



## FROM HUMANITARIAN INTERVENTION TO RESPONSIBILITY TO PROTECT: A QUEST FOR LEGITIMACY AND LEGALITY

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### **ABSTRACT**

*The Concept of Humanitarian Intervention has received a negative reaction from a majority of the players involved in Conflict Management and War strategies . The concept tried to break the mould of UN Charter which limited the activities of Intervention and Sovereignty was a considered a sacred deity which was not to be trifled with . But the genocidal acts committed in the last decade of the 20<sup>th</sup> Century , forced the international legal community to come up with viable alternative plans.*

*By changing the nomenclature of Right to Intervene to Responsibility To protect , the International Commission of Intervention and State Sovereignty has given a new lease to the knotty issue of saving the lives of innocent citizens who are being massacred by their own government . The paper argues that in order to be legal and practically applicable , a concept has to be legitimate . This places a concept in a proper social construct . The first Section I of the paper will focus on the problems that one faces while defining a complicated phenomenon like humanitarian intervention and what alternative are able to overcome the issue . Section II of the paper will explore the legal issues involved with the concept of Humanitarian intervention .*

Section III of the people will explore the legality-legitimacy duality. Section IV will give concluding remarks .

## **Section I**

**Defining Humanitarian Intervention :** Legal jurists have a fetish to search and define a concept so as to bring surety to a controversial or an unexplored idea . Definitions have a tendency to compartmentalize and spell out the essential attributes of a concept. The Positivists tried this approach for making declaratory traditions of law ascertainable. Concepts like sovereignty, were given a lexical pushing when, John Austin law itself was defined as the command of the sovereign . Definition gives an added advantage to a concept, as it is materialized and presented in a concrete form . The idea of definition gains momentum especially for those cases , where a concept is affecting the affairs of a sizeable portion of the population .

The concept of Humanitarian Intervention is intriguing and controversial. The concept has the potential to tickle the declaratory traditions of International Law and International Politics. At times it seems, as if, humanitarian intervention is the mid wife between Sovereignty and Human Rights. The definition of Humanitarian Intervention is preceded by the definition of Intervention. Various scholars have defined intervention in the following manner:

According to *Anzilloti*, “If States in order to satisfy non legal interests, can resort to war i.e. attack the integrity and the very existence of international subjects, it is easily understandable that they are also allowed to impel – not to war but by threat to wage a war - another state to adopt a certain behavior either within the ambit of its own authority or in its relations with other states . That is what called intervention.”<sup>1</sup>

According to *Kelsen* , “ The intervention prohibited by international law is usually defined as dictatorial interference by state in the affairs of another state . A dictatorial interference is an interference by threat or use of force.”

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<sup>1</sup> D , Anzilotti ; Corso di diritto internazionale , I (Rome , 1912-14 ) , p 315 . as cited in Antonio Cassese ; International Law in a Divided World , 1986 , p 145 .

According to *Hall*, intervention takes place “ when a state interferes in the relations of two other states without the consent of both or either of them or when it interferes in the domestic affairs of another state irrespective of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it .”

According to *Jackson*, “Intervention is the dictatorial or imperative violation by one state of the independence of another state. The essence of intervention is the force or the threat of force and it must be distinguished from such peaceful acts or interference as good offices, intercession, mediation and arbitration.”

According to *Alf Ross*, “*Intervention* means the dictatorial interference of a state in the internal or external affairs of another State.”<sup>2</sup>

According to professor V.S. Mani Article 15 of Pact of Bogota, 1948, contains the classical text of intervention.<sup>3</sup> Article 15 of Bogota Charter reads as follows:

“No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principles prohibit not only armed forces but also any form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.”

Article 16 of Bogota Charter further reads: “No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind.”

According to the above mentioned definitions Intervention means:

- (i) Dictatorial interference by a State ;
- (ii) In the internal and external affairs of another State ;
- (iii) Without its consent ;
- (iv) By threat or use of force ;

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<sup>2</sup> Cited in Mohd . Shahid , Mohd . Khalid , ‘ International Law and Politics of Intervention .’(2003) New Delhi, Raj Publications , pages 20 -21.

