https://doi.org/10.22364/iscflul.8.2.24

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IS THE R2P NORM A LEGAL NORM?

Keywords: responsibility to protect, norm, principle, atrocities

Summary

The conception of the Responsibility to Protect (R2P) was developed to resolve the practical problem of the inefficiency of the international community to address atrocities. The present contribution aims at the clarification of the theoretical problem on the nature of R2P norm and provision of conceptual tools for its solution. After differentiating R2P objects and contouring their content, the question whether the R2P norm is of a legal kind will be addressed. The contribution claims that application of the proposed legal concepts – theoretical conception related to the law, doctrine, norm, principle and rule – contributes to the clarification of the objects and content of the R2P; and that political responsibility approach to the identification of a legal norm and the specific concept of emerging norm are suitable tools for determining the legal nature of R2P norm.

Introduction

The practical problem which has motivated writing of this article is the issue of the inefficiency of the international community in addressing atrocities.[1] The conception of the Responsibility to Protect (in the following text: R2P) emerged as an attempt to address the problem[2] and, according to acceptance of

[1] It is generally accepted that the scope of protection by R2P is limited to atrocity that includes four crimes: genocide, ethnic cleansing, war crimes and crimes against humanity. See: Peters A. The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and Its Members. In: Fastenrath U. et al. (eds.). From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma. Oxford: Oxford University Press, 2011, p. 299.

[2] Debate about R2P is "about the possible remedies, including military intervention, to avoid or to put an end to massive violations of human rights committed by a state towards its own citizens or in situations where state authorities critically lack effectiveness." Focarelli C. The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine. Journal of Conflict & Security Law, 2008, Vol. 13, No. 2, p. 191.

this conception and its practical results, we can detect bright, shadow as well as dark periods of R2P development in recent history.[3]

The research starts from two assumptions: the theoretical conceptions related to the law have an important role in resolving legal problems; and the practical problem of our concern is a legal problem. Consequently, the inefficiency of the international community in addressing atrocities can be affected by the solutions to R2P theoretical problems. The R2P theoretical puzzles still remain unresolved and the nature of the R2P norm is one of them. Two aims of this contribution are: to clarify this specific theoretical problem and to provide the tools for its solution.[4] The present article claims that application of the proposed legal concepts contributes to the clarification of the objects and content of the R2P; and that the political responsibility approach to the identification of a legal norm (hereinafter – PRA), and the specific concept of *emerging norm* are adequate tools for determining the legal nature of R2P norm.

The clarification goal will be attained by differentiating objects comprised under the notion "R2P" and outlining their contents. The concepts of theoretical conception related to law, doctrine, norm, principle and rule will be exposed and applied for differentiation of the R2P objects (Section 1). After that, the content of R2P conception understood as a legal doctrine, and the content of the R2P norm will be briefly outlined (Section 2). It follows the section focused on the finding-solution goal prompted by the question whether the R2P norm is of a legal kind. The identification criteria proposed by different approaches to the identification of legal norm will be clarified (Subsection 3.1), as well as two understandings of the emerging norm (Subsection 3.2). After that, it will be indicated how norm-identification through PRA and the specific concept of the emerging norm can be used for supporting the claim about the legal nature of the R2P norm (Subsection 3.3). In Conclusion, we will summarize the insights and emphasize the importance of the introductory assumptions.

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[3] Gareth Evans described the phases of the development of R2P as: (a) [development] of the conception (2001–2005); (b) birth (2005); (c) growth to maturity (2005–2011); (d) mid-life crisis (2011–2014); (e) future [development] (2014–…). Evans G. The evolution of the Responsibility to Protect: From concept and principle to actionable norm. In: Thakur R., Maley W. (eds.). Theorising the responsibility to protect. Cambridge: Cambridge University Press, 2015. We could say that first three are bright phases of R2P with regard to its acceptance by states and international institutions, as well as considering its practical implementation, e.g., in Kenya and, at the beginning, in Libya. The shadow phasis has started with the results of Libya intervention and continues nowadays coloured with sceptical attitudes of some states towards R2P. The dark moments can be found in failure of international community to react upon atrocities, e.g., in Syria and recently – in Myanmar. Michael Byres found setbacks of R2P also when it was attempted to use it as a justification of the interventions that it did not cover. Byres M. International Law and the Responsibility to Protect. In: Thakur R., Maley W. (eds.). 2015, p. 101.

