold for justifying intervention on humanitarian grounds in cases of massive human rights abuses and in lieu of it, the Canadian Government established an independent, impartial authority, the International Commission on Intervention and State Sovereignty (ICISS), which it charged with the delicate task of shaping a framework for permissible humanitarian intervention.

The Commission formulated a report that it termed as ‘Responsibility to Protect’ with a hope that international collective action would be mobilised to protect pollution from war crimes, genocide, ethnic cleansing, and crimes against humanity when a nation fails in its responsibility to protect its own citizens.⁴

The Commission posits that the exceptions to the principle of non-intervention should be limited. Military intervention for human protection purposes must be regarded as an exceptional and extraordinary measure, and for it to be warranted, there must be serious and irreparable harm occurring to human beings, or imminently likely to occur.⁵

It has purposefully chose to name the report as ‘Responsibility to Protect’ rather than ‘Responsibly to intervene’ as the later term was more inherently abrasive and it had made the

² Burke, Ciarán. "The Humanitarian Intervention Discourse: A Debate on The Edges Of The Law." An Equitable Framework For Humanitarian Intervention. London: Hart Publishing, 2013

³ Picone P, ‘La “Guerra del Kosovo” e il Diritto Internazionale Generale’ (2000) 2 *Rivista di diritto internazionale* 309, 344; Zajadlo J, ‘Legality and Legitimization of Humanitarian Intervention: New Challenges in the Age of the War on Terrorism’ (2005) 8 *American Behavioral Scientist* 653.

⁴ Ashby, H, How the Kremlin Distorts the ‘Responsibility to Protect’ Principle Available at: <https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle> [Accessed on: 1st October, 2022]

⁵ The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, 2001 , Global Centre For the Responsibility To Protect Available at: < <https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/#:~:text=The%20report%2C%20known%20as%20the,of%20life%2C%20rape%20and%20more.>> [Accessed on: 9th August, 2021]

effort to involve the international community at large apart from including only military parties. They further aimed at responses that would be preventive in nature and would include diplomatic isolations, sanctions, embargoes rather than just military sanctions.

The legality of the Report or we would prefer using the phrase ‘validity of the military intervention’ depends on six principles which have to be fulfilled: the "just cause" threshold, four precautionary principles, and the requirement of "right authority."

- a. **JUST CAUSE:** The Commission warrants one condition as the ‘just cause’ for military intervention-actual or apprehended loss of life or ethnic cleansing and it further asserts that there is no set example that would be applicable to each case, but every case to be determined differently even though obtaining just and precise information is difficult. The violations ought to be ‘large scale’ in nature. Even though it is quite difficult to quantify as to what amounts to ‘large scale’, but we can definitely assert that military action can only be legitimate as an anticipatory measure in response to clear evidence of likely large scale killing or ethnic cleansing⁶ and not in case of violations falling short of outright or ethnic cleansing, overthrow of democratically elected governments and rescue of one’s own citizens by the state. The threshold criteria articulated here has been effectively manipulated by USA in invading Iraq as well as by Putin in intervening Russia.
- b. **PRECAUTIONERY PRINCIPLES:** The precautionary principles enumerated in the report are: right intention, last resort, proportional means and reasonable prospects
 1. **Right intention:** The primary motive of the states ought to be to avert human suffering and not occupying the territory. In order to assert that this intention is achieved the Commission is found to prefer multilateral interventions over unilateral interventions.
 2. **Last Resort:** The Commission posits that before reaching out to military intervention all the possible ways namely diplomatic and non-military avenue for the prevention or peaceful resolution of the humanitarian crisis should be explored⁷ which in verbatim means that if such measures would have been attempted in the given circumstances it would have failed.

⁶ Evans G & Sahnoun M, The Responsibility to Protect, *Council on Foreign Relations*, Vol-81, 2002 (Nov-Dec), 99-110

⁷ The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, 2001, Global Centre For the Responsibility To Protect Available at: < <https://www.globalr2p.org/resources/the-responsibility-to-protect-report-of-the-international-commission-on-intervention-and-state-sovereignty-2001/> [Accessed on: 9th August, 2021]

3. Proportional means: The Commission posits that it is essential to have a way of assuring that the amount of force proposed to be used should be bare minimum that is required to restore humanity.
 4. Reasonable Prospects: There must be reasonable chance of success in halting or averting the success that has justified the intervention; the consequences of action should not be worse than the consequences of inaction.⁸ No justification can be sought for such military intervention if they fail to achieve actual protection or the intervention aggravates the conflict.
- c. **RIGHT AUTHORITY**: The ‘right authority’ is the most crucial point in the report of ‘responsibility to protect’. The Commission in tune with the explicit prohibitions on humanitarian intervention in Charter, entrusts the responsibility on the Security Council thereby making the role of the Council utmost importance. The Commission posits that: firstly, that for military intervention, authorisation of Security Council must be sought or have the Council raise the matter on its own initiative or have the Secretary General raise it under Article 99 of the UN Charter; secondly Security Council should promptly deal with the request of authority when there is allegations of large scale loss of human life or ethnic cleansing .only after verifying the truth of the facts.