<sup>3</sup> V.S.Mani , ‘Basic Principles of Modern International Law .’ ( 1993 ) New Delhi , Lancer Books Publication, page 66

(v) And changing the will of the state as to how it carries its affairs.

Intervention can be called an action of coercion directed for producing a desired effect, particularly, to obtain the subordination of the sovereign will of the victim state or secure advantages of any kind.

It has been suggested that even if a state refuses to coerce the fact would remain that there had always been an *intention* by the recalcitrant State to coerce another State.<sup>4</sup>

The exhaustive explanation of the Intervention goes on to explain that when faced with a situation States and International actors can ascertain with precision as to when an intervention is illegal or not . If the mode is dictatorial and the motive is to change the will of the state for one's own purpose then it is an obvious violation of the norms of International law. However, the tool of definition is not useful in the hard cases. The case of definitions has been categorized by Raymond Wacks into three categories:

- A) Denotationist
- B) Functional
- C) Essentialism.<sup>5</sup>

For the purpose of Humanitarian Intervention and Responsibility to Protect the Functional Approach is necessary. The Functional Approach is backed by Ludwig Wittgenstein, who had famously asserted: “Don't ask for the meaning, ask for the use.”<sup>6</sup> According to this approach, the function of a particular concept is more important than something that it denotes. This point will be discussed in detail, when we will interpret Sovereignty through the prism of Responsibility to Protect later on.

One of the earliest definitions of Humanitarian Intervention has been given by E.C.Stowell. According to the author, humanitarian intervention is the reliance upon force for the justifiable purpose of protecting the inhabitants of another state

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<sup>4</sup> Ibid , page 68

<sup>5</sup> Raymond Wacks, ' Understanding Jurisprudence : An Introduction to Legal Theory ' , (New York) , 2012 , page 5

<sup>6</sup> Supra note 5 , page 5

from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.<sup>7</sup> In his seminal work, E.C.Stowell had cited the work of A. Rougier, which had made an interesting observation by stating that humanitarian considerations could never be the sole motive of the intervener. When time comes, every state will pursue its immediate interest which may not be altruistic at all.<sup>8</sup> Stowell , had prophesized the controversial aspect of humanitarian intervention , where he anticipated an outcome in which one country’s legal culture could be super imposed on other nation state’s without its consent . Stowell has described the situation in the following words:

“Whenever one power intervenes in the name of humanity in the domain of another power, it cannot but impose its concept of justice and public policy on the other State, by force if necessary, its intervention tends definitely to draw the other State into its moral and social sphere of influence. It will control the other state while preparing to dominate it. Humanitarian Intervention consequently looks like an ingenious juridical technique to encroach little by little upon the independence of a State in order to reduce it progressively to the status of semi sovereignty.”<sup>9</sup>

Fernando R. Teson has given an elaborate definition of humanitarian intervention from the liberal point of view.

"I define permissible humanitarian intervention as the proportionate international use or threat of military force, undertaken in principle by a liberal government or alliance aimed at ending. Tyranny or anarchy, welcomed by the victims and consistent with the doctrine of double effect."<sup>10</sup> If justified intervention has the aim to maximize human rights observance, but the intervener

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<sup>7</sup> E.C.Stowell , ‘ Intervention in International Law ,reprinted in L.B. Sohn , and T. Buergenthal , ‘international protection Of Human Rights ‘ (Indianapolis ) ( Bobbs Merrill ) , 1973 , mentioned in Thomas Franck , ‘ Humanitarian Intervention .’ in The Philosophy of International Law .’ The Philosophy of International Law ,(edited by Samantha Besson and John Tasioulas ) , ( Oxford ) , Oxford University Press , (2010) , page 533.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid

<sup>10</sup> Fernando R. Teson, The Liberal Case For Humanitarian Intervention Public Law and Legal theory working paper number 30, Florida State University College of Law, November 2001, Page3

is constrained by doctrine of double effect. Therefore, intervention on humanitarian grounds cannot be justified on Utilitarian grounds, as it may easily allow the deliberate targeting of innocent persons if conducive to realizing the humanitarian objective. This is prohibited by doctrine of double effect. The doctrine is explained by Fernando Teson in the following words:

".....According this doctrine, there is a moral distinction between, on the one hand, actions with foreseen and intended bad consequences, and on the other actions with foreseen yet unintended bad consequences. The Second ones may, depending on the circumstances be excused....."<sup>11</sup>.

