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Legal Basis of the Responsibility of a State to Protect Its Population in International Law

Abstract

The modern international law is based on the assumption that a state is a sovereign unit but with certain limitations to action inside and outside state. The responsibility to protect is one of those limitations towards actions of a state inside national borders. The article analyzes first pillar of the concept – the responsibility of a state to protect its own population from genocide, ethnic cleansing, war crimes and crimes against humanity – and embodies analysis of relevant documents of the international law: the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Convention on the Suppression and Punishment of the Crime of Apartheid 1973, and the Geneva Conventions. The Author determines the structure of the responsibility of a state to protect its own population: (1) positive obligation, that can be described through the obligation for positive development of the national legislation as to the sphere of the responsibility to protect, the obligation to prosecute criminals responsible for international crimes, the obligation to cooperate in case of crimes prevention, and (2) the common negative obligation of a state to refrain from committing international crimes. Also, the Author concludes that the duty of a state to accept humanitarian aid from the international community does not exist legally.

Annotasiya

Müasir beynəlxalq hüquq suveren vahid olan dövlətin bəzi daxili və xarici fəaliyyət imkanlarının məhdudluğu fərziyyəsi üzərində qurulmuşdur. Qorumaq məsuliyyəti dövlətin sərhəddaxili fəaliyyətindəki məhdudiyyətlərdən biridir. Məqalədə anlayışın əsas sütunu – dövlətin əhalisini genosid, etnik təmizləmə, müharibə cinayətləri və insanlıq əleyhinə cinayətlərdən qoruması öhdəlikləri araşdırılır və müvafiq beynəlxalq hüquqi sənədlər analiz edilir: Soyqırım Cinayətlərinin Qarşısının Alınması və Cəzalandırılması haqqında Konvensiya 1948, Aparteid Cinayətlərinin Qarşısının Alınması və Cəzalandırılması haqqında Konvensiya 1973, Cenevrə Konvensiyaları. Müəllif dövlətin əhalini qorumaq məsuliyyətinin strukturunu müəyyən edir: (1) Pozitiv öhdəlik - qorumaq məsuliyyəti üzrə milli qanunvericiliyi pozitiv cəhətdən inkişaf etdirmək öhdəliyi kimi təsvir edilir, beynəlxalq cinayət törədən şəxslərin ittiham olunması öhdəliyi, qadağan olunmuş cinayətlərlə bağlı işlərin açılmasında əməkdaşlıq öhdəliyi və (2) dövlətin beynəlxalq cinayətlərdən çəkinməsi ilə bağlı neqativ öhdəlik. Müəllif bu nəticəyə gəlir ki, dövlətin beynəlxalq ictimaiyyətdən humanitar yardım qəbul etmək vəzifəsi hüquqən mövcud deyil.

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Introduction

The responsibility to protect concept is a quite modern phenomenon in international law. The concept was legally fixed in the 2005 World Summit Outcome Document (UN General Assembly Resolution 60/1); henceforward the responsibility to protect was considered by the institutions of the United Nations score of times[1]. The responsibility of a state to protect its own population is the first and the most consensual part of the concept[2]; the responsibility of a state is primary and basic as to the corresponding responsibility of the international community. It does not introduce new norms or principles into corpus of international law, but it helps on within existing law; thus, the concept (and its primary pillar) corresponds to international law and deals with existing norms with a goal to structure separated norms into an effective tool against mass atrocities.

The 2005 World Summit Outcome Document is to an extent silent about the responsibility of a state. The wordings like "…*responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means*…" do not provide such responsibility within the content. Specification of the responsibility of a state to protect its own population can be found in documents of soft law[3] and the doctrine, but a deep analysis of

[1] From 2008 – annual debates at the UN General Assembly; In 2008 the UN General Secretary appointed the Special Adviser on the Responsibility to Protect; the UN Security Council has used the concept in Resolutions 1674, 1706, 1970, 1973, 1975, 1996, 2014 etc.

[2] No one state denies the responsibility to protect its population as a formal obligation; discussion is continuing on the measures and tools which forms the content of the responsibility of a state to protect its population.

