

International Law and Responsibility to Protect: South Asian Perspective

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Abstract

The evolution of responsibility to protect (R2P) is a result of an attempt to change the nature and character of dynamics of humanitarian intervention as questions of its legality gained momentum post the cold war period with a particular focus on human rights. It changed the contours of humanitarian intervention. One of the foremost criticisms is the selective implementation of R2P. There still exists an ambiguity about the nature of R2P and there have been different interpretations since the adoption of the R2P concept at the world summit in 2005. This paper argues that dichotomy of evolution of international standards like the R2P on one hand and continued inadequacies of evaluating the legal character of such norms poses challenges for implementation of international law.

Key words: Responsibility to protect, Developing Countries,

South Asia, Universal Application of International Law

RESPONSIBILITY TO PROTECT: A PRIMER

The notion that States and the world community have a 'Responsibility to Protect' population has led to a debate about the efficacy of its role from conflict prevention to peace keeping to international administration, and has become an anathema for developing countries. The evolution of responsibility to protect is a result of an attempt to change the nature and character of dynamics of humanitarian intervention as questions of its legality gained momentum post the cold war period with a particular focus on human rights. It thus changed the contours of humanitarian intervention. One of the foremost criticisms is the selective implementation of responsibility to protect. There still exists an ambiguity about the nature of responsibility to protect. Since the adoption of the responsibility to protect concept at the World Summit in 2005 there have been

different interpretations as to whether it is a legal norm or a political norm or an emerging norm. There are differing points of view alluding to the concept as an emerging norm; as an obligation and political responsibility in the constituent documents like the High Level Panel report and the Summit document. Therefore, there is a need to develop a conceptual framework on issues of sovereignty and non intervention in the Asian context as responsibility to protect has become an anathema for developing countries. It is believed that norms that govern international law should wholly reflect regional attitudes in international law making process.

In this background, the paper is divided into three parts. It would be argued that dichotomy of evolution of international standards like the responsibility to protect on one hand and continued inadequacies of evaluating the legal character of such norms poses challenges for implementation of international law. An appropriate understanding of the legal options for international cooperation, manifest with developing countries approach is the key for clear and strong sense of implementation of international law. Part I of the paper deals with the interpretation of some important works on humanitarian intervention and Constituent documents leading to the evolution of the responsibility to protect doctrine. Part II deals with the survey of attitudes of countries in the South Asian towards the notion of responsibility to protect, followed by an appraisal of the region's approach towards the said notion. Some concluding observations are presented in Part III of the paper.

I. THE SETTING

A. Interpretation of Some Works on Humanitarian Intervention

The period of 1980s and 1990s saw the powerful States demand for a 'right to protect' or a 'right to intervene' in the matters of violation of fundamental human rights within developing countries. With this emerging trend, they are now asking for the 'duty to intervene'. Justification for humanitarian intervention during that period was for the most part enunciated by Henry Schemers¹ and Fernando Teson². Through their works, they laid the foundation towards an obligation to intervene during the recent decades. Their works consistently revolved around the 'higher' law of human rights, with a specific

focus on the evolution of a 'higher' law of human rights and an emerging obligation to intervene in matters relating to violation of human rights.

Schemers recognizes that the principle of non-intervention is 'strongly embedded in international law', but asks: 'should that remain so'? According to him, non-intervention and the right of a government to stay in power are outdated. The obligations under modern international law must be corrected.³ Interestingly, however, he does not underestimate the problems of application of such an obligation to intervene, in view of the possibilities of abuse and suggests the following three rules.⁴

1. Hegemonic intervention within a power bloc to undo a change of government in a State that no longer conforms to the accepted ideology should not be permitted.
2. No intervention serving the power politics of another State should be permitted; and
3. It should be objectively established that the domestic situation in the country concerned is contrary to the rules of international law.

