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The Concept of Humanitarian Intervention: The Rise of Common Man and the Responsibility to Protect

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Summary

What are the governing dynamics of the process experienced throughout International Legal System that raised the dilemma to redefine the concept of humanitarian intervention? The collapse of collective security system, on one hand, and the prolonged expansion of 'legalization' as well as 'institutionalization', on the other hand, are the dynamics that have augmented the importance admitted to 'international personality' of non-state actors as well as 'responsibility to protect' people. This, in turn, raised the need for stretching the rules of 'the prohibition of the use of force' and 'state sovereignty' in favor of the authorization of the 'humanitarian intervention'.

Introduction

Rosalyn Higgins's process theory explains how the dynamics of the process experienced throughout 'global legal system' expanded 'legalization'; and, in turn, how this expansion process of legalization raised a dilemma to redefine the concept of 'humanitarian intervention' in compliance with the emerging norm 'Responsibility of Protect'. The collapse of 'collective security system' unlikely to what was expected, on one hand, and the prolonged expansion of 'legalization', on the other hand, are the dynamics that have augmented the importance admitted to 'global legal personality' of 'non-state actors' as well as 'responsibility to protect' people which, in turn, raised the 'theoretical puzzle' whether to stretch the rules of 'non-use of force' and the 'non-intervention' in favor of the authorization of the 'humanitarian intervention'. Herein, the 'dilemma' is that while there are 'moral' values at the core of concept, those holding the 'traditional' view of global law as 'rules' disagree with the concept. Noam Chomsky claims that the lack of 'precision' about the concept might also be used by a group of states to do 'abusive' claims on an intervention to the sovereignty that derives from a state's failure of 'Responsibility to Protect' her own people; and, through interpreting examples cited by Sean Murphy illustrates that "Japan's attack on Manchuria, Mussolini's invasion of Ethiopia, and Hitler's occupation of parts of Czechoslovakia, all accompanied by lofty rhetoric about the

solemn responsibility to protect the suffering populations, and factual justifications”.¹ Chomsky has got these matters wrong as he overlooks to view international law as a process. Following this short initiating with a discussion of the puzzle and why it’s puzzling, this article then introduces the ‘causal logics’ of Higgins view of law as ‘process’ and those of the main competing ‘traditionalist’ view of law as ‘rules’. Then, it scrutinizes the specific circumstances under which the ‘non-use of force’ and the ‘non-intervention’ rules were regulated. Further then, the article specifies the process of legalization that has facilitated the rise of the ‘common man’ and the ‘responsibility to protect’. The final part contrasts why the causal logics of process theory taking into account the expansion of legalization lead us to take position on the need for legal synthesis of the humanitarian intervention – other than the expectation generated by traditionalist view.

The Causal Logics of Higgins’s Process Theory

The theoretical puzzles of humanitarian intervention can be well explained in light of the causal logics of Higgins ‘process theory’ that views ‘global law’ as a ‘process’ which is intertwined with ‘political issues’; rather than viewing it as only a set of ‘rules’. Higgins rejects the traditionalist’s view that favors the “impartial implementation of rules” what she puts as “just accumulated past decisions”.² Traditionalist approach might result in global legal system’s failure to: response the needs of a changing ‘global pluralistic society’; as well as, tackling the new ‘global threats’. The ‘needs’ and ‘expectations’ of ‘past circumstances’ when these rules were articulated may well diverge from the needs of ‘present circumstances’ which, in turn, provoking a ‘legitimacy deficit’ and ‘disobedience’. The global legal system should rather keep up with present circumstances as a ‘normative system’ in order to exhibit a binding conduct through the relationships of its legal actors.

