

THEORETICALLY POSITING THE DOCTRINE OF RESPONSIBILITY TO PROTECT (R2P) IN LIGHT OF THE SITUATION IN INDIAN-ADMINISTERED KASHMIR

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Introduction

The situation in Kashmir is not only complex but also majorly ignored in the usual academic circles that study self-determination, sovereignty, territorial integrity and interventionism, in light of the doctrine of Responsibility to Protect (R2P). While critical stances on human rights in the region are definitely supported by an adequate bank of literature (Malik, Zhilong, & Mubeen, 2020; Goldston & Gossman, 1991), the manner in which academia deals with mitigation is unidimensional i.e. through either balancing regional powers or debating constitutional legality (Behera, 2016; Indurthy & Haque, 2010; Hussain, 2010). Of late, there has been a steady rise in the discussion on whether R2P can be applied in this situation (Naveed, 2020; Chowhan, 2020; Raashed, 2020; Hussain & Mehmood, 2021; Qadri, 2021), as a method of granting emancipation to a population that has been trapped amidst territorial rivalries of three nuclear states – Pakistan, India and China. The region has been jarred with propaganda and crackdowns on

civil society, leading to an infantilization of local voices (Zargar, 2021). Thus, in light of such a situation, which is deteriorating on a regular basis and without any oversight by the international community, the question arises: can R2P be invoked in Kashmir?

This paper aims to answer this question by analyzing if the options under R2P can be tweaked in a tailor-made fashion for effective dissemination. Note must be taken of the fact that this paper will also scratch the legal surface but only critically. The theoretical, political and operational dimensions of the R2P lie at the core of this study. This paper will open with a brief dissection of the territorial factor involved in the conflict and go on to reflect upon the grounds for the application of R2P and finally discuss how it can be applied and the outcomes that are to be expected. The objective here is to shed further light on feasibility of sustainable solutions in terms of administering R2P in one of the most politically complex situations, and thereby set a precedent for an elaboration of the theoretical framework of R2P, pondering upon its possible revival as a dominant tool for the civilian protection and prevention of atrocity crimes. An additional objective would also be to outline the boundaries of discourse that exist under this domain and put things into perspective in terms of how trajectories can fan out.

Characterization of the Situation

One of the reasons why the situation in Kashmir can be rightfully termed as 'complex' is that the region is truncated across three States, as into Pakistan Occupied Kashmir (POK), India Held Kashmir (IHK) and China Occupied Kashmir (COK). Hence, the three states, all of whom bear nuclear weapons, are in a state of perpetual tension with regard to the ownership of the region (Snedden, 2013). However,

this paper will primarily deal with IHK owing to the genocide alert issued by Genocide Watch in 2019 after the revocation of Kashmir's special status by India (Stanton, 2019). Stanton argued that the situation in Kashmir not only fulfilled his own Ten Stages model but also Harff's (2012) risk factors thereby making the possibility of genocide inevitable. The blatant abuse of human rights in Kashmir is a phenomenon that has been ongoing for decades, especially after the Indian military had been granted the use of overreaching measures in 1990 via the Armed Forces (Special Powers) Act (Egyesült, 2007), commonly referred to by its acronym - AFSPA. Ever since, there have been reports of forced disappearances, extra-judicial killings, the use of torture and sexual violence, all of which had been perpetrated by the Indian armed forces in order to terrorize Kashmiris, thereby subduing them into authority and enforcing a North Indian religious and ethnic domination over the local population (Chatterji, et al., 2009). The widespread use of rape as a weapon of war has also been documented along-with bureaucratic efforts to downplay any amount of coverage of the same (Kazi, 2014). The discovery of mass graves in 2011 caused a temporary stir in the international media without resulting in any concrete action. The present, post-special status scenario has seen consistent internet blackouts, the use of civilians as human shields, the use of lethal force to deter social movements and break up communal gatherings and the continued use of sexual violence as a tool to break the popular morale (Ellis-Petersen, 2020). Chowhan (2020) and Hussain & Mehmood (2021) argue that these conditions are suitable for the invocation of R2P as a temporary remedy that can be faced with multiple obstacles but must be considered nevertheless owing to the exhaustion of available options.