[3] Implementing the Responsibility to protect, Report of Secretary-General (2009), UN Doc. A/63/677, at: http://responsibilitytoprotect.org/implementing%20the%20rtop.pdf (last visited 05.11.2016); Responsibility to Protect: State Responsibility and Prevention, Report of Secretary-General (2013), UN Doc. A/67/929–S/2013/399, at:

existing "hard" norms (and common understanding by states) is urgent for the concept to be accepted by the international community.

The main problem that has to be discussed is the concrete formulation of the different elements of the whole concept; it is also true for the responsibility of a state to protect its own population. Modern international law allows juridical interpretation whereby old norms afford a deeper sense in the situation of a new legal reality[4]; thus, the concrete meaning of the norm may derive through the practice or interrelations with other norms. Generally speaking, the responsibility to protect does not create new norms and we need to look and to comprehensively analyze the existing rules to discover the content of the responsibility of a state to protect its own population. Thence, the aim of the article is to provide a detailed analysis of the content of the responsibility of a state to protect its own population within the corpus of existing modern international law.

I. Foundations of the responsibility of a state to protect its own population

The responsibility to protect according to the 2005 World Summit Outcome Document deals with four categories of international law: genocide, ethnic cleansing, war crimes and crimes against humanity. The concept is indisputably based on the documents of international human rights law[5], but deploys them on special occasions – *ad extra* violations of human rights.

The responsibility of a state to protect its own population had existed before the International Commission on Intervention and State Sovereignty issued in 2001 its Report "The Responsibility to Protect"; the International Commission just modified formulations in appliance with genocide, ethnic cleansing, war crimes and crimes against humanity. This fact enables scientists to consider the existence of this responsibility as a customary norm[6],

http://responsibilitytoprotect.org/SG%20report%202013(1).pdf (last visited 05.11.2016); Compendium of United Nations standards and norms in crime prevention and criminal justice, UNDOC (2006), at: https://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf (last visited 05.11.2016); NEPAD Framework Document, (2001), at: http://www.nepad.org/nepad/knowledge/doc/1767/nepad-framework-document (last visited 05.11.2016); etc.

[4] *See:* Malcolm N. Shaw, International Law, 932-938 (6th edition, 2008) [hereinafter "Shaw"].

[5] *See:* The Universal Declaration of Human Rights (1948); The International Covenant on Civil and Political Rights (1966); The International Covenant on Economic, Social and Cultural Rights (1966); The Convention for the Protection of Human Rights and Fundamental Freedoms (1950); etc.

[6] *See:* Alex J. Bellamy, *The Responsibility to Protect – Five years on*, 24:2 Ethics and International Affairs 143, 160 (Summer 2010); Rachel Van Landingham, *Politics or Law? The Dual Nature of the Responsibility to Protect*, 41:1 Denv. J. Int'l L. & Pol'y 63, 78-79 (2012).

especially when even main opponents of the concept in the UN, such as Venezuela, Cuba, Myanmar, Nicaragua and Sudan, do not deny such a responsibility[7]. Despite this, the problem of the concept's definition is still on the table: the responsibility of states is formulated in common terms and is not concretized in "hard" law, but does in soft international law[8]. Thus, the nature of the responsibility of a state to protect its own population is that of the result, and it does not obligate states to use certain measures. As the International Court of Justice has said in the *Case concerning application of the Convention on the prevention and punishment of the crime of genocide*: "*…the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible*"[9].

The 2005 World Summit Outcome Document fixed the responsibility of a state to protect its own population in the following way: "*138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it…*". The responsibility of a state to protect its own population concretizes the common principle of respect for human rights in a particular situation (the sphere of the responsibility to protect) – crimes of genocide, ethnic cleansing, war crimes and crimes against humanity. The responsibility derives from international legal obligations and sovereignty, through which the states possess the territorial supremacy within their borders and the independence in international relations[10]. The UN Secretary-General Ban Ki Moon also defines, that "*…it is based on the conviction that State sovereignty is enhanced through more effective protection of populations from atrocity crimes. The responsibility to protect and State sovereignty are thus allies, not adversaries*"[11]. Due to the principle of sovereignty the state (neither the international community, nor the UN) has the primary responsibility to protect its own population, but this responsibility is not complete or sufficient in international law; it is

[7] Luke Glanville, *The Responsibility to Protect Beyond Borders,* 12:1 Human Rights Law Review 1, 3 (2012).