View of law as a process requires the ‘judicial functions’ to go beyond than procedures for determining the appropriate rule, which is only a part of their purpose; these rules articulated to tackle ‘past circumstances’ should never be applied in an impartial means unconsciously of ‘present circumstances’ – as they might be

¹ Chomsky

² Higgins, 1995, p. 2

'inappropriate' for. Pointing out the denial of 'traditionalist' to view global law as beyond rules, Higgins explains their expectation from global law to be: about only 'authority', but not 'political issues' as they see the latter as a 'burden' to the former; and, not used for justifying political aims.³ These concerns are widely held also by the critics of the humanitarian intervention for: accusing states as would likely 'abuse' the concept for acquiring the right for use of power; and, backing the UN Charters' prohibitions on the use of force as 'justified'. Jonathan Charney, in his article titled "Anticipatory Humanitarian Intervention in Kosovo", illustrates India's intervention into East Pakistan with claim of protecting ethnic Bengalis that has been condemned by a large majority in the UN General Assembly as there were 'hidden interests' of India behind the action.⁴ Unlike traditionalist perception of political issues as a burden to the authority, Higgins nevertheless views them not 'adversarial' to each other but rather 'intersecting'. Undertaking a statement made by Judges Fitzmaurice and Spender that puts "correct legal views" as applying rules with main "guiding reliance" on not the 'values' of past circumstances rather than present circumstances; Higgins brings about settling in a reference to her own pre-statement that there is an undeniably vital link between "law" and "policy":

Policy considerations, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is part of the legal process, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence, There is no avoiding the essential relationship between law and politics.⁵

Here then, almost Higgins's focus gradually shifts from the link between 'law' and 'political issues' to the "justification of the end by the means".⁶ Thus, many of the developing states fear that the legalization of the humanitarian intervention concept would trigger a "third wave of imperialism pursuing its own 'self-defined national interest' with no regard to others sovereignty".⁷ According to their concerns, it is not 'humanitarian' but rather 'hidden incentives' and 'interests' of the parties that would drive humanitarian intervention as a modern indicator of Western 'neo-colonialism'. They accuse approval of such a 'problematic' concept, whether morally 'just', as

³ Higgins, 1995, p. 3

⁴ Charney, p. 836.

⁵ C. W. Jenks, 1967, Quoted in Higgins, 1995, p. 5

⁶ Higgins, 1995, p. 6

⁷ Kegley,

would present an unfortunate 'precedent' which, in turn, might be abused by hegemonic states for their own interests incompatible with purposes of global law. Agreeing with the view of law as rules, many developing states indicate the lack of a centralized decision making as probably leading to an 'escalation' of international violence, discord and disorder, and diminish protections of human rights worldwide. Higgins rather disrespects these accusations that making legal choices through considering also political issues would necessarily grant states to find every 'means' appropriate to use global law for "post facto" justification in order to realize anticipated political aims which, in turn, simply will encourage others for similar demands.⁸ Therefore, Higgins's requirements cover not only considering 'political issues'; but also something more associated with 'legal decision makers' having the responsibility to judge the circumstances of present 'political issues' against those of 'past decisions' in order to proof the lawfulness of legal statements.

These puzzles raise the obvious question as to the debate on legal theory whether global law is 'rules' or 'process'. Higgins investigates firstly "legal positivists" whose view of law focuses on "rules" and "commands" deriving from a 'supreme-ruler'; and, then "middle view" scholars whose have attempted for 'reconciliation' without taking sides in claim of a pragmatic approach.⁹ She accuses both views as paying no attention to settle crucial problems; and, advocates the necessity for taking side on viewing the global law as a 'process' which recognizes the centrality of circumstances despite requiring more efforts for identification and application of sources. She also mentions to 'critical legal studies' that recognize the significance of political circumstances, while their judgment of law is as 'contradictions' lead them to become suspicious about the realization of aims through law. Higgins rather believes that these 'contradictions' do not necessarily challenge against reasonably preferring mutual benefits.

