

УДК 341.1.01

К исследованию правовой природы «ответственности по защите»

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Аннотация

В статье анализируются понятие и правовая природа «**ответственности по защите**» (ОПЗ). Исследуются касающиеся данной проблематики документы ООН. Особое внимание уделяется проблеме соблюдения основополагающих норм и принципов современного международного права, а также реализации данной концепции в условиях глобализации. Рассматриваются существующие в международном праве подходы к исследованию ОПЗ.

Ключевые слова

Право на защиту, ООН, государственный суверенитет, международно-правовые аспекты применения силы, права человека.

Introduction

At the end of XX and the beginning of XXI century due to the intensification of the processes of globalization and the resulting interdependence of states in the modern system of international relations,

the emergence of new challenges and threats, and the splash of "color revolutions" and "turbulence" in the Middle East and North Africa, the issue of legality of outside coercive intervention in internal conflicts, i.e. the process of implementation of the concept of "responsibility to

protect" in the international relations is becoming more relevant. It's necessary to search for practical mechanisms/arrangements for its application.

The modern international law is based on the following principles, which are enshrined in the UN Charter (1945), the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, of 24 October 1970, the Helsinki Final Act of the CSCE/OSCE of 1975, a number of other international instruments: the prohibition of the use of force or threat of force, peaceful settlement of international disputes, sovereign equality, respect for sovereignty and territorial integrity, respect and promotion of human rights, etc.

If in time of "cold war" these fundamental international legal principles in a sense played the role of the "rules of conduct" between two opposing blocks of states, due to the collapse of the socialist camp headed by the Soviet Union the United States and its allies launched a new division of the world, used unilaterally or collectively the force to resolve conflicts. Ideologically, it is justified as the fight for protection of human rights, including minority rights, as in case with the NATO operation against Yugoslavia in

1999. In fact, this operation can be classified as a "humanitarian intervention", i.e. enforcement action (usually with the use of armed force) without the authorization of the UN Security Council.

However, the consequences of war against Yugoslavia, which caused the significant destruction of infrastructure and numerous victims among the civilians, were a sensible case of possible scenario for the judicious politicians and leaders of several countries.

Another important event that occurred in five years prior to the war against Yugoslavia, was the genocide in Rwanda, when the United Nations responsible for maintaining the international peace and security was powerless in the case of mass extermination of the Tutsi people.

The international community had a dilemma, which was recognized and voiced by the then-UN Secretary General Kofi Annan, who has called upon the UN Security Council to find a way out, when a political regime does not want to or can't to respect human rights covering up with the principle of State sovereignty, in its own territory. The international community is not prepared to agree to outside military intervention without Security Council authorization. The solution was found in the development of the concept of "responsibility to protect" (RtoP).

Different aspects of the concept of responsibility to protect are covered in some documents¹ primarily of the UN².

As a rule, the foreign authors G. Evans³, Ed. Luck⁴, A. Bellamy⁵, S. Teylor⁶, B. Valentino⁷, L. Hultman⁸

- 1 "The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty", available at :www.iciss.ca/pdf/Commission-Report.pdf
- 2 "A More Secure world: our shared responsibility (Report of the High level panel on Threats, Challenges and Change; New York, 2004)", available at: www.un.org/secureworld/report2.pdf; Kofi Annan, In Larger Freedom: towards development, security and human rights for all. Report of Secretary-General to the UN Summit 21 March 2005 (New York, 2005)", available at: <http://www.un.org/largerfreedom/>; "Remarks by the Secretary-General to the Security Council", *UN document SG/SM/13070*, August 25, 2010.
- 3 Gareth, Evans (2008), *The Responsibility to Protect: ending mass atrocity crimes once and for all*, Washington, D.C., 348 p.
- 4 Edward, C. Luck (2009), "Sovereignty, Choice, and the Responsibility to Protect", *Global Responsibility to Protect*, No. 1, pp. 10-21.
- 5 Alex, J. Bellamy (2009), *Responsibility to Protect*, Polity Press, Cambridge, 268 p.
- 6 Taylor, B. Sebolt (2007), *Humanitarian Military Intervention: The Conditions for Success and Failure*, Oxford University Press, Oxford, 312 p.
- 7 Benjamin, Valentino (2006), "The Perils of Limited Humanitarian Intervention: Lessons from the 1990s", *Wisconsin International Law Journal* 24, No. 3, pp. 723-740.
- 8 Hultman, Lisa (2010), "Keeping Peace or Spurring Violence? Unintended Effects

etc. devoted their studies to the analysis of this concept.

Despite the widespread use of the concept of "responsibility to protect" in international legal documents and papers of foreign international lawyers, the issue of the "responsibility to protect" was examined in detail not enough in Russian legal publications.