[4] Ramesh Thakur and William Maley listed three sets of issues, which the theorizing on R2P can address: conceptual clarification, normative justification and the relationship of R2P to social phenomena. Thakur R., Maley W. Introduction: Theorising global responsibilities. In: Thakur R., Maley W. (eds.). 2015, pp. 9–10. In this contribution, the first set is addressed in the context of the first goal, and the last two sets of issues in the context of the second goal, as long as these two sets refer to the question of how the R2P norm can be described as a legal norm.

1. Responsibility to protect: Conception, doctrine and norm

The discourse about R2P is marked by the disagreement about the content of international law, as well as by conceptual confusion when different concepts and different meanings of the same concept-terms (i.e., norm) are used to discuss the R2P.[5] The last-mentioned characteristic is partially caused by interdisciplinary approach to R2P especially when described from the perspectives of international law and international relations.

The description of a phenomenon from different aspects is more than welcomed when addressing the international problems. Moreover, the study of law in general combines two approaches.[6] The legal sciences focused on posited law (legal dogmatics), e.g., science of international law, aim at answering the question about what are the legal norms in a community governed by law, while sociology in a broad sense (including international relations) aims at describing the social factors influencing the content and effects of law.[7] However, the different linguistic apparatus that various disciplines use for the explanation of a phenomenon cause the problem of mutual understanding. The awareness of different approaches of legal dogmatics and sociology makes some scholars to explicitly declare what approach they follow.[8]

However, the separation of domains whether or not announced to the audience, sometimes turns into an activity of influencing the result in one domain by using the exclusive methodology of the other. For instance, this is the case when the legal answer to the question "what is the law" is being replaced by statements about the factual political relations. When the understanding of atrocity crimes is reduced to "[current] might is right", the interpretation of legally relevant R2P objects, especially those outside the framework determined by current might, becomes a child's play on the ground of international relations and peripheral activity in legal sciences. What is more important, the domination of such a one-sided interference into domains, as well as insistence on rigid separations of domains suppresses the theoretical attempts to connect political and legal domains in more co-operative way. For instance, such attempt can be

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[5] Melissa Labonte has detected in academic discourse the following understandings of the term R2P mainly in reference to R2P as a norm: a single norm, a collection of different norms, 'accepted norm', a 'new norm', or a 'new international norm', professional, legal, social or practical norm, norms in context of 'norm advancement' or 'normative trajectory' or 'norm consolidation', outcome of 'positive normative developments' or 'normative shifts', 'collection of shared expectations that have different qualities', political concept based on well-established legal principles and norms, 'contested norm', between a concept and a principle, 'emerging' norm and 'fading norm'. Labonte M. R2P's Status as a Norm. In: Bellamy A. J, Dunne T. The Oxford Handbook of The Responsibility to Protect. Oxford: Oxford University Press, 2016, pp. 134–135.

[6] Ross A. On Law and Justice. Clark, New Jersey: The Lawbook Exchange, 2004, pp. 4, 19, 20 and 23.

[7] Ross 2004, pp. 21 and 23.

[8] See Bellamy A. J. The Responsibility to Protect Turns Ten. Ethics & International Affairs, 2015, Vol. 29, No. 2, p. 162.

found in the legal theories explaining how social and moral phenomena can be of legal importance.

1.1. Conception, doctrine, norms, principle and rule

The first conceptual confusion about R2P refers to the often hidden assumption about what R2P is. The confusion can be resolved by clarification of different concepts of conception, doctrine, norm, principle and rule. As noted below, the R2P is all of that but not all at the same time. It is important to separate different objects of R2P by using different concepts. Even more importantly, it must be explained how these concepts interconnect.