In consequence, it becomes relevant to clearly see what are the important purposes in distinguishing, on one side, "rule-based lawyers" that compel the "law as it is"; and, on the other side, the 'process-based lawyer' that expect the "law as it might be that" – accused by the former as "standing in contrast to law as it is".¹⁰ Higgins evaluates

⁸ Higgins, 1995, p. 7

⁹ Higgins, 1995, p. 9

¹⁰ Higgins, 1995, p.10

the latter as: promoting the desired values appropriate with 'present circumstances' when the former commands the employ of untimely values of 'past circumstances'; providing 'means' for 'authoritative decision making' on issues when there are no specific rules existing to regulate them; allowing 'legal decision makers' to be concerned with a range of concepts "claims and counterclaims, state practice, decisions by a variety of authorized decision makers".¹¹

Circumstances of the Non-Use of Force and the Non-intervention Rules

The main lesson from Higgins to our minds is 'the whole picture' of global law as a 'process' of an executive authoritative system existing in an anarchic legal system to all "authorized decision makers".¹² As a result of this process, the global law has shifted its focus from the harmonization of 'conflicting interests' to the formulation of 'global concerns' to tackle 'global threats' against existence of 'global peace'; and, has become not only governing the 'interstate', but also 'intrastate' relationship of governments with their own citizens. Through the expanding bodies of 'human rights law', global law has been applied to 'global organizations' as well as 'common man' under specific circumstances. To rely solely on 'accumulated past decisions' for the 'non-use of force' and the 'non-intervention', through neglecting this 'process' experienced since these 'prohibitions' were decided under the specific circumstances of the time when the UN established, will diminish effectiveness of global law to tackle 'present dangers'. What merits greater reliance on the 'humanitarian intervention' is the shift in the nature of 'global threats' – through engagement of new threats such as "failed states and rogue regimes, unprecedented destructive capabilities of weapons, increased capabilities of non-state actors, vulnerability of Western Democracies and Islamic Radicalism".¹³ While many advocate a multilateral approach consisting of various states for 'humanitarian intervention'; it is the United Nations Security Council (UNSC) most 'implied' and 'legitimate' in this issue. Chapter 7 of the UN constitution entitles the UNSC to: identify the threats against peace, the circumstances of violation of peace, or aggressive actions; and, to carry out militarily or civil action for maintaining the 'global peace'. Further, the employment of military

¹¹ Higgins, 1995, p.10

¹² Higgins, 1995, p. 10

¹³ Cassin

intervention or power is accepted 'legitimate' and 'just' only in the cases of 'self-defense' or performed by groups 'authorized by the UNSC'.

The non-use of force and the non-intervention rules had represented the 'expectation' that the UN Charter would have provided 'collective security' as a response to 'global threats'. Nevertheless, the nature of threats to global security has been changed dramatically since the founding of the UN that constrains and even outlaws the use of force and intervention. The concept of humanitarian intervention today seeks to respond this changing nature of 'global threats' that arise as a result of 'intrastate' relationship rather than 'interstate'. The non-use of force and the non-intervention rules, which are very debatable whether responding to the new generation of global threats, might let global legal scholars to scrutinize the nature of threats to global security and the specific circumstances when these UN prohibitions were regulated.

First 'constrain' against the approval of humanitarian intervention is the 'Article 2(4) of the UN Charter' that prohibits "the threat or use of force against the territorial integrity or political independence of any state" regardless of the 'motivation' unless there is a situation of 'self-defense' or collective enforcement action with the 'authorization' of the UNSC.¹⁴ Following its ratification in 1945, the UN Charter has been adopted with a number of provisions. On December 10, 1948 'The Universal Human Rights Declaration' was accepted by the UN for the promotion and encouragement of respect for human rights and fundamental freedoms as well as allowing the observation of domestic conduct of states. The declaration contains a list of economic, social, cultural and political rights and provides throughout its second article that "everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, color, sex, language, religion, political"¹⁵. The responsibility of the UN for promoting universal respect for and observance of human rights; and, the responsibility of member states to take 'joint' and 'separate' action in cooperation with the organization for the achievement of these purposes are stated in the article 55 and article 56: "where the violations of

¹⁴ Charney, p. 835

¹⁵ Felix, p. 15

human rights are 'grave' and 'widespread', requires action to use force – humanitarian intervention -, when all the other 'remedies' are exhausted".¹⁶