In this regard, without claiming complete coverage of this issue, the author attempts to analyze the legal nature of the "responsibility to protect" as a phenomenon in contemporary international law and international politics, as well as related approaches on the use of international legal measures to resolve conflicts.

Understanding the concept of "responsibility to protect"

In a general sense the "responsibility to protect" is a set of measures, including the use of force, i.e. the admissibility of armed intervention, to which the international community could resort for the mandatory UN Security Council sanctions against other sovereign states in order to prevent and stop the massive violations of human rights, as well as in

of Peace Operations on Violence Against Civilians" *Civil Wars* 2, Nos. 1-2, pp. 29-46.

emergency situations, in conditions of unwillingness or inability of the national authorities to eliminate the causes and consequences⁹.

Nowadays the concept of "responsibility to protect" is a set of principles based on the controversial idea that "sovereignty – it is not a privilege but a responsibility"¹⁰ of State¹¹. Those principles are as follows:

1. States have an obligation to protect populations from genocide, war crimes, crimes against humanity and ethnic cleansing.

2. If any State is unable to provide the above conditions, the international community, first of all, through the United Nations, is obliged to help this State through the use of methods for early warning, assistance in negotiations

between the political parties, and other measures of peaceful settlement of disputes.

3. If any State is unable or unwilling to protect their citizens and the above peaceful measures, including diplomatic, did not bring effective results, the international community has a responsibility to intervene, including, as a last resort, the use of armed force¹².

In this case, there are three levels of responsibility:

– First, each individual State has its own responsibility to protect its own population in case of the above-mentioned crimes.

– Secondly, the international community under the auspices of the United Nations is responsible for the use of "diplomatic, humanitarian and other peaceful measures" as an aid to protect the population of any State.

– Finally, the third level of protection is used when national authorities do not fulfill their obligations to protect the population, or when the use of peaceful measures does not bring the desired result. In this case, the State declares its readiness to use collective enforcement

9 In particular, in 1999, even before the invention of the concept of "responsibility to protect" British Prime Minister Tony Blair noted that the world has not only the right but also the obligation to intervene in the worst humanitarian crises to settle them as soon as possible.

10 Thakur, R. (2006), *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*. Cambridge, p. 34.

11 The divisiveness of this thesis is that, in fact sovereignty is still the "privilege of the state," because it implies the absence of the state. Rather according to the author, we can talk about the inadmissibility of "sovereign permissiveness."

12 "The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty", available at :www.iciss.ca/pdf/Commission-Report.pdf

action, including the military measures, with the consent of the UN Security Council under Chapter VII of the UN Charter.

It appears to be essential that the "responsibility to protect" was carried out in strict compliance with the norms and principles of the modern international law and in accordance with the UN Charter.

It should be added that the concept of "responsibility to protect" is not limited to the protection of the civilian population. It should be examined in a wider context – in close connection with the peaceful efforts of the international community and, above all, to preventive diplomacy, peacekeeping and peacebuilding, which are carried out by the UN and other international organizations.

Different countries and organizations in the legal framework of the "responsibility to protect"

The concept of the "responsibility to protect" is ambiguous and causes much controversy among politicians and scientists. Some of them recognize the legitimacy, especially military intervention under the pretext of human rights protection in conflicts or for other hu-

manitarian reasons. Others believe that the implementation of the "responsibility to protect" should be carried out in strict compliance with the principle of non-use of force and threat of force, sovereignty and territorial integrity, non-interference in the internal affairs of States, cooperation among the States, peaceful settlement of disputes, respect for human rights and fundamental freedoms, the conscientious fulfillment of international obligations, etc.¹³.

At the same time, from the emergence of this concept (2001 to present), it has been criticized. For example, China has called into question the principle of the "responsibility to protect" in the discussion in the UN Security Council in 2007, the representatives of a number of developing countries (Algeria, Egypt, Pakistan, Cuba and Iran) also criticized it rightly pointing to the potential threat to the sovereignty of States. Its immaturity is named as one of the criteria of insolvency of the "responsibility to protect".

A new outbreak of controversies surrounding the "responsibility to protect" appeared in 2008 due to a failure

13 It was attempted to reconcile the different approaches to the RtoP during the preparation of the World Summit Outcome Document in 2005, which is reflected by the compromise character of its provisions on the "responsibility to protect".

of the military regime of Myanmar to receive international assistance during the humanitarian catastrophe caused by the cyclone "Nargis".