Considering all these layers of complexity, he concludes among other things that 'the international responsibility entails a right, in extreme cases even a duty, to intervene when States severely infringe human rights.'⁵

Teson is another 'humanitarian' scholar of the 1980s. In the debate on humanitarian intervention, he posits two 'horns of dilemma' that confront the international community:⁶

Many States unilaterally intervene by force in order to put an end to serious human rights violations? Or should States instead absolutely abide by the prohibition of the force as embodied in Article 2 (4) of the United Nations Charter, and thus refrain from intervening in such cases?

According to Teson, the second horn of his dilemma:

It entails the seemingly morally intolerable proposition that the international community, in the name of the non-intervention principle, is impotent to combat massacres, acts of genocide, mass murder and widespread torture.

The justifications put forward by Teson:

The best interpretation of relevant treaty materials and state practice is that humanitarian intervention is consistent with the present international legal order.⁷

In response to such observation, one is prompted to ask whether such interpretation of the treaty materials and frequent interventions (based on such interpretations) by the developed States find justification among the legal community as a valid State practice.⁸ The point of departure is between the two horns of dilemma, so as to build a bridge between the debates relating to humanitarian intervention and responsibility to protect so as to avoid or at least to contain the ‘dangers of abuse’ and ‘foreigner’s lack of knowledge’⁹ of the States in which they are intervening. Any number of examples from the recent history with reference to Afghanistan, Vietnam, Iraq etc exemplify this situation. Further, there are some inherent fallacies that need to be analyzed. The argument that international community is under a duty to act in cases of human rights violations is questionable to certain extent. On international plane, the concept of human rights is quite diverse. It depends much upon the traditional and cultural diversity of nation states. When there is no unanimity in the fundamental human rights, how can anyone envisage their protection and that too via military intervention? Is the international community mature enough to guarantee correct protections to the violation, wherever they occur? Analogous to this is the word of caution by Kofi Annan himself while presenting ‘The Secretary General’s Report to the Millennium Assembly in March 2000, he recognized that humanitarian intervention remains’ sensitive issue, fraught with political difficulty and not susceptible to easy answers’¹⁰

There are no easy answers to such problems. Further, World Summit Outcome document states that ‘Responsibility to Protect advocates that each

State has the primary responsibility to protect its people, that, if it fails, then the Security Council has it, that, if the Council fails, a regional organization has it, and that, if that too fails, other individual States have it'. Three questions stem out – Is there such a hierarchy meant to exist (sic)? Why is it that this responsibility to protect is cast upon the Security Council, which is constitutionally mandated to play no role at all in economic and social development? And what kinds of protection can the Council accord to the country after the 'surgical' operation.¹¹ It is a difficult and complex problem to study and as a point of departure, it is germane to study the implications of the concept of R2P for developing countries and South Asia¹² in particular. Research on this aspect is anything but sporadic in academic literature in the Asian region and it is hoped that this work will make a contribution to this area.

II. WHITHER REGIONAL ATTITUDES IN SOUTH ASIA?

South Asia has rich ancient, cultural and historical traditions that make this region a sub-unit. In spite of such similarities, the South Asian region is one of the least connected regions that is prone to conflicts and confronted with problems of social inequities, water sharing and refugee problems. Some basis for such situations in the region was in the aftermath of decolonization; religious or ethnic factors and relations with big States that countries in the region maintained. Consequently, States in the region were unable to evolve a regional approach to regional or international issues.¹³ All the factors have its cumulative impact on the respective State's perspectives on international law including issues of use of force and humanitarian intervention. With the idea of evolving regional cooperation, South Asian Association of Regional Cooperation (SAARC)¹⁴ was established in 1985. According to the SAARC Charter, the idea of regional cooperation for achieving social progress, economic growth and cultural development, is based on principles of sovereignty, territorial integrity, political equality, and independence of all Member States with key emphasis on discussion of multilateral issues affecting the region. In the aftermath of relations between and amongst countries in the region, that led to conflicts both inter-state and internal violence resulting in circumstances of humanitarian emergencies, it is necessary to evaluate of attitudes of South Asian countries on issues of humanitarian intervention and responsibility to protect. However,

there has been little analysis of attitudes of South Asian countries with respect to responsibility to protect in the academic literature. With the region being considered as ‘leader in development of third world’¹⁵; ‘economic power house’¹⁶ and comprising of nuclear powers with geo-strategic importance, only makes such a study imperative to examine the impact of the region if any, on the international law making and norm creation process in the current context of our discussion.