The conception that is of specific relevancy for legal issues is the set of theoretical assumptions about social, in our case, international, relations in the community. For instance, the shared theoretical assumptions about the characteristics of parliamentary democracy could be considered as a conception of a political order. Once the conception is used as the basis for a practice, it becomes a doctrine. It can be a political doctrine, if it is employed in political debates or a legal doctrine if such a conception or political doctrine is used in adjudicative processes, e.g., when the judge of a supreme court makes decisions in line with the doctrine on social equality.

The norm is the directive for behaviour and can be of different types, e.g., moral, legal and religious, depending on the key characteristics stipulated for differentiation.[9] We propose to find the key distinctive feature in the reaction to the breaches of the norm. This is not only one of the possibilities for making the differences between norms, but also the one we found suitable for the explanation of R2P.

Furthermore, the norm itself can be of two types: principle and rule.[10] On the one hand, the principle is a norm that is fundamental and underdetermined in a specific sense. It is fundamental because, among other things, it can be used as the ground for establishment of other norms and other established norms should be in line with a principle. When principles are the norms of the main parts or the whole normative system, they are considered to be fundamental principles.[11] The principle is underdetermined, because its content is general in a sense to anticipate all, or at least not sufficiently defined, ranges of situations to be applied to; or because the consequences of the norm are not determined enough. As the result of this specific uncertainty, the principles to be used in resolving the legal problem should be concretized in a way to identify a rule having

[9] Tim Dunne finds that R2P "is not a 'legal norm' in the conventional sense" and questions its quality of social norm, as well as inquires, what is the content of R2P as a moral norm. Dunne T. The Responsibility to Protect and World Order. In: Thakur R., Maley W. (eds.). 2015, p. 97.

[10] The explanation follows Riccardo Guastini's description in: Guastini R. La sintassi del diritto [The syntax of law]. 2nd edition, Torino: Giappichelli, 2014.

[11] In the context of deliberation on the extent and limit of the R2P, Jean-Marc Coicaud refers to the "fundamental principles" at the core of international law. Coicaud J.-M. International Law, the Responsibility to Protect and international crisis. In: Thakur R., Maley W. (eds.). 2015, p. 163.

ground in the corresponding principle applicable in a case. Moreover, the principle "suffers" from the specific suitability for derogation, especially when in conflict with other principles. Since many principles of equal status exist in the system and among them colliding principles could be applied to the same situation (e.g., the principles of privacy and freedom of press can be applied to the situation of published information on illness of the president), the balancing of the principles is regularly used.[12] On the other hand, the rule is a norm sufficiently determined to be applied as the premise for the conclusion about the concrete legal situation and with more certainty that it will not be derogated by other norms in the same manner as a principle could be derogated.

From the above, it becomes clear how the conception, doctrine, principle and rule can be linked. The conception can become relevant for legal doctrine, and principles can be relevant for the determination of rules. The missing component is the link between the legal doctrine and principles. It is well known that, at least in some communities governed by law, some practitioners and especially importantly – those that apply the law, use the doctrine for the construction of implicit norms. Implicit norms are not identified as those formulated in texts or by studying the custom. They are the result of legal reasoning, and one of the possibilities to construct them is to rely on the theoretical construction that is adopted as a doctrine.[13] If it is the case that a judge constructs a norm based on the theoretical conception, then it can be said that doctrine has enabled the "discovery" of the principle in the system, i.e., the formulation of implicit norms. In the same way as the European Court of Justice has "discovered" the principle of direct effect, the international law-applying institutions can "discover" R2P principles.

1.2. Established and emerging norms

The second problem for a mutual understanding of R2P refers to another division of norms, i.e., "established" and "emerging norms".[14] The R2P is often marked as an emerging norm[15] and sometimes even as an established norm although it is not always clear in the latter case whether it is seen as a political-moral or legal norm. The distinction between emerging and established norm is of great importance for legal scientists and for those political scientists[16] who think that a norm makes a greater impact when endowed with a legal status.

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[12] Coicaud emphasized that "competitive relationships among fundamental principles are problematic but essential." Coicaud J.-M. 2015, p. 165.

[13] On implicit norms and the role of theoretical assumptions, see: Guastini R. 2014.