[8] First of all, in: Responsibility to Protect: State Responsibility and Prevention, Report of Secretary-General (2013), UN Doc. A/67/929–S/2013/399, at: http://responsibilitytoprotect.org/SG%20report%202013(1).pdf (last visited 05.11.2016).

[9] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, § 430.

[10] Карташкин В.А., *Защита прав человека: от гуманитарной интервенции к использованию механизмов ООН,* 9 Обозреватель – Observer 12, 16 (2012).

[11] A vital and enduring commitment: implementing the responsibility to protect. Report of the Secretary-General (2015). UN Doc. A/69/981–S/2015/500, 5-6 at: http://www.un.org/ru/preventgenocide/adviser/report2015.pdf (last visited 29.10.2016)

directly linked to the corresponding and subsidiary responsibility of the international community to prevent and to react to the failure of a state.

It is worth noting that the responsibility of a state to protect its own population is applied territorially, i.e. to all population of a state irrespective of nationality, citizenship or other characteristics. The Secretary-General precisely noted "…"*populations" refers not only to citizens or civilians but to all populations within State borders*"[12]. It is quite important for the understanding of the responsibility to protect, which contrasts sharply with the intervention of a state aiming to save its own citizens on the territory of another state.

II. The duty of a state to accept humanitarian aid

The connection of the primary responsibility of a state to protect its own population with the corresponding responsibility of the international community to prevent and to react to the failure of a state is undeniable. However, some authors amplify this connection, as Carsten Stahn: "*Responsibility to protect is based on the assumption that the host state has a duty to accept aid, assistance, or even the use of force from the outside. This idea may be found in the final clause of Article 2(7) of the Charter*"[13]. While interpreting the Article 2(7) of the UN Charter[14] we should keep in mind sensibility of states and international organizations to the broad interpretation of international law – it is quite known that broad interpretation of norms can lead to the abuse of prescribed rights and non-execution of legal duties. In case of the duty of a state to accept humanitarian aid (especially in different forms and under special conditions), there is a strong possibility for abusing the right to give such aid by powers of high political interest. It follows that theoretically the duty of a state to accept humanitarian aid contradicts with the sense and the aim of the Article 2(7) of the UN Charter.

Indirect acknowledgement of such assumption (about existing of the legal duty of a state to accept humanitarian aid) can be found in the UN Security Council Resolution 2165 (2014); but the reading of the text of the resolution (in its entirety) is essential for the analysis: the UN Security Council "*deeply disturbed by the continued, arbitrary and unjustified withholding of consent to relief*

[12] Responsibility to Protect: State Responsibility and Prevention, Report of Secretary-General (2013), UN Doc. A/67/929–S/2013/399, at: http://responsibilitytoprotect.org/SG%20report%202013(1).pdf (last visited 05.11.2016);

[13] Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm,* 101:1 The American Journal of International Law 99, 119 (2007).

[14] The Article 2 (7) of the UN Charter:

> *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.*

operations and the persistence of conditions that impede the delivery of humanitarian supplies to destinations within Syria, in particular to besieged and hard-to-reach areas, and noting the United Nations Secretary-General's view that arbitrarily withholding consent for the opening of all relevant border crossings is a violation of international humanitarian law…"[15]. There is an appealing position of the UN Security Council in its Resolution 2165 (2014) with regards to the duty to accept aid – the UN Security Council only cites the view of the UN Secretary-General as an authoritative position inside the UN system towards the particular situation (the Civil war in Syria), but states nothing about the existence of the common duty of states to accept aid in different forms as a legal norm in international law.

As a legal norm, the duty to accept aid directly contradicts with the foundation of modern international system – the principle of sovereignty. Another case to support the position of non-existence of the state's duty to accept several forms of humanitarian aid is the practical situation in 2008 towards the intervention in Myanmar (Burma)[16]. Immediately after Cyclone Nargis struck Myanmar on 2 May, 2008, the government of Myanmar refused to accept humanitarian aid from the international community. Restrictions imposed upon visas for aid workers and the perseverance upon self-distribution prompted anxieties regarding the unmonitored destinations of such aid and the increasing vulnerability of stricken populations[17]. The continuing resistance from the government and deteriorating humanitarian situation in Myanmar induced French Foreign Minister Bernard Kouchner to invoke the responsibility to protect and the possibility for launching military intervention to deliver aid to the victims of Cyclone[18]. This proposition was rejected by states as illegal and politically causeless[19] and gave a rise to the

[15] Security Council. Resolution 2165 (2014) of 14 July 2014. UN Doc. S/RES/2165 (2014), at: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2165(2014) (last visited 11.11.2016).