Few countries in the region have been taken as a sampler to assess the South Asian attitudes towards the notion of responsibility to protect, in order to cover some distance in this project.

A. International Law and Responsibility to Protect in South Asia: An Overview

1. India

During the UN reform meeting held in 2005, India put forward the thought on the issue of “responsibility to protect” that it is essential to exercise necessary caution and responsibility and categorically stated that ‘it is against any kind of ‘military humanism’ or ideological basis that would give legitimacy to right of humanitarian intervention. For developing an international norm on this aspect, India offered a pragmatic prescription necessitating the need to study the concept of responsibility to protect’s limitations and the obligations it poses and most importantly the methodology for exercising it. Besides the inherent complexities that complicate the actions of States in protecting human rights within their domestic jurisdiction, India expressed the need to have political will for calling it a halt to grave acts like genocide and gross violation of human rights.¹⁷

On 24 July 2009, India issued a statement¹⁸ through its permanent representative to the UN, at the General Assembly Plenary Meeting on Implementing the Responsibility to Protect, “...It has been India’s consistent view that the responsibility to protect its population is one of the foremost responsibilities of every state. India also expressed that ‘Sovereignty as responsibility has, however, always been a defining attribute for nation States where safeguards for protection of fundamental rights of citizens are

constitutionally provided. On top of it, India expressed that international community should resort to diplomatic, humanitarian and other peaceful means, to help protect populations in the specific situations of genocide, ethnic cleansing, war crimes and crimes against humanity. India further affirmed that “Willingness to take Chapter VII measures under the UN Charter can only be on a case by-case basis and in cooperation with relevant regional organizations with a specific proviso that such action should only be taken when peaceful means are inadequate and national authorities manifestly fail in discharging their duty” (sic). Indeed India advocated for a safeguard mechanism against misuse of new norms created by the international community.

Further India upholds that ‘internal affairs’ are not subject to external intervention. The objections have come from two distinct quarters- the diplomatic community and the policy analysts. The diplomats concern themselves with the scope of actions that grow of such doctrine. It is seen as a development that would lead to a foreign intercession in a sovereign land. Policy analysts see it as a reek of a neo-imperial ethos designed to deprive weak regimes across the world of their rights to govern their own affairs. However, India continues to support the progressive development of the principle.¹⁹

In the background of events relating to invocation of the responsibility to protect doctrine in Libya and Syria and earlier actions of NATO in former Yugoslavia, India’s perception of issues relating to application of R2P seems to be taking shape towards having a regional consultation with the Arab League, African Union before concluding their view points. It is largely an outcome of the discussions India had with emerging likeminded powers like Brazil and South Africa.²⁰

2. Pakistan

Pakistan’s position regarding the doctrine makes it clear that the application of the doctrine should not contravene the principle of State sovereignty and the principle of non-interference in internal affairs. This is a clear indication from the statement by the Pakistani Ambassador to UN, Mr. Abdullah Hussain Haroon.²¹ While addressing a plenary session of the UN General Assembly on “Responsibility to Protect”, he stated that Pakistan had no

difference with the principle on the necessity to protect innocent civilians. However, the primary responsibility for the protection of civilians rests first with the State, and sovereignty should remain the overarching principle for contemporary international relations.