[14] Carlo Focarelli describes it as "a norm situated in limbo halfway between existence and non-existence". Focarelli C. 2008, p. 193.

[15] Focarelli founds that the opposition between advocates and critics of R2P "is supposed to be encapsulated by the notion that [R2P] is the subject of an international 'emerging norm'". Focarelli C. 2008, p. 192.

[16] The specific approach to R2P norm from the angle of political sciences is, for instance, the theory by Amitav Acharya on "norm circulation". Acharya A. The Responsibility to Protect and a theory of norm circulation. In: Thakur R., Maley W. (eds.). 2015.

The legal scientists are interested in clarifying this distinction for two reasons and both are connected to the explanation of what law-applying institutions do or should do when applying law, e.g., Security Council, when making a decision on atrocities and doing this, for any reason, by applying the international law; or international courts, when resolving disputes connected to atrocities; or states, when making a decision on sanctioning other states for atrocities by applying international law.

On the one hand, a legal scientist is interested in distinguishing what belongs to the legal system and what is out of its scope, as well as discerning legally relevant and irrelevant elements amongst the latter. One way to make these distinctions is to state that only formulated norms (and possibly – customary norms, if not considered belonging to the legally relevant non-legal norms) are established norms (legal norms) of the system and that among non-legal norms, legal relevance pertains only to those which are explicitly directed by legal norms to be applied. Following these criteria, the emerging norms are out of the legal system and legally irrelevant. However, it is also possible to use other criteria that changes both statuses of a norm.

On the other hand, a legal scientist could be interested in description or prescription of how and when a norm, *prima facie* not seen to a legal norm or referred to by a legal norm, becomes a norm to be applied by a law-applying institution. One way is to explain the emerging norm as in some sense already being a part of the legal system. The other way is to be satisfied with its status of "legal relevancy".[17] Although emerging norm is not "legal" in the same sense as being an established norm, regarding which it is clear that it is the member of the system – it is a legally relevant norm, because it has a significant capacity to be taken into consideration by law-applying institution and once when this happens to become an established norm.

2. The content of the R2P

Two years are very-well known to be of existential importance for R2P. In 2001, International Commission on Intervention and State Sovereignty (ICISS) produced the report "The Responsibility to Protect".[18] Notably, the Commission was not an official agency empowered to produce international norms. Although the report is not a legal document produced by an official institution, it is produced

[17] Krešić M. Compulsory adjudication: an emerging principle of European Law and the Western Balkans' accession to the European Union? Paper presented at IVR Special Workshop on Ethnic Diversity, Plural Democracy and Human Rights in Europe. Luzern, 2019.

[18] International Commission on Intervention and State Sovereignty (ICISS). The Responsibility to Protect: Research, Bibliography, Background. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty Responsibility. International Development Research Centre: Ottawa, 2001.

on the initiative of the UN Secretary General[19] and the members of the Commission were epistemic authorities in the area of international law. The second benchmark is the 2005, when UN General Assembly (UNGA) in its document[20] recognized some of the main theoretical assumptions of ICISS report. Neither this second document can be perceived as a legal document with norms of binding force. It is rather to be considered as a policy document of international community with the potential to be implemented (among other addressees) by the Security Council (UNSC). This potential exists and develops due to the activities of relevant actors and especially of the UN General Secretaries. Since the UNSC is an institution that *may* order the use of physical coercions based on the determination of the breach of international norms, we can consider it as a quasi-judicial institution. Based on this interpretation of facts, we can say that R2P conception is developed in 2001, and it becomes recognized as the political doctrine in 2005 with a potential to become a legal doctrine. Since the UNSC as a quasi-judicial institution has in the following years referred to R2P in its decisions, it could be claimed that the R2P conception has been recognized as a relevant legal doctrine.