Thus proportionate collateral harm caused by a humanitarian intervention, where the goal is to rescue victims of tyranny or anarchy, may depending on circumstances be morally excusable. The argument for humanitarian intervention is located midway between strict deontological approaches and unconstrained utilitarian ones. The latter simple directs agents to intervene whereas they maximize the good in terms of the several welfare. The former would forbid intervention that would result in the violation of rights of innocents even intervention that will certainly maximize universal rights observance. The goal of restoring human rights and justice thus is more than simply helping people. Because rights and justice are so central to justified politics the goal of restoring them stands out in a moral sense. The parties might agree to humanitarian intervention either by application of maximum principle or by a stronger assumption about the party's public sprinted commitment to political justice and human rights.

The above mentioned definitions present two different points of view. One presented by Stowell dwells on the ulterior motive which intervening powers might possess while making a save for the human rights of the strangers. The views of Fernando Teson present the other extreme view which might jeopardize the global state order. Teson's views are well intentioned, but, it might lead to international anarchy. Stowell's skepticism about the ulterior purpose of intervention is now backed by empirical evidence. Bianca Sarbu's work has

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<sup>11</sup> Ibid, Page

shown that all interventions are primarily backed by National interests.<sup>12</sup> Her work reflects the views of the Realist School. Realist school gives primacy to national interests over values. The most salient realist criteria which underpin the decision over intervention or non-intervention are best summed up by Bianca Sarbu in the following points:<sup>13</sup>

1. National Interests

2. Lack of State Strength

3. Security concerns.

1. National Interest : The author submits a realist assertion in U.N. peace-keeping mission is that peace-keepers go where the permanent 5 members of the security council want them to go, because the National interests of the Permanent members are inherently tied to it .National interest can be equated to maintenance of a geo-political influence. The author cites the study of Laura Neack which is composed of 18 U.N. peace-keeping operation in the timeframe of 1948-1990. Her study explores the extent as to whether State participation in U.N. peace-keeping results from a State's idealistic commitment to the global community and international peace or whether participation is tied to State's national interest. Her interpretation provides support for the realist school. She has shown that the tool of humanitarian intervention is used to maintain the status quo in international regime.<sup>14</sup>

2. Lack of State Strength: Another realist claim is that the probability of military intervention led by one of the permanent members of the Security Council decreases as the capacity of a threatened State to depend itself militarily increases or alternatively, if there is a Regional power on the ground. The logic is that the International community should be selective in its operation. It is expected that the U.N. should avoid humanitarian or other types of military

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<sup>12</sup> Bianca Sarbu Driver of humanitarian intervention : Going beyond Human Rights violations, M.A. Thesis, for Master of Arts in Comparative and International studies, the Swiss Federal Institute of Technology, Zurich, Year (2009) Page. 29

<sup>13</sup> Ibid, page 12.

<sup>14</sup> Ibid, pgs. 14, 15.

intervention when the State in question or another State in the region has the military capability to take hold of the situation.<sup>15</sup>

3. Security concerns: According to the erudite author, in an anarchic system, States need to safeguard their security and survival. Conflicts generally produce considerable negative spillover including refugees and economic cum political instability in regions where the problematic country is located.<sup>16</sup>

The core argument of the realist school is that national interest is the Panacea for the enforcement of any matter of foreign policy. If a purpose is based on moral grounds and does not serve the best national interest then it will not benefit the cause of a rational actor then such altruistic cause will not be supported. The idea is based on the egoistic nature of human itself. This idea is the pertinent part of Hobbes, Freud and Machiavelli political philosophy.