It was further emphasized that responsibility to protect should not become a basis for contravening the principles of non-interference and non-intervention. The international community's responsibility within responsibility to protect was to provide appropriate, diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, which deal with threats to peace. Moreover, responsibility to protect should be implemented on a case-by-case basis, not as a norm but an exception. Given that situations leading to action based on responsibility to protect were often the result of underdevelopment and poverty, the commitment to help States build capacity remains the best prevention.²² Pakistan believes that all cases addressed by responsibility to protect could be prevented if available mechanisms under international law pertaining to genocide etc.²³ Interestingly, for Pakistan, the root cause of all these problems is under development and hence advocates a human right to development that could give access to developmental needs like food, shelter, fair terms of trade, debt relief, and adequate access to finance and technology and thus the necessity of helping States, which are under stress, at their request, before conflicts and crises break out.²⁴ It is a preventive mechanism to avoid any future internal conflicts.

3. Sri Lanka

The civil war situation in Sri Lanka lasted for many years killing thousands of civilians and causing enormous sufferings to Tamil and Sinhalese population leading to humanitarian crises. It galvanized the debate relating to the application of the responsibility to protect doctrine. On 31 March 2011, UN Secretary General Ban Ki-moon released the report of 'the Panel of Experts on accountability in Sri Lanka' commissioned in 2010. The Panel concluded that "a wide range of serious violations of international humanitarian and human rights law were committed by the government of Sri Lanka and the LTTE, some of which would amount to war crimes and crimes against humanity". While the government was found to have put in place measures to address accountability,

the panel found them deeply flawed, not meeting the international standards for independence and impartiality, and thus, ineffective. However, the Sri Lankan government rejected the report as “biased, baseless and unilateral”.²⁵ It also challenged the authority and scope of the Human Rights Council as well as the office of the Secretary General in such instances. It has been argued by the government that the protection of civilians is a much broader and wider concept, with wider application, whereas the responsibility to protect is very much focused on the four major crimes. In such a situation, it is pertinent to examine Sri Lanka’s views on efficacy and sustainability of the responsibility to protect doctrine as reflected in the UN General Assembly debate on responsibility to protect in 2009. Sri Lanka expressed the need to develop a common ground for implementation of the responsibility to protect by avoiding selective application of the doctrine, with a need to clearly define the basis for invocation of the doctrine. While participating in the debate the Sri Lankan representative Palitha Kohona noted “Member States are particularly sensitive to the way in which this new intervention is to be operationalized. This is borne out of the historical experiences of many countries that have emerged from centuries of colonial rule”. Some of the key questions raised were definition, scope and determination of a situation that warrants intervention. This need was felt to dispel notions about the possible misapplication of the R2P doctrine. In deciding its application, Sri Lanka affirmed the need to clarify the application of the R2P in region specific contexts thus highlighting the need for regional initiatives focusing on the history, culture and value systems of the region. The cornerstone of Sri Lanka’s view point on the invocation of the R2P is complementary role of the doctrine with State consent as the key basis for its application, if any.²⁶

4. Bangladesh

Despite the hiccups to the acceptance to the norm of R2P in the region, the attitude of Bangladesh²⁷ is a striking feature. Bangladesh affirmed the requirement to balance the protection mechanisms with the international legal principles while subscribing to the concept of R2P ‘as a powerful instrument to impede humanitarian tragedies’. According to Bangladesh, responsibility to protect vulnerable population vests primarily with the individual State and that international community should ensure right to development of all nations.

Bangladesh further emphasized the significance of domestic jurisdiction, non-interference, territorial integrity and mechanisms of peaceful settlement of disputes as encapsulated in the UN Charter, before invoking international responsibility to protect vulnerable population. On the other hand, it reiterated a view point that is not peculiar to South Asia. Bangladesh took a cautious approach to the notion of R2P with an allegiance to all encompassing international norms that should establish responsibility and accountability so that such norms do not just become a matter of convenience for the international community.