[16] Detailed analysis of crisis in Myanmar (Burma) 2008 can find in: Andrew Selth. *Even Paranoids Have Enemies: Cyclone Nargis and Myanmar's Fears of Invasion,* 30:3 Contemporary Southeast Asia, 379-402 (2008); Alison McCormick. *From Sovereignty to Responsibility: An Emerging International Norm and Its Call to Action in Burma,* 18:1 Indiana Journal of Global Legal Studies, 563-591 (Winter 2011).

[17] See: M. Weaver, Cyclone Nargis relief effort in Burma (2008), at: http://www.guardian.co.uk/news/blog/2008/may/07/cyclonenargisinburmathere (last visited 11.11.2016); and Human Rights Watch Report, I Want to Help My Own People (2010), at: http://www.hrw.org/en/reports/2010/04/29/i-want-help-my-own-people (last visited 11.11.2016).

[18] The International Coalition for the Responsibility to Protect. Crisis in Burma (2013), at: http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-burma (last visited 29.10.2016).

[19] *E.g.* position of China: China Blocking UN Responsibility to Protect Action for Burma (2008), at: http://burmacampaign.org.uk/china-blocking-un-responsibility-to-protect-action-for-burma/ (last visited 11.11.2016); Great Britain: Bypass junta's permission for aid, US and

issue of the international legal response to disaster relief[20]. From a particular standpoint, the duty of a state to accept humanitarian aid does not legally exist. Nevertheless, non-acceptance of international humanitarian aid by a state can handle legal matters as an indicator of the government intention for determining "state failure"[21].

III. Structure of the responsibility of a state to protect its own population

The responsibility of a state to protect its own population has a dual structure: the positive responsibility (or duty) of a state to put into the national practice and to protect basic human rights, that is to set a secure environment inside the state where every person or a group of persons bears the responsibility for infringement or violation of human rights; and the negative duty of state to exclude the possibility of infringement or violation of human rights by national authorities. This structure derived from the normative regulation of the issue: basic human rights documents put obligations on the state for ensuring human rights on national level[22] (positive duty) and another group of norms of international humanitarian law and international criminal law puts on the state the duty to refrain from illegal acts such as genocide and war crimes[23] (negative duty). Despite the fact that the responsibility to protect

France urge (2008), at: https://www.theguardian.com/world/2008/may/09/cyclonenargis.burma (last visited 11.11.2016); Vietnam and Indonesia (as non-permanent members of UN Security Council): Security Council Report. Updated Report No. 4: Myanmar (2008), at: http://www.securitycouncilreport.org/update-report/lookup-c-glKWLeMTIsG-b-4130257.php (last visited 11.11.2016).

[20] *See:* The International Law of Disaster Relief. Ed. by David D. Caron [and] Michael J. Kelly [and] Anastasia Telesetsky (2014); J. Benton Heath, *Disasters, Relief, and Neglect: the Duty to Accept Humanitarian Assistance and the Work of International Law Commission*, 43 International Law and Politics, 419-477 (2011).

[21] *See:* Adrian Gallagher, *Syria and the indicators of a "manifest failing"*, 18:1 The International Journal of Human Rights, 1-19 (2014).

[22] The Preamble of the Universal Declaration of Human Rights 1948: "*…a common standard of achievement for all peoples and all nations…*"; the Article 2(1) of the International Covenant on Civil and Political Rights 1966: "*Each State Party to the present Covenant undertakes to respect and to ensure…*"; the Article 2(1) of the International Covenant on Economic, Social and Cultural Rights 1966: "*Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation…*"; the Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950: "*The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms…*". It is easy to see that rights and freedoms of citizens are impossible to ensure without legal obligations of national states.