So far we have seen that the very concept of Humanitarian intervention poses problem from the point of view of its definition, the ulterior criterion which an intervening authority might have in their mind while making a case for intervention in a particular nation state. Next section will explore the legal hurdles that have made humanitarian intervention a controversial norm in spite of the fact that at times, it intends to promote and help in solving higher purposes. It is because of the controversial nature of the Humanitarian Intervention that the concept has now been replaced by Responsibility to Protect. The problem is that Humanitarian Intervention has not travelled the road where a norm becomes legal through legitimacy. The argument related to the dual nature of legality- legitimacy and its relationship with Responsibility to protect will be discussed in the next sections of the paper. The next section deals with the legal conundrum that humanitarian intervention faces and how it has made the concept controversial

## Section II

The quest for legality of Humanitarian Intervention: The concept of Humanitarian intervention faced legal hurdles in the form of the interpretation of the UN Charter. If one adheres to the Original intention theory and a lexicographic

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<sup>15</sup> Supra note 12, pages. 15-16.

<sup>16</sup> Ibid, page. 17.



approach, then, it becomes a Sisyphus' task to carve out the case for humanitarian intervention as the doctrine of Sovereignty is embedded in a Procrustean manner under Article 2 (4) of U N Charter. The debate of Humanitarian Intervention is a related to the interpretation of Art 1 (3) and Art 2 (4) of the UN Charter. The concept is tied to the struggle between the Purposes { Art 1 (3) } and Principles { Art 2 (4) } of UN Charter .Art 1 (3) mentions human rights protection as one of the purposes of United Nations , whereas , Art 2 (4) mentions non use of force . This tension is endorsed by Simon Chesterman . In the words of the author :

“ The tension between sovereignty and human rights in the international legal order established after the Second World War is manifest in the opening words of the UN Charter . War is to be renounced as an important of national policy .Human Rights are to be affirmed . But in its substantive provisions , the charter clearly privileges peace over dignity: the threat or use of force is prohibited in Article 2 (4) ; protection of human rights is limited to the more or less hortatory provisions of Articles 55 and 56....”<sup>17</sup>

The cause of humanitarian intervention has been opposed as it is not featured in the scheme of UN Charter . It tends to sabotage the Westphalian Principle of Sovereignty which is embedded and deeply entrenched through Art 2 (4) of the UN charter . The doctrine of non intervention as elaborated under Art2 (7) also creates problems. The norm of collective self defense , and the primary responsibility to maintain peace and order given to Security Council hampers the development of humanitarian intervention . The central role of non use of force and the prohibition of the threat to use of force is a part of the jus cogens regime .<sup>18</sup> According to Alexander Orakhelashvili , non use of force is a part of jus cogens regime because it allows a State to survive and exist independently .<sup>19</sup> In

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<sup>17</sup> Simon Chesterman , 'Just War or Just Peace ?': Humanitarian Intervention and International Law (Oxford ) , Oxford Publication 2003 , page 45 .

<sup>18</sup> Christine Gray , ' International Law and the Use of Force .' (Oxford) , Oxford Publications , 2000 , page 24 , Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) , ICJ Reports (1986) 14 , para 190 .

<sup>19</sup> Alexander Orakhelashvili , ' Peremptory Norms in International Law .' (Oxford), Oxford University Press , (2007), page 50

Oil platforms case, Judge Simma affirmed that the norms of general international law on unilateral use of force are peremptory in nature .<sup>20</sup>