The content of R2P conception discovers the revolutionary attempt of its authors to change the prevailing paradigm of international community. We claim that it can introduce a revolutionary shift[21] because its content refers to the change of six main pillars of the 1945 World Community recognized as the problematic by legal scholars from the very beginning of the UN appearance. The following six issues can be detected as the issues of concern of the R2P doctrine: sovereignty and human rights; sovereignty and intervention; restrictive and extensive interpretation of international delicts; political and legal approach to UNSC's decisions; aristocratic and democratic arrangement of world governance; and development and *status quo* of international law. The constraints of the current article do not permit to expose the doctrine in detail, following the matrix of these six pillars. For the purpose of this contribution, it is enough to understand that

[19] The UN Secretary General Kofi Anan has a crucial role in stimulating the conceptualization of R2P before the establishment of ICISS and in transferring the R2P conception in UN system. See: Cater C., Malone D. M. The Genesis of R2P: Kofi Annan's Intervention Dilemma. In: Bellamy A. J., Dunne T. The Oxford Handbook of the Responsibility to Protect, Oxford: Oxford University Press, 2016, pp. 116–122.

[20] UN General Assembly. World Summit Outcome. Document A/RES/60/1, 24 October 2005.

[21] Charles Sampford and Ramesh Thakur used Thomas S. Kuhn's distinction between the normal and revolutionary phasis of science development – the former concerned with resolving puzzles within the dominant paradigm and the later with development of the new paradigm – to characterize the R2P as a new paradigm of international relations. Sampford C., Thakur R. From the Rights to Persecute to the Responsibility to Protect: Feuerbachian inversions of rights and responsibilities in state-citizen relations. In: Thakur R., Maley W. (eds.). 2015. In the similar vein, Anne Peters considers R2P "to definitely ousted the principle of sovereignty from its position as a Letztbegründung (first principle) of international law". Peters A. Humanity as the A and Ω of Sovereignty. The European Journal of International Law, Vol. 20, No. 3, 2009, p. 514.

the content of doctrine, when applied, introduces the change of international order that failed to be achieved through the process of international legislation.[22]

If the R2P is to be compressed in one norm it can only be that: international institutions– both states and centralized international institutions – are obliged to protect population from atrocities. The ICISS concretize this norm in a way which implies that the norm has a characteristic of a rule, although the Commission uses the term "principle". The content of this norm, considered by ICISS to be "emerging norm" and "the core principle identified in this report", is described, as follows. If "major harm to civilians is occurring or imminently apprehended, and the state in question is unable or unwilling to end the harm, or is itself the perpetrator" (antecedent), the "intervention for human protection purposes, including military intervention in extreme cases, is supportable" (consequent).[23] When we return to the more abstract content of the norm, as we have introduced it here, the implied norms can be extracted. Bellamy recognizes that R2P is consisted of two group of norms: "those relating to how states treat their own populations and those relating to a state's responsibilities to contribute to the protection".[24] Regarding the first group of norms, Bellamy claimed that they have been commonly understood as "well-established principles of international law"[25] and he focused his research on the normative nature of the second group of norms. Following Bellamy, we can say that R2P norm consists of two elements, i.e., it implies two fundamental norms: (N1) states have to protect its own population; and (N2) international institutions (including states) have to protect population. It is obvious that these norms are principles. We can further reconstruct the R2P norm and its two parts in a way to be considered as consisting of the following five principles.

1) Everyone has a right to be free from atrocities.
2) The violation of this right is an international delict that threatens the international peace.
3) A state has international duty to protect this right concerning the members of its population.
4) International institutions have duty to protect this right if a state failed to provide protection of its population.[26]

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[22] Byres considers that R2P has not "exerted much influence on the rest of the international legal system", but nevertheless finds that "the concept may – on an *ad hoc* basis – be influencing how states respond when another state violates the law seeking to prevent atrocities." Byers M. 2015, p. 102. The fact that the concept may cause even this effect, shows the power of doctrine and its consequences depend on those who apply the doctrine.

[23] ICISS 2001, para. 2.25. See also: 8.2 and 2.24.

[24] Bellamy A. J. The Responsibility to Protect Turns Ten. 2015, p. 162.

[25] Ibid. On already existing obligation of state towards their citizens states see also: Focarelli C. 2008, p. 210; Orford A. International Authority and the Responsibility to Protect. Cambridge: Cambridge University Press, 2011, p. 23.