In addition to differences on the normative content of the "responsibility to protect", active debates are ongoing on its implementation. For the first it is necessary to take preventive action against the authorities of the countries that have policies fraught with grave human rights violations against its own people, that is prevent the causes of the situation in which you need to use "responsibility to protect". Another important element is the political will of the international community to be able to take decisive action in the framework of the RtoP.

When it comes to deciding on the measures under the "responsibility to protect", the main body is the Security Council under the UN Charter. However, there is a real danger of "paralysis" of this body as a result of the potential differences between the P5 of the Security Council. It seems that the proposals by the International Commission on Intervention and State Sovereignty (ICISS) on refusal of the permanent members of the veto in cases of genocide, war crimes and crimes against humanity, the possibility of "back legitimation" of the General Assembly, with the blocking solution

in the "Five" and the adoption of criteria for intervention required for the Security Council and others are not acceptable in the foreseeable future.

Another problem with the RtoP implementation is the need to have real potential, it is not enough to have a desire – you need the very real potential, i.e. the international community represented by the United Nations must have the necessary capabilities.

Besides, there is real danger of abuse in the implementation of this conception¹⁴. It should be added that there is currently no common understanding of the "responsibility to protect" as an effective and legitimate means of protection in non-international conflicts. In this sense, we can clearly see two basic approaches to this issue in the international law:

1. The approach, which is mainly popular among a number of foreign international lawyers¹⁵, recognizes and

14 In this sense, on eloquent example is the events in Libya and Syria, where Western countries under the guise of the need to protect the civilian population in the RtoP, support one of the parties to the conflict and lead to a change of undesirable matter the political regime, which ultimately leads to an increase in the number of victims among the civilian residents.

15 This concept is popular among the lawyers who stick in the relationship between international and national law

emphasizes the legitimacy of military intervention under the pretext of human rights protection in situations of conflicts or other humanitarian reasons (for example, the cyclone "Nargis" in Myanmar). The "Responsibility to Protect" is perceived and promoted as a "new emerging norm of international law", which is a priority in relation to other norms and principles of international law, with "unprecedented status"¹⁶. Often priority is given not to peaceful means, but to military intervention.

The advocates of this approach tend to use double standards in the analysis of the internal armed conflicts, as well as in determining the legitimacy of the leaders of the parties in the conflict.

2. Another view, which is popular among the representatives of the Russian doctrine of international law, is to ensure priority of strict implementation of norms and principles of international law and, above all, of the provisions of the UN Charter (the principle of non-use of force or threat of force, state sover-

to the concept of so-called "radical legal monism."

16 Sarkin, J. (2009), "The role of the United Nations, the African Union and Africa's sub-regional organizations in dealing with Africa's human rights problems: Connecting humanitarian intervention and the responsibility to protect", *J. of African law*, Cambridge, Vol. 53, No. 1, pp. 1-33.

eignty and territorial integrity, non-interference in the internal affairs of States, cooperation among the States, peaceful settlement of disputes, respect for human rights and fundamental freedoms, and the conscientious fulfillment of international obligations) in resolution of conflicts¹⁷.

However, Russia participated in the elaboration of the concept of "responsibility to protect" (V. Lukin, E. Primakov)¹⁸, and did not speak against the RtoP at the United Nations General Assembly in 2005. Russia's permanent representative to the UN V. Churkin reported in 2007 that the concept is very vague and it is as a "framework that does not have a universal political and legal content." He also stated that the content of the concept should be focused on since it is actually about a new legal justification of the use of force, and therefore, according to the Russian ambassador, to ensure "a balanced, non-confrontational approach that takes into account the interests of the entire international communi-

17 Lavrov, S. (1999), "The Russian Approach: Ilie Fight against Genocide, War Crimes, and Crimes against Humanity", *Fordham International Law Journal*, Vol. 23 No. 2, pp. 415-429.

18 Vladimir Lukin took part in the work of the International Commission on Intervention and State Sovereignty (ICISS) and Eugeny Primakov – High-level Panel on Threats, Challenges and Change.

ty and is based on the fundamental principles and norms of international law"¹⁹. According to this view, in fact, a similar "power scenario of the global world order inevitably meet resistance"²⁰.

In this context, a conspicuous example is the "Libyan model" considered an allegedly good example of the "responsibility to protect" by the Western politicians and lawyers. What has really happened? During the implementation of UN Security Council Resolution 1973, member-states, exceeding its mandate to protect the civilian population, in fact, had rendered assistance to one of the parties to the conflict, which actually led to change of political regime in Libya.

It's necessary to add another important issue to this – the observance of the principle of respect for human rights and fundamental freedoms of the people. This argument was used by supporters of a military scenario in Libya. However, after the change of regime in this country new cases of mass murder, torture,

illegal arrests and other such violations of human rights and freedoms were reported.