However the report had been severely distorted time to time since its inception and this report has been often viewed as an instrument of colonization by the less powerful states. This fear cannot be seemed to be baseless as the world had witnessed how the United states had intervened in Iraq in 2003 as per the ‘Bush Doctrine’, in the name of pre emptive of war to destroy the mass destructive weapons and with their inability to find such much-vaunted weapons of mass destruction, ‘humanitarian rationales namely the alliance, borrowing language similar to that of the R2P, retrospectively had put forward that it was quiet necessary to act against Saadam Hussain’s regime.’⁹

We observe a similar trend even in the Russia-Ukraine war where justifications furthered by Moscow avows that their act of aggression was to protect the ethnic Russians. The Kremlin have opted to rationalise their act on the basis of the language of ‘Responsibility to protect’ and also as a fight against the acts of genocide.

With the collapse of Soviet Union in 1990 and beginning of the search of its own national

⁸ Evans G & Sahnoun M, The Responsibility to Protect, *Council on Foreign Relations*, Vol-81, 2002 (Nov-Dec), 99-110

⁹ Burke, Ciarán. "The Humanitarian Intervention Discourse: A Debate On The Edges Of The Law." An Equitable Framework For Humanitarian Intervention. London: Hart Publishing, 2013

identity, Kremlin under the leadership of Putin began to assert the concept of ‘being a Russian’ which eventually extended at large across the internationally recognised and defined borders and territories. This was a pretext in lieu of which Russia started to extend its power and interfere in to the matters of the neighbouring countries. Thus, the Kremlin enacted a series of laws, programs and policies designed to address the status of ethnic Russians abroad, some of which provided the Kremlin with a convenient pretext for alleging discrimination.¹⁰

Mirroring NATO’s moral justifications for their interventions in Kosovo, Russia held the Orange revolution in Ukraine in 2004 -2005 as an attempt of genocide on the ethnic Russians, thereby eventually establishing the legality for intervening in the Internal affairs of Ukraine being based on eth principle of “Responsibility to protect”. In the years following the unanimous U.N. agreement on the R2P principle, Russia found greater justification for its military intervention by portraying ethnic Russians in post-Soviet countries as vulnerable groups needing protection from hostile governments.¹¹

In 2008, Russian Foreign Minister Sergei Lavrov asserted that Russia’ s military action in Georgia was due to Russia’s ‘Responsibility to Protect’, however this justification represented a distorted merging of the R2P principle, protection for vulnerable groups, and undermined moral authority for humanitarian intervention.¹²

Russia invaded Ukraine and even further annexed Crimea in 2014 on the same pretext of protecting the ethnic Russians, a responsibility emanating from its ‘Responsibility to Protect’. Kremlin asserts that since then genocide against Russian speaking Ukraine has increased and this has led to the present day war. But unfortunately, these justifications forwarded by the Putin government failed to garnered support outside Russia, quite similar to the station in the case of US-Iraq war.

The military aggression of Russia against Ukraine was unprovoked and definitively violative of Article 2 (4) of the UN Charter. The burden for justifying the use of force now lies on Russia as International Court of Justice had pointed out in Nicaragua case, para 266 that neither court nor international scholars ought to ‘ascribe to States legal views which they do not themselves formulate.’¹³ Hence we would look forward to the official statements released from the Russian governments to evaluate whether there was proper and just invocation of the principle of

¹⁰ Ashby, H, How the Kremlin Distorts the ‘Responsibility to Protect’ Principle Available at: <https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle> [Accessed on: 1st October, 2022]

¹¹ *ibid*

¹² *ibid*

¹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*

‘Responsibility to protect’ so that we can say that act of Russia never flouted the basic principle of Charter which is prevention on use of force.