B. Responsibility to Protect: An Appraisal of Attitudes of South Asia

From an analysis of survey of thoughts of some nations in the South Asia, it could be stated that Westphalian principles like sovereignty, non – interference, territorial integrity, peaceful settlement of international disputes are sacrosanct for countries in the region. It is important to note that jurists like Mani argued that ‘respect for sovereignty and non intervention are two cornerstones of international peace in the contemporary world’.²⁸ However, there are asymmetries in the region of South Asia. Although there are common threats like poverty, climate change, under development, terrorism etc in the region but there are threat perceptions relating to India’s role and presence in the region. This creates asymmetrical patterns relating to the need to have a regional collective security mechanism in the region. In 1985 when SAARC came into being, its objective was to improve the economic conditions of the region, and excluded security issues from its agenda. Although security multilateralism in traditional form is associated with collective security, from the regional attitudes, it may be opined that Asia in general has been unwelcoming to collective security.²⁹ Moreover, a regional security structure is difficult to achieve without cooperative security architecture.³⁰ Article X³¹ of the SAARC Charter prohibits discussions on any contentious issues and it would most certainly stand in the way of establishing a regional mechanism to pursue the concept. Adherence to Westphalian principles by States in the region matters much more for disputes within the region of South Asia. For instance the Islamabad Declaration of the 12th SAARC Summit (2004) stated that members of the SAARC “are particularly mindful of the security concerns of small States. It calls for a strict adherence to the UN Charter, international law and universally

accepted principles relating to sovereignty and territorial integrity and peaceful settlement of disputes.³² The fact of the matter is that, States are influenced by some of the parameters like geography, neighbours, government structures etc in their behavior³³ towards developing a perspective of international law and its implementation in their respective territories. South Asian region is no exception to this phenomenon. And even the geographic situation in South Asia makes countries wary of issues relating to intervention.

As mentioned in the foregoing, South Asia's aspirations originated in the background of their colonial history and regional conflicts. The governing patterns basing on which South Asian States structured their thoughts is 'political realism'³⁴ with power as the end of political actions in municipal and international arena. As an outcome of this pattern, South Asian States are doubtful if there are legal and moral connotations in the intention to intervene or responsibility to protect, because in State centric international system, it is questionable if foreign policies are based on moral contents. Therefore, the norm of non-interference is important for the region because imbalances in power situations lead to elements of suspicion as intervention to protect enhances the power situation of countries. If we are seeking this postulate as the purpose of international law, then one can deduce some formidable questions, as viewed from the South Asian perspective. Let us assume then, if the purpose of public international law is regulation of conduct of States through multilateral institutions, then the question that need to be raised is who are the international law makers? Whether in the making of international law, concerns of cultural relativism and moral pluralism are accommodated? When the establishment of the United Nations became a reality and the process of decolonization has started, all nations have become sovereign and equal recipients' of rights and duties in international law. In the context of such a widened range of responsibility, picking up a bolder proposition, Costas Douzinas says, "...'humanity' cannot act as the *a priori* normative source and is mute in the matter of legal and moral rules'³⁵ Within this scheme, it should be noted that there is need for conceptual clarity based on factors like cultural relativism towards reconciling of international legal regimes and easy model international law frameworks should not be assumed too quickly. International law is supposed to be universally applicable among all States in equal measure.³⁶

As Yasuaki Onuma observes, ‘we must grasp international law from a transcivilizational perspective to understand, appreciate and assess international law’.³⁷ Underlying the significance of universality of international law and with a strong plea for Asian African countries’ contribution to development of international law, R.P.Anand, a foremost international lawyer who worked on the historical traditions of international law, aptly writes:³⁸

As we study and look at international law from historical perspective, especially in the context of the role of Asian and even African countries in its origin and development, there are several questions which have been raised but not satisfactorily answered. After the fifteenth century, Europeans went to Asian countries for their own needs and developed not only active trade and commercial relations, but intimate political relations as well with these independent Asian communities, especially in India and the East Indies. What rules of inter-state conduct applied between these European countries and Asian states? Without some common rules of international law, Europeans could not have survived in Asian countries.