Another 'constraint' on humanitarian intervention stems from the basic norm of global law about 'sovereignty' that has been constructed upon the principle of the 'non-intervention' in the internal affairs of states. The Westphalian type of sovereignty grants states with the principle of 'consent' that allow them the 'choice' for what degree they will participate to or limit the specific rules of global legal system. According to this type of sovereignty, global law and bodies must avoid intervention into issues those are governed within the choices of national authorities that are also decisive on the aims and stability of global legal system law. Kreijen Gerard, in his article titled "State, Sovereignty, and International Governance" claims that states rational interests are at the core of global rules regulating non-intervention, employment of force, economic collaboration, and political relations.¹⁷ He puts it as "world order is order among sovereign states; international law as part of world sovereign states. States voluntarily limit the exercise of their external autonomy by accepting rules of treaty or customary international law".¹⁸ While states can claim 'isolation' and 'independency' from any global intervention, they can nevertheless claim 'recognition' as sovereign units throughout the global system that can participate to global legal agreements as well as relationships with other states. The principle of 'sovereign equality' of states views them as "equal members of the international community, notwithstanding differences of an economic, social, political or other nature."¹⁹ Nevertheless, the relations of states frequently experience various types of interventions to each other's internal affairs especially in economic relations for getting others to open their markets to foreign products and to implement other structural changes. Also, 'political' and 'militarily' interventions are made in some extreme cases for carrying out 'civil' or 'militarily' actions in a state's territory. Rene Cassin accuses Article 2(4) as overrating the national sovereignty and calling UN members to not act against human rights mistreatment in a given country.²⁰ Nevertheless, the recent political transformations throughout Eastern Europe diminished the significance of the national sovereignty compared to the importance

¹⁶ Shaw, p. 257

¹⁷ Kreijen, p. 3-4

¹⁸ Kreijen, p. 4

¹⁹ Felix, p. 11

²⁰ Cassin, p. 87

admitted for the treatment of human rights in a given country.²¹ While intervention to internal affairs of a state has become appreciated within a gradually increasing media support, it is still problematical in legitimacy.

The classic tradition of state sovereignty has also been changed by EU member states as their national authorities are transferred to the 'community' as a whole in many of policy fields. Further, state sovereignty is no more 'independent' from the 'supremacy' and 'direct effectiveness' of EU law. As a result of states increased interdependency, formal sovereignty has rather become a 'bargaining' resource than a territorially defined 'barrier'. While the EU doesn't have 'full' and 'exclusive' powers within its jurisdiction, high level interdependence makes member states to transfer their 'authorities' to the EU for their benefit. Through developing a more sustained cooperation in accordance with the growth of EU's institutional capacity, EU member states rather preferred mutual benefits than insisting on the external and unitary sovereignty. It is a very debatable issue whether states need sovereignty in our contemporary time. Keohane claims that success in the contemporary world can be achieved without state sovereignty through illustrating the Germany as a significant actor without full sovereignty playing a crucial role throughout European and global affairs.²² In our globalizing world, transforming some of the sovereignty to institutional organizations is not necessarily a mark of a state's 'weakness' but rather a sign of 'strength', self confidence and sophistication about how to achieve security and welfare for one's citizens.

Miriam Sapiro points out that the major impetus behind the non-use of force and the non-intervention rules was developed from the tragedy of the Second World War (WW2) and "those nations that had been attacked were determined not to be lulled into a vulnerable complacency again."²³ These UN prohibitions were taken under the certain circumstances when the general expectation was that there would be no need for the individual resort to force since the UN would guarantee the security of individual states. Higgins implies that the UN collective security has totally failed:

"...The Charter was meant to provide for collective security. At the heart of the Charter was the idea that it would be realistic to enjoin states to use

²¹ Cassin, p. 88

²² Keohane, p. 743-765

²³ Sapiro, p. 599.

force only in self-defence, because collective security would be provided to ensure that rights would not be denied in a manner which might threaten international peace. The reality is that the UN collective security system has totally failed. It is of critical importance frankly to acknowledge this and to focus our minds on the consequences that flow from this reality. From the outset the United Nations has been unable to set up the forces whereby it was envisaged that the Security Council would provide collective security. The umbrella which was to encourage members to limit their use of force to self-defence has never really been unfurled.”²⁴

The UN tragically remained ‘futile’ in the face of danger as the Cold War had triggered ‘polarization’ of the global system and the ‘division’ of the global governance. As the decisions of the UNSC was degenerated by ‘veto powers’ of five allied countries of the WW2, the UN had not done her duty to solve problems and to identify the acts that execute the sanctions system against the states that their aggression to another becoming a threat to peace. The intervention to the former Yugoslavia in 1995 well illustrates the weakness of the global security system. The risk of Russia and China using their veto had brought the NATO, rather than the UN, as the preferred body in applying the possibilities provided by global law.