[23] This method is common for the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Convention on the Suppression and Punishment of the Crime of Apartheid 1973, the Rome Statute of the International Criminal Court 1998, the Geneva and

in the wording of the World Summit Outcome Document 2005 (§§138-140) does not directly impose on the state the positive duty to ensure an effective human rights protection, the existence of this duty derived from the following wording – protecting from genocide, ethnic cleansing, war crimes and crimes against humanity envisages foremost human rights protection (especially, right to life); *ad extra* violations of human rights are substance of abovementioned crimes. The positive duty of a state is vague and formal, but "*…the positive obligation to protect is normally not an obligation of result, but mostly an obligation of conduct. It requires the state to exercise due diligence, but not to guarantee absolute protection*"[24]. The negative duty is quite clearly fixed in international legal documents. The main documents to analyze are the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the Convention on the Suppression and Punishment of the Crime of Apartheid 1973, and the Geneva Conventions. These documents of international law contain certain rules on state responsibility, duties and obligations, what clearly lacks in the documents on human rights law.

IV. Obligations of a state under the Convention on the Prevention and Punishment of the Crime of Genocide 1948

The Convention on the Prevention and Punishment of the Crime of Genocide 1948 (hereinafter – the Genocide Convention) in Article I embodies the central obligation of a state – to prevent and to punish the crime of genocide. Notwithstanding that the Genocide Convention does not stipulate the duty of a state to refrain from committing genocide, the International Court of Justice in the *Case concerning an application of the Convention on the prevention and punishment of the crime of genocide, interpreting the Genocide Convention*, has noted: "*…in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide*"[25]. It is worth noting that a state also must refrain from the helping another state to commit genocide or to prepare for committing genocide (a state is banned to help violator both in case of violating norms *jus cogens* and in case of violating regular norms of international law[26]).

the Hague Conventions.

[24] Ann Peters, *The Security Council's Responsibility to Protect,* 8 International Organizations Law Review 1, 19 (2011).

[25] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, § 166.

[26] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, § 159 (concerning obligations from

This case reflects another significant aspect of genocide prevention: the obligation to prevent genocide has no territorial restrictions. Thus, if the threat of committing genocide is emerging or genocide is being committed outside the boundaries of state "*…responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide*"[27]. A state must act outside its national borders *bona fide* as a member of the international community; this obligation is prescribed *inter alia* in Article 41(1) of the 2001 Articles on Responsibilities of States for Internationally Wrongful Acts[28].

Article V of the Genocide Convention provides the frames of the responsibility to protect within the national mechanism: "*The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III*". In other words, the Genocide Convention prescribes the obligation of a state to improve its national legislation in manner equivalent to convention's normative regulations.

It must be emphasized that the Genocide Convention contains the norm, which implicitly links the Chapter VII of the UN Charter with the Article VIII and prescribes: "*Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide…*". Formulation "to take such action under the Charter of the United Nations" includes *inter alia* military action, launched according to the Chapter VII of the UN Charter. The roots of this issue are also in positions of states, which were expressed when preparing the Genocide Convention: delegations of the USSR and France clearly expressed the view that acts of genocide can be considered as the threat to the international peace and security and this was direct link to the Chapter VII of the UN Charter; other states did not challenge this position[29]. Thus, states have considered military intervention within the framework of the Chapter VII of the UN Charter as a means to prevent and to stop the acts of genocide.

international humanitarian law).

[27] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, § 430.

[28] The Article 41(1) of the 2001 Articles on Responsibilities of States for Internationally Wrongful Acts: "*States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40*".

[29] Paola Gaeta, The UN Genocide Convention: A Commentary, 401-402 (2009).

V. Obligations of a state under the Convention on the Suppression and Punishment of the Crime of Apartheid 1973

The responsibility of a state to protect its own population was constructed in a similar vein under the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973 (the Apartheid Convention). Apartheid is in the sphere of the responsibility to protect as a particular case of crimes against humanity or of genocide (depending on forms of apartheid)[30]; thus, closer examination is important for its analysis. It is also worth noting that the Apartheid Convention is the only one of international legal regulations on the matter in hand in addition to, in the first place, the Rome Statute of the International Criminal Court 1998.