On the day, Russia stormed Ukraine with missiles, aerial strikes and even bombarded with the help of the ground forces, Putin released a statement thereby justifying the action of the State of Russia. He at the very first instance pointed out that the western world have been continually abused the international legal principles and interfered into the internal affairs of different States. He gave examples of military operations that was carried against Belgrade without seeking sanctions from the UN Security Council, incessant bombing of civilian cities at the heart of Europe, the illegitimate use of force against Libya, the fate of Syria, the justifications forwarded in invading Iraq which lacked legal grounds and many more.¹⁴

Putin posits:

‘In general, one gets the impression that practically everywhere, in many regions of the world, where the West comes to establish its own order, the result is bloody, unhealed wounds, ulcers of international terrorism and extremism. All that I have said is the most egregious, but by no means the only examples of disregard for international law.’¹⁵

Hence Putin tries to establish the first threshold criteria for the ‘Responsibility to protect’ which is the *just cause* for carrying out the intervention. He not only mentions the violations of the international legal norms by the West as the sole cause of the aggression but considers it to be one of the causes for invoking the principle of ‘Responsibility to protect’. The other ‘*just causes*’ which he identifies are – ‘the threat posed to Russia by NATO’s expansion, the supposed control by the West over ‘Nazis’ in Ukraine, the placement of sophisticated weapons in Ukraine, including potentially nuclear weapons.’¹⁶

Per Putin these are ‘existential threat’¹⁷ to Russia, unfortunately the world community had failed to recognise such threats. The claims of genocide on the ethnic Russians lacked evidence and hence they called on Russia to “immediately, completely and unconditionally withdraw all of its military forces” from Ukrainian territory.¹⁸

Putin further asserts that they had no other options than to resort to use of force as that was their

¹⁴ Putin’s declaration of war against Ukraine , Available at: <https://www.spectator.co.uk/article/full-text-putin-s-declaration-of-war-on-ukraine> [Accessed on: 1st October, 2022]

¹⁵ *ibid*

¹⁶ *ibid*

¹⁷ *ibid*

¹⁸ UN News, Available at :< <https://news.un.org/en/story/2022/09/1129102>> [Accessed on: 1st October, 2022]. The draft resolution, circulated by the United States and Albania, was supported by ten of the fifteen members of the Council, with Russia voting against it. Four members abstained, Brazil, China, Gabon and India.

last resort, though we find no instances where measures other than military aggression had been invoked to prevent the apprehended war on Russia or Russian speaking people from Ukraine. Putin wants us to believe that they have no other ulterior motive in invading Iraq, which again is a little doubtful as their acts lack any legal justifications and it can rightly be believe that Russian invasion of Ukraine in the pretext of saving population from the regime of Kiev was farce and only a way of extending it power over the aforementioned State. Though Putin claims that the people's republics of Donbass had requested for help and as a result of which He in accordance with Article 51 of Part 7 of the UN Charter, with the sanction of the Federation Council of Russia and in pursuance of the treaties of friendship and mutual assistance ratified by the Federal Assembly on 22 February this year with the Donetsk People's Republic and the Luhansk People's Republic, decided to conduct a special military operation¹⁹, we failed to find any document supporting such aversions. The legal justifications thus according to us is scripted by Russia itself. Further even if we agree that there has been act of genocides on the ethnic Russians in Ukraine the amount of force used by Russia in halting the alleged bullying and acts of genocide on the ethnic Russians in Ukraine were far from being proportional to the acts that Putin was apprehending of.

In regards to the right authority, which is supposed to authorise the military intervention under the principle of 'responsibility to Protect', the UN Security Council has never permitted Russia to carry out military aggression against Ukraine. This is evident from the fact that Security Council adopted a statement on 6th of May, 2022 supporting the Secretary General's effort to achieve a peaceful solution in Ukraine.²⁰ Moreover the Security Council Resolution 2623 called for eleventh emergency special session of United Nations General Assembly on this subject of invasion.

Hence Putin failed to justify his acts being based on the principle of 'Responsibility to protect' He tried to mislead the world community, so that his act of military aggression could be validated. Russia misused the language of R2P to exert its power over the neighbouring state of Ukraine. This is an alarm for the United Nations as well as for its member states. They ought to develop measure to thwart future distortions of the principle in the pretext of unrestrained and unprovoked military aggression. Failure to hold Russians accountable for its misuse of the principle and unfounded claims of genocide would lead the autocrats to use the principle as a tool of colonization. Russia should be subjected to exemplary punishment so that international

¹⁹ Milanovic M, What is Russia's Legal Justifications For Using Force Against Ukraine? Available at : <https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/> [Accessed on: 1st October, 2022]

²⁰ UN News, Available at : <<https://news.un.org/en/story/2022/09/1129102>> [Accessed on: 1st October, 2022].

community refrain from abusing the principle of “responsibility to protect’ in pretext of military aggression and thereby prevent it from becoming a bane.