The Process of Legalization and the Rise of ‘Common Man’ as a Global Legal Actor

In the earlier stages of its development, global law has been engaged with regulation of ‘interstate’ relations since states have both created and enforced this law. It’s still a reality that the mass of particular regulations of global law are shaped by states to govern their behavior. Further, the sovereign rights of nation state in claim of ‘independency’ have been at the core of the global legal system since long time. The aim of this system of law has been to preserve the ‘self-interest’ of the state through ensuring peaceful ‘co-operation’ and ‘co-existence’. Nevertheless, the global legal system has undergone a process through ‘prolonged’ and ‘unpredictable’ expansion of ‘legalization’ based on a move to legal rules. The process of legalization is an unusual trend that started in the 1980’s by states that very often established and involved in ‘institutions’ to collaborate in very ‘anarchic’ global structure; and, then in the post-Cold War era accelerated to ‘delegate’ the ‘settlement of disputes’ to ‘self-governed authorized actors’ that grant ‘states’ as well as ‘common man’ ‘access’ to

²⁴ Higgins, 1992, p. 270

their procedures.²⁵ The state competences have been delegated to 'impartial sides' for settling conflicts through 'interstate' or 'transnational' nature which are also available to 'common man' and 'groups' rather than being solely 'state centric'.²⁶ The rise of 'common man' brought humanitarian debates into a significant part of global legal discipline for fulfilling its 'responsibility to protect' human rights in case of their violation. The expansion of the legalized institutions and development of a specialized human right law have challenged the 'sovereignty' right of states. We are experiencing a new global system that the actors are not only 'states' but also 'non-governmental organizations', 'multinational corporations' and 'common man'.

In the post-Cold War era, 'conflict resolution' has become to be practiced through the expansion of 'legalized institutions' and participation of the efforts through 'officially' by 'state officers'; as well as, 'unofficially' by 'non-state actors' to face global threats. This 'multi-track conflict resolution' further includes the 'constituent tracks' of states that are 'complementary' to each other and in total operates as a system of global diplomacy that effort for 'mediation' and 'solution' of conflicts.²⁷ This increased 'decentralization' tendency throughout the state systems as well as a greater 'fragmentation' within the global legal system has been furthered by the rapid advancements and transformation of 'capabilities'.²⁸ James Rosenau speaks of 'global turbulence' to express that the advances of 'common man's' 'capabilities' through better education and technologies have altered the 'identity' and 'number' of actors while 'state authority' is declining. This, in turn, on one side, promoted greater 'integration', while, on the other hand, facilitated greater 'fragmentation' throughout the global legal system.²⁹ Simultaneously with the accelerated 'homogeneity' of social system throughout the globe, the process of 'globalization' has ironically triggered its 'heterogeneity' through 'fragmentation' into 'specialized' and 'self-governing' fields.³⁰ The fragmentation of global social system to achieve authorized meaning required to be allied with the development of 'privatized' and reasonably

²⁵ Keohane, 2000

²⁶ Ibid., p. 74

²⁷ Diamond

²⁸ Rosenau

²⁹ Ibid.

³⁰ Cohen

‘self-ruling’ regulations such as “rule complexes, legal institutions and spheres of legal practice”.³¹