An Explainer on R2P

R2P is a doctrine of global political commitment adopted by the UN in 2005, with the aim of preventing and responding to genocide, war crimes, ethnic cleansing, and crimes against humanity. It is a framework that places the primary responsibility for the protection of populations from mass atrocities on the state, but also acknowledges the responsibility of the international community to take timely and decisive action when the state is unable or unwilling to protect its population. R2P is based on the principle that sovereignty is not an absolute right, but rather a responsibility. This responsibility includes the protection of the population from mass atrocities, and the state has a duty to exercise this responsibility. If a state is unable or unwilling to protect its population, then the international community has a responsibility to intervene to protect the population (Bellamy, 2008).

R2P has three pillars. The first pillar emphasizes that the state has the primary responsibility to protect its population from mass atrocities. It encourages states to develop effective domestic institutions and policies to prevent and respond to such atrocities. The second pillar focuses on the international community's responsibility to assist the state in fulfilling its responsibility to protect. This can include providing technical assistance, capacity building, and diplomatic support. The third pillar emphasizes that if a state is unable or unwilling to protect its population from mass atrocities, then the international community has a responsibility to take timely and decisive action, in accordance with the UN Charter (Evans, Thakur, & Pape, 2014).

R2P has been a subject of intense debate and controversy since its adoption. Critics argue that R2P is an infringement on state sovereignty and could be used to justify intervention for political or economic interests (Bellamy, 2008). Proponents, on the other hand, argue that R2P is an important step towards preventing mass atrocities and ensuring that the international community takes action to protect populations when necessary (Evans, Thakur, & Pape, 2014). Since this paper deals with the modalities with the ongoing R2P discourse with regard to Kashmir, any discussion with regard to the concept in itself is beyond the scope – unless it plays directly into the debate regarding Kashmir, as stated in the sections to follow.

Legal Obstacles

The primary legal obstacle with regard to the applicability of R2P is an equivalent of what Schmidt (2014) outlines in her work on the interplay of R2P and International Humanitarian Law in the case of Gaza. Schmidt's analysis on the applicability of R2P in Gaza allows one to draw similarities with the situation in Kashmir, both resembling occupied territories. While no clear legal precedence exists in terms of operational matters of R2P in such a scenario, Adams (2014) argues that in the case of Gaza, both Israel and Hamas have sovereign responsibilities and the parameter of this said responsibility ought to be defined by each actor's effective control. Thus, if we employ the same logic with regard to the case of IHK, it can be argued that India does exercise effective control over its respective Kashmir territory and is responsible for the protection of civilians.

A caveat exists herein: unlike in Gaza, where the ontology of Israeli occupation is backed by international law, Kashmir's occupation is still, up to this point, an affective claim. The Instrument of Accession signed in 1947 between Maharaja Hari Singh and the Indian Government disrupts legal positivism towards the branding of India as an occupying power. The Instrument of Accession in 1947 granted India the grounds to legally extend jurisdiction to the valley. Kashmir acceded to India with the Maharaja signing the document as a mark of consent granted to the Indian Union, on behalf of the population of the erstwhile Princely State (Bose, 1999). A substantial portion of the acceded territories had receded to Pakistan in the immediate post-Independence period by means of conflict (Stein, 2010).

This circles back to the question of demarcating political obligation on part of the Indian Administration to protect life through responsible State Action in the regions it enjoys territorial control. Although India enjoys de-facto territorial control over IJK, its control should extend to the entire valley as per the Instrument of Accession prior to any established mechanisms of a Plebiscite, advocated for by the UN Security Council, that may alter the legal status-quo. In the present day, a rather obvious democratic question persists: is the *vox populi* of the Valley represented through the Maharaja's signature dated 1947? Seven decades serve as a substantial period for discourses to be rebranded and thus revisiting discursive spaces between the State and the people is of paramount importance. Current attempts by the Constitutional machinery of India to delimit political boundaries post the territorial alteration in 2019 needs to encompass the broader objective of looking into popular aspirations

centered around developmental goals, disarmament and political expression.