However , there have been various points of view that have refuted the pedantic interpretation of Art 2(4) of UN Charter . This is led by the proponents of teleological branch of interpretation of treaties . According to Robert Kolb , the most controversial aspect of Article 2 (4) is its last 23 words .<sup>21</sup> The phrase , ‘ .... Against the territorial integrity or political independence of any state , or in any other manner inconsistent with the Purposes of The United Nations’ are indeed intriguing . Reference to the travaux of the UN Charter goes on to show that the term ‘ territorial integrity and political independence’ were not a part of the original Dumbarton Oaks proposal<sup>22</sup> and was inserted only after the insistence of the Australian Delegate .<sup>23</sup> Leland Goodrich and Edvard Hambro observed that the limitations imposed by Art 2 (4) are not absolute and interventions for protective purposes should be allowed . <sup>24</sup>Anthony D’ Amato is one of the strongest supporter of the restrictive interpretation of Art 2 (4) .<sup>25</sup> Fernando Teson has argued that humanitarian intervention does not result in the violation of the territorial integrity or the political subjugation of a nation State .<sup>26</sup> W. Michael Reisman presented an extreme version and talked about legalizing some of the cases of unilateral intervention . <sup>27</sup>

The concept of Humanitarian Intervention gained momentum only when civil war situations developed in some of the areas around the world. Three most common cited examples in this instance are :

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<sup>20</sup> Ibid.

<sup>21</sup> Robert Kolb , ‘ An Introduction to the Law of The United Nations .’ ( Portland , USA) Hart Publishing (2010) , page 70.

<sup>22</sup> The Dumbarton Oaks Proposals , Ch II , para 4 , read : ‘ All members of the Organization shall refrain in their international relations from the threat or use of force in any way inconsistent with the purposes of the Organizations .’ : 3 UNCTAD 3.

<sup>23</sup> Supra note 17 , page 49.

<sup>24</sup> Leland M Goodrich and Edvard Hambro , ‘ Charter of The United Nations : Commentary and Documents ( 1<sup>st</sup> Edition ; ) ( Boston ) World Peace Foundation (1946) pages 68-69.

<sup>25</sup> Anthony D’Amato ‘International Law : Process and Prospect ( Dobbs Ferry ) , Transnational (1987) .

<sup>26</sup> Fernando Teson , ‘ Humanitarian Intervention : An Inquiry into Law and morality ,( Dobbs Ferry ) Transnational publications , 1997

<sup>27</sup> W. Michael Reisman , ‘ Coercion and Self Determination : Construing Charter Art 2 (4) .’ (1984) 78 American Journal of International Law page 642 .

India's action in Bangladesh

Tanzania's action in Uganda.

Vietnam's action in Cambodia.<sup>28</sup>

It has been argued that humanitarian intervention has not been mentioned in Friendly Relations Declaration<sup>29</sup> and in the Definition of Aggression<sup>30</sup>. The concept of Humanitarian Intervention was revived in the decade of 1990s. It has also been termed as the golden age of intervention. This happened because of certain socio political reasons :

The collapse of the Soviet empire.

Emergence of US as a sole power .

The survival of liberalism as the only working ideology .

Renewal in the respect for human rights .

The growth of the nexus between liberalism , human rights and good governance .

Growing strategic importance of NATO .

Christine Gray cites the earliest attempt to legalize humanitarian intervention in the joint operations taken by UK , France and UK to protect Kurds and Shia in Iraq in 1991.<sup>31</sup> Although, the 1991 action was one of the most unambiguous situation dealing explicitly with the concept of humanitarian intervention, the biggest challenge came in the form of Kosovo / Serbian Bosnian conflict . The ethnic cleansing carried out during President Milovic regime was unparalleled. NATO's unilateral intervention in the situation was received with a lot of criticism by the International Legal Community. It has been criticized on the following grounds:

It has violated the absolute rule imposed under Art2 (4) .

The primary role for maintenance of international peace and security which has been given to Security Council under Article 24 of the UN Charter was violated when NATO intervened unilaterally.

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<sup>28</sup> Supra Note 18 , page 26.

<sup>29</sup> General Assembly Resolution 2625 (1970).

<sup>30</sup> General Assembly Resolution 3314 (1974) .

<sup>31</sup> Supra note 18 , page 28.

The authorization which is given by Security Council under Chapter VII was absent when NATO conducted its air strikes.