The accelerated expansion of ‘legalized institutions’ has shifted the ‘regulatory procedures’ of conflict resolution from ‘general global law’ to functionally ‘specialized legal institutions’ and ‘legal regimes’.³² This process of fragmentation nevertheless has triggered ‘intersection’ and ‘conflicting’ of self-governing ‘specialized issue-fields’ or ‘institutions’, whether through ‘each other’ or ‘general international legal system’, about the interpretation of relevant global rules and regulations.³³ The ‘legalization’ process has accelerated the ‘specialization’ of different fields, such as human rights law. These self-ruling specialized fields lacking “clear relationship”, either to each other or to general global law, have triggered ‘functional deviations’ that combined with the deviating pursuits and concerns of varying actors in a global ‘pluralistic legal world’.³⁴ This invokes for a new ‘legal synthesis’, what Higgins suggests, as a vital need to response the varying needs of a pluralistic global society that well diverge from past circumstances when the current rules were articulated. Else if global law continues reflecting only state needs and past values, a ‘legitimacy deficit’ and ‘disobedience’ would uncontrollably and injuriously increased – as Higgins warns.

While ‘common man’ as one of the international legal personalities has been provided with increased rights since the declaration of human rights, the hesitation of global law still continued through insisting on ‘sovereignty rights’ that have already proved to be exploited by many brutal regimes – such as in Somali, Rwanda, Former Yugoslavia, Congo, Sudan, Darfur, Libya and Syria others. The ‘inability’ of the global community to reconcile violations against human rights was interpreted as ‘tragedy’ in the former UN Secretary General Kofi Annan’s speech on 20 September 1999.³⁵ The emergency of the issue to redefine the concept of ‘humanitarian intervention’ to meet the varying needs of changing actors, responsibilities and opportunities has been raised by Annan’s question whether states “must wait because the decision of the Security Council couldn’t provide immediately action” when “a group of states decide

³¹ Ibid.

³² Pauwelyn

³³ Koskenniemi, 2006

³⁴ ILC,

³⁵ Annan,

on an intervention to prevent genocide”.³⁶ Annan implied the need for appreciating ‘legitimate’ and ‘universal’ principles in order to achieve ‘lasting support’ for the adaptation of the global legal system with the concept of humanitarian intervention. He invoked for adopting the nature of national sovereignty and changing manner of national interest through global changes what he put as: on one hand, concerning ‘state sovereignty’ that is “redefined—not least by the forces of globalization and international co-operation”; and, on the other hand, concerning the individual sovereignty that is “enhanced by a renewed and spreading consciousness of individual rights”.³⁷ And, he brought to a close through declaring “when we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.”³⁸

One of the contemporary contradiction against Westphalian concept of sovereignty as ‘control’ has become the newly emerged view of sovereignty as ‘the responsibility to protect’ that is obliged by specialized field of ‘human rights law’ on states behavior towards their own citizens as well as external duties. When a sovereign state is ‘unwilling’ to tackle the roots of human rights violations itself, global legal system may step in to compel these states ‘will’ and ‘behavior’. This practice of global law moves well beyond its traditional characterization as regulating the interstate relationship. The 2001 report of ‘International Commission on Intervention and State Sovereignty’ (ICISS) on ‘responsibility to protect’ has been the forerunner the amendment of the UN Charter through incorporating the effect of global rules and institutions on internal administrative procedures into states sovereignty – rather than rejecting them.³⁹ Demanding “no transfer or dilution of state sovereignty”, the report redefined the recognition of UN membership as having ‘primary’ responsibilities stemming from state’s “signature” that are: in the ‘intrastate’ relations to “respect the dignity and basic rights of its citizens”; while, in the ‘interstate’ relations “to respect the sovereignty of other states”.⁴⁰ Else if “a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it,” the responsibility to protect proceeds to the next step and shifts from ‘state’ to the ‘global community’ to act through the UN; as

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Chomsky

⁴⁰ <http://responsibilitytoprotect.org/ICISS%20Report.pdf>, p.13

well as, “the principle of non-intervention yields to the international responsibility to protect”.⁴¹