As a result, Russia and China in the Security Council were against the repetition of the "Libyan scenario" in Syria.

Thus, we can say that in a certain sense the basis of the concept of "responsibility to protect" is formed by the conflict between law and morality. On the one hand, RtoP, focusing on the priority of human rights and fundamental freedoms, justice and the value of human life on the other – the concept is at contradiction with the basic principles of modern international law as a state sovereignty, non-interference in internal affairs, as well as the non-use of force, which essentially comes in conflict with the existing concept of the international security and the world order which has been established after the Second World War.

Conclusion

Based on an analysis of the legal nature, essence and mechanisms of the "responsibility to protect" and the consequences of its application in the real world politics, we can distinguish the following issues associated with this concept:

19 Saikin, Yu., "The concept of UN non-interference" ["Kontseptsiya nevmeshatel'stva OON"], *Rossiiskaya gazeta*, available at: www.rg.ru/2007/10/11/oon.html

20 Zor'kin, V., "Rule of law and security imperative" ["Verkhovenstvo prava i imperativ bezopasnosti"], *Rossiiskaya Gazeta*, available at: www.rg.ru/2012/05/15/zorkin-poln.html

1. At present, there are almost no clear criteria of legitimacy of the "responsibility to protect".

2. It is not possible to avoid the abuse of the "responsibility to protect" in order to achieve political goals.

3. The controversial and even dangerous nature of the thesis of the priority of the concept of "responsibility to protect" in relation to other norms and principles of the modern international law.

4. There is a tendency to use violent methods of implementation of the RtoP in order to establish the global world order.

5. There exists no mechanism/institution to analyze the situation before the beginning of the armed intervention of the international community to the domestic conflict²¹.

6. There is a conflict between the concept of "responsibility to protect" and the fundamental principles and norms of international law, in the first place, are the institution of state sovereignty, non-interference in the internal affairs of States and the use of force and threat of force.

7. A vagueness and ambiguity of the criteria for intervention in the frame-

21 As a hypothetical possibility that role could be played by reanimated MSC (but under the direct supervision of the UN Security Council).

work of the implementation of the "responsibility to protect".

Given the above factors, which highlight the shortcomings of the "responsibility to protect", we can assume that at the moment the concept of RtoP is controversial and needs further development by the international community, especially within the UN and with the active participation of its Security Council²².

Thus, as demonstrated by the analysis of the legal nature of the concept of the "responsibility to protect" is ambiguous both in legal and political terms at the present time. There are following aspects:

– First, the theoretical basis and practical implementation (in particular, in case of the Libyan and Syrian models of "crisis" settlement) clearly demonstrate its internal contradictions and immaturity. In fact, it is directed against the foundations of statehood – state sovereignty, which is fraught with destabilization of the entire system of international law as the basis of international relations;

– Second, in conceptual terms it's necessary to make the emphasis on

22 In this sense, an eloquent proof of this statement is the conflict in Syria, and the position of Russia and China.

measures to prevent conflict situations. In this case, the State should not use this concept as a political and legal means to displace undesirable regimes. The RtoP should be improved by the international community in the framework of the UN and under the exclusive control of the UN Security Council;

– Third, institutionally we need close interaction and coordination of the

UN member states, institutions of the World Organization (UN Security Council, the UN General Assembly, the UN Secretary General, the Peace-building Commission, the Human Rights Council, the Commission of the International Law, the Special Representative of the UN Secretary-General, etc.) for its further development and implementation in the future.

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"Responsibility to protect": analysis in legal terms

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Abstract

The article analyzes the concept and legal nature of the "responsibility to protect" (RtoP or R2P) doctrine on the basis of the UN documents relating to these issues. At the end of XX and the beginning of XXI century the due to the intensification of the processes of globalization and the resulting interdependence of states in the modern system of international relations, the emergence of new challenges and threats, and the splash of "color revolutions" and "turbulence" in the Middle East and North Africa, the issue of legality of outside coercive intervention in internal conflicts, i.e. the process of implementation of the concept of "responsibility to protect" in the international relations is becoming more relevant. It's necessary to search for practical mechanisms/ arrangements for its application.

The basis of the concept of "responsibility to protect" is formed by the conflict between law and morality. On the one hand, RtoP, focusing on the priority of human rights and fundamental freedoms, justice and the value of human life, the other – the concept is at contradiction with the basic principles of modern international law, as state sovereignty, non-interference in internal affairs, as well as the non-use of force, which essentially comes in conflict with the existing concept of the international security and the world order which has been established after the Second World War.

Keywords

Right to protect, UN, national sovereignty, international legal aspects of the use of force, human rights.