[26] On importance of distinction between power or duty to intervene, see Focarelli C. 2008, p. 210. Anne Peters considers that R2P doctrine implies "that Security Council is not only authorized, but – if the circumstances so warrant – morally or even legally obliged to act." Peters A. 2009, p. 539. "[O]nce R2P is accepted as a fully-fledged legal principle" concrete legal obligations arise for Security Council and states. Peters A. 2011, p. 297.

5) The decisions of international institutions concerning the atrocities should be justified in accordance to the principle of proportionality.[27]

From these principles, different rules applicable in particular situations can be constructed, e.g., the rules for situation when a state has failed to perform its function to protect own population. The elaboration of all rules implied by R2P principles requires additional space out of the one limited for this contribution. However, it should be clear that, if relevant law-applying institutions in situation of addressing the cases of atrocity crimes (as exemplified above) started applying rules constructed in such a way, the consequences would be far-reaching for the international community.

3. The nature of R2P norm

3.1. The identification of legal norms

The two main models of identifying legal norms appear in the discourse on international law. They can be shortly explained, as follows.[28] The positivist approach is focused on identifying the norms of the legal system by searching for them exclusively in valid legal document or custom. According to the non-positivist approach, the identification of legal norm does not necessarily depend on the actual practice of states or centralized international institutions for producing law through treaties or customs neither on the existing practice of law-applying institutions, i.e., states, nor international centralized law-applying organs. The non-positivist approach includes those attempts to establish a norm independently of the existing social practice of the legal organs. If a norm can be identified by one of methods proposed by proponent of non-positivist approach, it does not matter whether legal organs have omitted or wrongly applied these norms. These situations are qualified as a "legal error" made by these organs.[29]

One of the non-positivist approaches is PRA, based on determination of norms of political morality of the community which can be claimed to emerge as legal norms. The justification for such claim is based on "the theoretical thesis of the existence of the specific political responsibility of law-applying organs to apply

[27] Meaning the principle of proportionality in a broader sense, as described by Robert Alexy, that includes the sub-principles of suitability, necessity and proportionality in the narrower sense. Alexy R. A Theory of Constitutional Rights. Oxford: Oxford University Press, 2002, pp. 66–69. His understanding of the principle as the optimization requirements relative to what is factual and legally possible encompasses the ICISS criteria for military intervention in case of atrocities: right intention, last resort, proportional means and reasonable prospects (ICISS, 2000, 32–37). On use of these criteria as form of practical moral reasoning see Bellamy A. J. The Responsibility to Protect and the just war tradition. In: Thakur R, Maley W. (eds.). 2015.

[28] See: Krešić M. About non-positivist perspective on legal values in international law. Bratislava Law Review, 2020, Vol. 4, No. 2, pp. 34–35.

[29] Krešić M. 2020, p. 35.

these as legal under specific conditions, even when the application of these norms has not yet been manifested in the practice of any law-applying organs."[30]

3.2. The identification of emerging norms

One way to identify an emerging norm is to explain the process of emerging by equating it with the process of appearance of customary law. There are enough indicators for legal scholars to make such claims in regards to R2P. However, this approach is vulnerable to counterarguments showing that R2P is not a part of the international customary law.

There is another way to identify an emerging norm, which avoids this objection. It is focused on the central role of adjudicative or quasi-adjudicative body, whereby custom presents only one of the indicators of norm-emerging. Following this second approach, the emerging norm can be defined as "a norm experienced as developing the feeling from moral duty or conventional fact towards the feeling of the legal obligation; due to the manifestations specific for every normative context of: formulated legal norms, customs and culture; that if sufficiently strong can influence the normative ideology of the (quasi)adjudicative body to identify such a norm as the grounds of coercive enforcement." [31]

The first approach, based on the identifying of the elements of custom, fits into the positivist approach to legal norms based on researching the texts and customs. The second approach which we propose to be followed in the case of the R2P, bridges the gap between the set of clearly established legal norms and the set of those norms that are in the process of emerging as legal norms.