Where ‘human rights law’ identifies a set of clear prescriptions on states behavior to act in appropriate means towards their own citizens, the ‘responsibility to protect’ norms pursue dynamically to influence not only ‘national law’ but also the ‘national political circumstances’ through a more ‘inclusive’ and ‘transformative’ approach.⁴² The very considerable threat essential in these new norms of global law, according to Martia Slaughter, nevertheless, “lies in the potential of national governments to co-opt the force of international law to serve their own objectives”.⁴³ That is, through authorizing humanitarian intervention, global legal system might grant states new license to carry out in another way unlawful or unfair behavior. Where controversial values such as human rights and non-use of force are seen to be in ‘contradiction’, global legal coercion of rules such as ‘humanitarian intervention’ that give preferentiality to one value might arise at a loss of other. This conflict is especially challenging when a brutal regime is capable of use political issues as a ‘pretext’ or ‘mask’ to advance its national interests through making the common man suffer. While Higgins claim that legal decision makers can manage these normative conflicts through scrutinizing lawfulness of legal statements, also preventive measures can be taken such as what suggested by Slaughter to “harness the strengths of well-functioning national institutions while targeting and restricting the reach of abusive ones”.⁴⁴ Slaughter puts “the quality of domestic institutions” vital for states to avoid abusing through counterbalancing the power of specific interest groups to use global law for their own interests. She claims that while states with weak domestic institutions are more likely to abuse, what reduces the risk of abusing to minimum within states are “robust and independent institutions, strong constitutional frameworks, transparent political processes, and embedded systems of checks and balances”:

Where international law does target such states, international rules, regimes, and institutions will have to be designed to address both the capacity and quality of domestic governance. Check and balances will have to be embedded into the system itself, pushing not only for particular

⁴¹ Ibid.

⁴² Ibid.

⁴³ Slaughter, 478

⁴⁴ Ibid., 480

substantive outcomes, but also for legitimate domestic processes to achieve these goals. Similarly, international regimes themselves will have to balance a range of competing values – such as human rights and national security – rather than focus on one particular goal when compelling state action.⁴⁵

Conclusion

The concept of humanitarian intervention hasn't been developed by 'coincidence'; but seeks to meet the 'technical' and 'functional' needs of present circumstances. It deviates from what has been offered by general global law in order to response the varying needs of a 'pluralistic global society' that has been derived from shifting circumstances. The global legal system has experienced a revolutionary process 'from' the time when UN Charter entered into force under certain expectations for the achievement of collective security. The non-use of force and the non-intervention rules were regulated under these past circumstances that granted states as the only 'legal actors' and their 'sovereignty' as well as 'independence' has been at the core of the global legal system that was constrained by the principle of 'state consent'. Under present circumstances, we have experienced a highly 'interdependent' global legal system that states are not the only actors and the concepts of sovereignty and independency have been diminished. EU member states transferred their authority to supranational institutions where many decisions are taken through the principle of 'consensus' rather than being limited to state 'consent'. The emergence of non-state actors expanded the rights of 'common man' and reaccelerated a new phase throughout the history of human rights. The transformation of global dangers coupled with the collapse of expectations for the collective security system brought the validity of the non-use of force and the non-intervention rules into a very debatable issue. The focus of an increasing volume of global legal rules shifted from the conduct of states towards other states, or other states citizens, to their own citizens. And, the new developments in humanitarian law such as the 'Responsibility to Protect' requires primarily states to protect the 'fundamental human rights' of their own citizens from violation; it invokes for a 'humanitarian intervention' only when all else fails to prevent genocide.

⁴⁵ Ibid., 480

Thinking through Higgins's view of law as process that cares the expansion of legalization and fragmentation, this article invokes for a legal synthesis to settle the shifting norms of global law from the 'non-use of force' and the 'non-intervention' to 'humanitarian intervention' and 'responsibility to protect'. This process of legalization triggered fragmentation that nevertheless has generated 'contradictions' of self-governing specialized issue-fields such as 'human rights law' with 'general global law'. Despite all the complexity and perils humanitarian intervention poses, these threats are neither entirely novel of such type that they could not be managed through methods legal decision makers have applied to manage the 'normative disputes' that may have appeared before. Higgins lays a burden on legal decision makers to proof the lawfulness of legal statements that would require more efforts for identification and application of sources.

To conclude, the main lesson of Higgins view of law as process into our minds is this, in light of present circumstances, a multilateral form of humanitarian intervention can provide sufficient efficiency for preventing the tragedies. Remaining silent against the violation of human rights would diminish the 'legitimacy' and 'obedience' of global law which, in turn, could trigger the collapse of global peace.

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