The Article IV of the Apartheid Convention sets, that: "*The States Parties to the present Convention undertake: (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime; (b) To adopt legislative, judicial and administrative measures to prosecute, bring to trial and punish in accordance with their jurisdiction persons responsible for, or accused of, the acts defined in article II of the present Convention, whether or not such persons reside in the territory of the State in which the acts are committed or are nationals of that State or of some other State or are stateless persons*". It clearly defines two responsibilities of a state: a positive development of the national legislation on the matter and the duty to prosecute criminals responsible for crime of apartheid. Basically, the Apartheid Convention is constructed similarly to the Genocide Convention and has the similar Article VIII (as to implicit possibility of military actions).

Notwithstanding the Apartheid Convention sets another obligation, which is quite diverse and directly linked to the crime of apartheid: "*The States Parties to the present Convention undertake to accept and carry out in accordance with the Charter of the United Nations the decisions taken by the Security Council aimed at the prevention, suppression and punishment of the crime of apartheid, and to co-operate in the implementation of decisions adopted by other competent organs of the United Nations with a view to achieving the purposes of the Convention*" (Article VI). It literally stipulates the duty of states to cooperate with the UN and its bodies aimed at the prevention, suppression and punishment of the crime of apartheid. This obligation was broadly formulated in the Article 41(1) of the 2001 Articles for Responsibility of States for Internationally Wrongful Acts: "*States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40*" – breach of an obligation arising under a

[30] Shaw, *supra* note 4, , at 436-438.

peremptory norm of general international law. The same obligation can be reached from interpretation of the Article 2(2) of the UN Charter[31] and the Article 26 of the Vienna Convention on the Law of Treaties 1969[32].

The obligation to cooperate is also specified in the Rome Statute of the International Criminal Court 1998, which must be analyzed in interrelations to the abovementioned legal norms. The Article 86 of the Rome Statute states: "*States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court*". The Rome Statute specifies the obligation to cooperate as to the specific stages of criminal procedure. Special obligation is provided in the Article 88: "*States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part*". This formulation directly correlates with the obligation for positive development of the national legislation (as stipulated in the Geneva and the Apartheid Conventions); however, this time it concerns procedural law, not material. The International Committee of the Red Cross defined the obligation of states to make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects as an international custom both in international and non-international armed conflicts[33]. Thus, the obligation to improve the national legislation is used for both material and procedural law.

VI. Obligations of a state under the Geneva Conventions 1949

The Geneva Conventions 1949 constitute a distinct body of documents on international humanitarian law; they are interlinked legal acts with similar rules in patches and different subjects of regulation. Regarding interrelation of the Geneva Conventions and the responsibility to protect it is truly to say that the Article 1 of the Geneva Conventions offers a valuable legal basis for the concept of the responsibility to protect, and one that should be used and referred to where possible[34]. Moreover, the international engagement to end crimes against humanity, war crimes, genocide and ethnic cleansing, as well as other violations of the Geneva Conventions, is not an option, but dictated

[31] The Article 2(2) of the UN Charter: "*All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter*".

[32] The Article 26 of the Vienna Convention on the Law of Treaties 1969: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*".

[33] Jean-Marie Henckaerts [and] Louise Doswald-Beck, Customary International Humanitarian Law: Volume I - Rules, 618 (2005).

[34] Julia Hoffmann [and] André Nollkaemper [and] Isabelle Swerissen, Responsibility to Protect: From Principle to Practice, 103 (2012).

by international law[35]. Thus, the close examination of the Geneva Conventions in respect of the responsibility to protect is crucial for the analysis.

The Article 146 of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 stipulates: "*The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article*…". The duty to criminalize serious breaches of the Geneva Conventions is generally accepted without any doubt by the international society. Besides the duty to criminalize, this Article also stipulates: "…*Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case*…". Thus, the IV Geneva Convention has fixed two sorts of obligations – the general obligation of criminalization and the formal obligation of criminal prosecution. Similar legal norms about the obligation of criminalization have embodied in the rest of the Geneva Conventions (Article 49 – the I Geneva Convention, Article 45 – the II Geneva Convention, Article 129 – the III Geneva Convention); and all the Geneva Conventions, except for the II Convention, contain norms about the obligation of criminal prosecution.

It is useful to highlight in this regard that the obligation of criminal prosecution for persons alleged to have committed serious breaches of the Geneva Conventions fixed in the Geneva Conventions only with regards to the international armed conflicts, which are outside the scope of the responsibility to protect. The responsibility to protect does not cover situations of interstate armed conflict; its scope is limited to atrocities committed or anticipated inside sovereign jurisdictions[36].