Political Obstacles

The political obstacles that arise echo the five structural problems put forth by Paris (2014). The legitimacy of R2P suffers from a 'mixed motives problem,' characterized by vague notions of altruism with inherent motives of self-interest which will in no way be non-existent in Kashmir. Neither is its success divorced from the 'counterfactual problem' nor will it be able to establish the conspicuous harms of non-intervention if it is actually applied and naturally lead to unwanted consequences. Libya shows the non-restrictive nature of mandates as a common trend in R2P operations, highlighting the 'end-state problem'.

Rana (2011) elaborates upon the doubtful position of India on R2P and his conclusion points towards the notion that political will is lacking in terms of supporting the doctrine. Any form of support towards an interventionist policy concerning the protection of human rights has the potential to raise fresh questions on Indian actions in Kashmir, which India is bound to avoid as she maintains that Kashmir is a 'domestic issue' (Noorani, 2019). Additionally, Rana (2011) mentions that India is particularly wary of the Third Pillar of the doctrine owing to geopolitical tensions with Pakistan and China. With frequent cross border skirmishes occurring on a near-regular basis, any form of military action will not only face heavy retaliation but also may lead to an absolute collapse of the humanitarian machinery that R2P would want to establish for the people of

Kashmir. India has the propensity to engage in further policing of the Kashmiri population if the hint of such initiatives is noticed amongst members of the international community.

India's skepticism towards a military intervention based on the Third Pillar, as highlighted by Rana (2011) is rational for varied reasons and must also resonate internationally. Firstly, R2P implementation does not hint at a bright record. Post its application in Libya, India's erstwhile Ambassador to the United Nations, Hardeep Singh Puri, stated how it gave R2P a bad reputation and that the only motive was the political destabilization of Libya. Puri also alleged that civilians had been armed and that the no-fly zone had been implemented only selectively (Virk, 2017). Thus, a military solution would do little to prevent the situation from being further turned into a power negotiation amongst regional Great Powers, implying a plethora of new security dilemmas encompassed in a realist narrative.

Overcoming the Odds

The question thus arises: keeping the above-mentioned dilemmas in mind, what can be done in terms of emancipation for the Kashmiri population, under the garb of the R2P? A part of the answer lies in revisiting several of the coercive and non-coercive methods that are enshrined under the doctrine, and the need for R2P to be a tailor-made process in terms of kickstarting a discourse on Kashmir. Firstly, further academic research must be conducted on India's effective control in Kashmir, such that no legal loopholes can be exploited by India in order to push-back against the evidence presented. Once a

growing body of literature is able to characterize this subject matter, India's settler colonial project can be exposed giving way to the amassing of evidence of Indian actions in the region, most of which has been heavily censored and suppressed (Qadri, 2021).

Secondly, two perspectives must be outlined when engaging with the process of initiating R2P. The first perspective is that the discourse should focus on the voices of the Kashmiri people and their needs for self-determination, which has largely been ignored (International Crisis Group, 2010). The optics on the crisis ought to shift in terms of how the conflict is viewed, which means that the region ought to be characterized as one which is occupied and not as a strategic zone that is sought after by Great Powers (Shah, 2021)—a narrative that leads to the dehumanization of the people, thereby making them expendable (Naveed, 2020). The situation must be internationalized such that greater checks and balances can be enforced by the international community on the actions of India (Raashed, 2020).

The second perspective is that there ought to be an overwhelming effort in operationalizing Pillars I and II of the doctrine. Chowhan (2020) explores various diplomatic methods that make themselves available including the extensive usage of the United Nations Human Rights Council's (UNHRC) Universal Periodic Review mechanisms along-with national human rights instruments which can function in tandem by making use of inter-state diplomacy and the strategic use of persuasion and pressure. In case these prove to be ineffective, Pillar

III can be operationalized by implementing economic sanctions and reducing Indian opportunities for business on a global basis.