A case in context is Libya. Devoid of any common rules of application of responsibility to protect in Libya complicated the debate of its application leading to a divide on international consensus for the norm, but as it has been noted, as long as the topic is high on the agenda of both Western and non-Western actors, there is hope that meaningful progress can be made. Unprecedented debates about R2P such as those in Brazil and India certainly show not everybody’s views are set in stone.”³⁹ With this view point, States should consider the implications of political questions that have consequences on matters of peace and security in a decentralized international system.⁴⁰

III. TASKS AHEAD: SOME PREFATORY REMARKS

There is dichotomy of evolution of international standards like the R2P on one hand and continued inadequacies or disagreements of evaluating the legal character of such norms which poses challenges for implementation of

international law. Analyzing the relation between cooperation, harmonization and intervention, V.S.Mani remarks:

The expansion in the international community's concern which has been insulated from traditional international law, has taken place in order to stress the need for international cooperation and harmonization of national action, within the meaning of Article 1 (4) of the United Nations Charter. Where cooperation is envisaged, dictatorial intervention is not morally and legally justifiable. What has expanded is international 'concern' and not 'international jurisdiction' in respect of the implementation of human rights.⁴¹

The problem is not with the fundamentals of the need to protect but the modalities by which protection ought to be triggered, conditioned and regulated so as to eventually benefit people. While working on a project earlier on 'International Law of Humanitarian Assistance in Situations of Disasters', the author of this paper reflected upon the scope and urgency of the issue of methods of humanitarian assistance to be addressed, which is analogous in the current context:

The notion of sovereignty should result in unified understanding for inter-state cooperation as the transition of international law has been from confrontation to cooperation. Such cooperation is imperative for the realization of human rights of individuals at all times i.e. during peace and conflict. In case of arguments of absolute sovereignty as obstacles to responsibility of States in protection of individuals, it is imperative to examine the functional interdependence between protection mechanisms, human rights and international responsibility. This interdependence if viewed in the perspective of international cooperation and shared responsibility, then it may enable States to shape responses accordingly by accommodating views of Asian States at large. It may provide a basis towards a definitive study of aspects of international responsibility to protect. (Emphasis added).⁴²

Emmerich Vattel recognized a long time back, the need to accommodate the interests of the community of nations. It may also be one among many strategies by “which states and peoples pursue their interests and undertake joint action in accordance with felt necessities and values”⁴³ It is apt to mention that for international law to be universal; South Asian attitudes inter alia seems to depict the need to have system of United Nations that epitomizes multilateralism but not diverse multiple interests. Of relevance here is an observation made by Yogesh Tyagi⁴⁴, ‘... about the problems of multiple decision making with Member States of the General Assembly and the Security Council having their respective self interests, [and] because of which countries might be unwilling to join expensive humanitarian missions. For a collectivity like the UN so large and ideologically diverse, it is important to find out views of developing countries on the nature of international humanitarian assistance that could well serve as a guiding factor in order to ascertain political, normative and operational dilemmas. As a result, it is imperative to situate work relating to responsibility to protect norms within old and new paradigms of sovereignty and to ask how far it travels in the direction of purposes that should be achieved. There is growth of the discipline of international law ever since the establishment of the United Nations. If such was the maturity of thought displayed by the international community, a similar understanding is imperative to clarify certain standards pertaining to humanitarian intervention that remain unresolved for years.

As Joseph Slaughter puts it, human rights has now become a large corporation and should be renamed ‘Human Rights Inc’.⁴⁵ Drawing an analogy from this statement, do we have to abandon our attempt to understand the world – its norms and values – in framing of international legal principles and allow ‘Humanitarian Inc’ to take over?

Notes

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 - 6 See note 3, Mani at p.218-219. Also see, note 2, Teson at 4.
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 - 8 See note 3, Mani at p.228.
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