3.3. R2P norm as a legal norm?

The positivist approach to answering the question of the nature of R2P norm can be found in Bellamy's elaboration.[32] His research was focused on questioning whether the second group of R2P norms on the responsibility of international organs satisfy the criteria he considers to be the criteria for identifying established norms: practice, duty-content and reaction to the breaches of norm. Since the criteria proposed by Bellamy corresponds to what is required by the traditionally understanding of international custom – practice and *opinio iuris* – it can be said that his analysis is based on the positivist approach. The data collected and interpreted by Bellamy makes him to confirm the correctness of his hypothesis that: the first group of R2P norms are part of customary law even before R2P appears; the second group of R2P norms initially belonged to the group of emerging norms which later satisfied the criteria for becoming legal norms.

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[30] Krešić M. 2020, p. 35 (note 7).

[31] Krešić M. 2019.

[32] Bellamy A. J. The Responsibility to Protect Turns Ten. 2015.

However, this claim regarding the R2P norms as established norms can be refused on the basis of counterarguments manifesting that R2P norms still are not part of international legal customs. In that case, the response can be to test a non-positivist approaches. Among these, the PRA seems to be the most suitable one, since R2P conception corresponds to the conception of political morality of the today's world order. This claim on R2P as a reflection of international political morality can be justified by the following arguments: the UN Charter is aimed at preventing the Second World War atrocities from repeating again; R2P doctrine was initiated as a response, required by UN, to changed circumstances and new challenges in the international community after 1990s; and moral consciousness shared by the world community causes strong reactions when atrocities appear.[33]

Even if the PRA has still not been applied by law-applying organ in a way to provide the R2P norm with the clear status of established legal norm, it can be claimed that PRA provides R2P norm with the status of an emerging norm, as it is defined above (the second approach to emerging norms). The aforementioned arguments on the political morality are also the arguments about the characteristics of cultural consciousness as one of indicators for the existence of an emerging norm. As such, they also play the role in justifying the claim on R2P as emerging norm. Arguments regarding the other two indicators of emerging norms – customs and norms formulated in existing international legal texts – strengthen such a justification. Bellamy's analysis of the customs shows that this indicator of emerging norm is strong enough, i.e., it cannot be denied that the practice relevant for a legal custom has already appeared in a significant measure and quality, even if one considers this practice, correctly or incorrectly, still insufficient for the legal decision on R2P as a legal custom. Finally, the text of UN Charter contains norms, e.g., on protection of peace, that could be used for construction of R2P norm as an implicit norm, e.g., if atrocities are seen as threats to peace.

Conclusion

The discussion about R2P could be clear and sharp, if it were to take into account distinctions between conception and doctrine, as well as between principles and rules. The R2P conception has been recognized as a legal doctrine and, based on this doctrine, the principles and rules can be constructed. Since this legal doctrine appears as reflecting the political morality of the international community, the application of the PRA in the identification of R2P norm can easily be used by law-applying organs. In addition to political morality, customs and the international texts including the UN Charter, – as three indicators for

[33] Šimonović finds R2P to be powerful 'concept' due to its universality, time boundlessness and consensual endorsement by world leaders. Šimonović I. Conclusion: R2P at a crossroads: implementation or marginalization. In: Jacob C., Mennecke M. (eds.). Implementing the Responsibility to Protect: A future agenda. London: Routledge, 2020, p. 262.

identification of emerging norms – make R2P norm suitable to be applied by law-applying organs.

The problems of international order addressed by R2P doctrine have existed from the very beginning of the UN. The argument regarding R2P as a legal norm that is formed by using the PRA and a specific concept of emerging norm is a sustainable legal argument that, if used by the law-applying organs, brings to the change of the international order, even without the amendments to the UN Charter. However, the implementation of these two tools depends on the law-applying organs; and in international community we find these organs in the Security Council, international courts and states themselves.

We have explained the sustainability of the first introductory assumption: theoretical conceptions, including the R2P conception presented as reflecting the current political morality, can be used by international law-applying organs as legal tools for resolving practical legal problems. It is the sustainability of the second assumption that makes the implementation problematic. The implementation of the PRA and the specific concept of emerging norm depends on whether law-applying organs consider the problem of atrocities to be a legal problem.

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