Livingston (2017) outlines this strategy in his example of Canada refusing to engage in business with Oil and Natural Gas Corporation of India (ONGC), a move which he refers to as 'investor activism' (Rock, et al., 2017).

The function of these measures stated above must achieve three outcomes. The first outcome should be the reinstatement of Kashmir's special status under Article 370 and 35A of the Indian Constitution. This would put political power back in the hands of the Kashmiri people, allowing them the sovereign right to determine their political and administrative future (Deshmane, 2019). The second outcome should be the repealing of the AFSPA, thereby reducing troop presence which would lead to a drastic reduction in draconian law enforcement practices (Kazi, 2014). The third outcome should be the eventual realization of a plebiscite to actualize Kashmiri self-determination as stated in United Nations Security Council Resolution 47 of 1948 (Raghavan, 2010). For this purpose, the United Nations Military Observer Group in India and Pakistan (UNMOGIP) should be strengthened and given a broader mandate (Khan, 2014). Of late, the UNMOGIP has been subject to severe budget cuts which has hampered their operations (Press Trust of India, 2017). The UNMOGIP is of prime importance in the case of a plebiscite as it serves as the eyes and ears of the international community during a period of transition. It is also the body that ought to be tasked with the situation not relapsing into a Great Power rivalry, thus maintaining the moral sanctity of an R2P application.

Additional considerations

Pressing political questions arise in terms of applying R2P to persuade India – why would she accept any form of intervention in the first place and consequently undermine her legal-sovereign claims further by upholding the principles of the intervention in a constricted sense? If moral persuasion is the way out in pressurizing India into action, how would the international community react when India counter-responds with the claim that if R2P has to be applied, it has to be applied uphold her responsibility as a state in her legally demarcated areas of sovereign presence, which includes IHK and well as POK. Thus, application of R2P, already perceived as a sleight of hand to underestimate state sovereignty, cannot further derail itself by manifesting in a politically incongruent manner if it has to maintain its legitimacy.

Furthermore, R2P is based on respect for norms, principles of International Law, peace and human rights. With legal precedents favoring India's calls for status-quo-bilateralism, it is difficult to ascertain a degree of political compulsion to make India dilute the issue internationally, let alone garner support for the same in the UN Security Council. R2P focuses on the four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing – codified in the Rome Statute of the International Criminal Court which India isn't a party to. Thus, politically going ahead with R2P premised on the aforementioned provides India with a rallying factor to diplomatically oppose the move as it is in the sovereign right of any country to differ from assumed normativity of treaties. Thus the 'morality argument' involving pressurizing India to abide by the Rome Statute is non-existent.

It would be difficult to convince the world of a better alternative than an internalized process of bringing peace, preventing atrocities and actualizing the aspirations of the people. The strongest precedent that R2P can have in Kashmir is that of one which it adopted in Kenya in 2007-08, premised primarily on facilitating mediation. It is imperative to steer as far as possible from adopting coercion, pressure or international condemnation which will not only malign R2P as a principle detached from the realities of Kashmir, but will further invoke a legitimacy crisis.

Conclusion

It can thus be observed from the paper that moral, political and situational grounds can be argued to exist for the application of R2P in Kashmir and it is touted by many to be the only tool remaining which promises an ounce of salvation for the Kashmiri population. It goes without saying that the strategy outlined in the aforementioned sections will not be easy to achieve owing to existing geopolitical tensions, legal complexities, lack of explicit, actionable political grounds, on top of the perpetual relative ignorance of the situation in the United Nations Security Council (Hussain & Mehmood, 2021). This further puts an added responsibility on the academic as well as policy practitioners to initiate further literature on the issue such that more attention can be drawn to the situation which continues to put policy-makers in a conundrum.

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