Legal existence of the obligation of criminal prosecution for persons alleged to have committed serious breaches of the Geneva Conventions in case of non-international armed conflicts can be identified through interpretation of legal norms. The International Court of Justice in the *Case concerning military and paramilitary activities in and against Nicaragua* called humanitarian obligations of parties to the armed conflict of international character a "minimum yardstick" or "elementary considerations of humanity" and "*The Court considers that there is an obligation…, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in*

[35] *Ibid.*

[36] Ramesh Thakur, *R2P after Libya and Syria: Engaging Emerging Power,* 36:2 The Washington Quarterly 61, 68 (2013).

all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression"[37]. The same position is supported by V. Rusinova: "*…despite the lack of the directly fixed in the international treaties obligation of criminal prosecution for serious breaches committed during non-international armed conflicts, it may be found the conclusion that there has been formulated a relevant international law custom*"[38]. Specialists of the International Committee of the Red Cross, analyzing practice of states, have said directly about the existence of the obligation of criminal prosecution for serious breaches committed during non-international armed conflicts as an international law custom[39]. Thus, international humanitarian law imposes on states the obligation of criminal prosecution for serious breaches committed during non-international armed conflicts.

The common negative obligation of a state to refrain from unlawful acts in international humanitarian law is fixed in the Article 32 of the IV Geneva Convention: "*The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands…*". The formal obligation is specified in different articles and arrangements as to a particular activity – for example, the Article 49 of the IV Geneva Convention prohibits deportation of population; the Article 14 of the II Additional Protocol prohibits starvation among civil population as a method of warfare in non-international armed conflicts. In a broad manner the Geneva Conventions use prohibition of particular acts as a chief method of normative regulation (and the Hague Conventions use prohibition on methods of warfare) – and this is the content of the negative obligation of a state to refrain from unlawful acts in international humanitarian law. The same is the negative obligation of a state in the responsibility to protect particularized in case of genocide, ethnic cleansing, war crimes and crimes against humanity. By the same token the IV Geneva Convention also emphasizes that the state in whose hands protected persons may be, is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred (Article 29). This formulation acknowledges the accountability of a state for failure to fulfill the responsibility to protect its own population.

[37] Military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986, §220.

[38] Русинова В.Н, Права человека в вооруженных конфликтах: проблемы соотношения норм международного гуманитарного права и международного права прав человека, 272 (2015).

[39] Henckaerts, 607, *supra note 33.*

Conclusion

Sure enough that the Genocide Convention, the Apartheid Convention and the Geneva Conventions are not all-encompassing legal documents on the issue of the responsibility of a state to protect its own population, but they are universal "hard" norms, which are legally binding. From this perspective the abovementioned legal conventions plus human rights conventions are superior to other acts of soft law and must be analyzed as primary sources for the responsibility of a state to protect its own population.

The Secretary-General's 2013 Report "Responsibility to Protect: State Responsibility and Prevention" proposes a practical structure for the responsibility of a state to protect its own population: building national resilience, promoting and protecting human rights, and adopting targeted measures to prevent atrocity crimes[40]; but the structure is operationally practical, not based on the existing norms of international law, but on the model practice (non-binding). The theoretical structure based on the "hard" norms of international law in that respect is crucial not for prevention (practically-oriented approach of the Secretary-General), but for the internal content of fulfilment. Moreover, the internal content is of a great importance in case of accountability of a state as the content in whole and in part are surely "hard" obligation.

The analisys shows that the responsibility of a state to protect its own population includes two sorts of obligations: (1) positive obligation, that can be described through the obligation for positive development of the national legislation (both material and procedural parts) as to the sphere of the responsibility to protect, the obligation to prosecute criminals responsible for international crimes, the obligation to cooperate in case of crimes prevention, and (2) the common negative obligation of a state to refrain from committing international crimes. An important feature is that the obligations are ones of conduct and not ones of result. The proposed structure in essence only describes in details what the state must do, and the toolbox for prevention which the state may use is broader. Further development of international law may add to the list other significant elements as well as an evolution of the responsibility to protect.

[40] Responsibility to Protect: State Responsibility and Prevention, Report of Secretary-General (2013), UN Doc. A/67/929–S/2013/399.