Assuming that NATO was a regional organization , even then under Art 53 it should have acted with the authorization of Security Council.<sup>32</sup>

When Yugoslavia challenged the actions of NATO before International Court Of Justice , Belgium defended NATO's action through the narrow interpretation of Art 2 (4) of U N charter which has already been mentioned . Belgium impliedly talked about the legalization of the humanitarian intervention . It argued that the intervention was not against the territorial integrity of Yugoslavia but to save the human rights of the citizens . Human rights are also a part of jus cogens regime .<sup>33</sup>

The concept of Humanitarian Intervention remained a controversial topic in international law throughout the decade. The contest between Westphalian Sovereignty and Human Rights turned out to be formidable. The concept entered a critical phase because of the following reasons :

Divergent views about the scope of Art 2 (4).

Ambiguity as to what would happen if Security Council fails to take action under Art 39 and does not fulfill its primary obligation under Art 24 of UN Charter .

Military intervention being the only tool available to solve the situation .

Conflict between the supremacy of Purposes and Principles of UN Charter .

Ulterior motive behind intervention .

No planned strategy for an honourable exit strategy after an intervention is over.

Basic concepts like Sovereignty and Intervention were not revised to keep up with the reality of the 20th and 21st century.

The modus operandi of the military intervention did not garner legality nor could it gain legitimacy in the international political scenario.

As argued earlier , and mentioned in point no (vii) and (viii) of the above para , humanitarian intervention lacked legality and legitimacy in the legal field . This

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<sup>32</sup> Ibid page 33 .

<sup>33</sup> Ibid page 37.

happened because basic concepts like Sovereignty and Intervention needed a revival and this came only in the form of Responsibility to Protect . The next section will argue that Responsibility to Protect is so far the most potent tool to deal with situations that have worsened to a point of no return . Responsibility to Protect will be successful because it has grappled with the legality and legitimacy duality .

### Section III

The legality legitimacy debate has spawned over a vast period of time . The legality- legitimacy can debate can also be related to Form- Substance debate . Legitimacy has its roots in Social Constructivism and is deeply related with the social expectations of different legal cultures . Legitimacy can be attributed as a social tool , which gives empowerment to a concept to be accepted by a society writ large . It is a means which can be used to achieve certain ends . Legality depends on the following factors :

Changing notions of a society towards a particular situation .

The sense of justice/ injustice of a group.

Historical / political / psychological / economical background of a particular legal culture .

Rational expectations of a given society .

Expected gain from changed situation .

Openness of a society towards notions of liberalism , human rights .

Homogeneity in a society . ( A homogenous society is more likely to be unanimous on a norm which should be acceptable by all ).

Psychological response to a particular form of government .( Whether a society has had a long relationship with democracy or not ? Whether it is being ruled by dictators or oligarchs ? )

The level of development in a particular society .

The legitimacy criterion is more important for International Law , because with the advent of globalization , the affair of one state quickly affects the legal culture of the entire globe. Legitimacy at an international level , requires a unanimity of opinion about those concepts which are bound to affect the lives of citizens

everywhere, irrespective of their legal cultures . Legality , can be seen as an architect that builds a responsible as well as a responsive society . It is a building block that sets the process of norm creation in place. Legitimacy is the base which decides the super structure of an International Society . If the movement is from an , ‘ Order of States’ to a ‘ Society of States.’ Then it has to be done through legitimacy .

The duality and relationship between legality and legitimacy is succinctly interpreted by Vesselin Popovski . The author places the legality legitimacy debate between the two competing schools of legal theory i.e. Legal Positivism and Natural Law School .<sup>34</sup> Legality is related to Analytical Positivism because of its Rule centric and ethics abhorrence approach , while Legitimacy is related with policy oriented approach .<sup>35</sup> According to the author , International law has a societal role to play and is functional role to play . <sup>36</sup> Legitimacy gives a much required flexibility to an otherwise rigid system of International Law which depends on treaty interpretations , opinion juris and state practice for its development. The legality – legitimacy relationship can be summed up in the following words :

“ .... The concept of legitimacy is connected to legality , or lawfulness, to conformity to standards which , apart from being legal , could also be ethical , religious , rational , or even subconscious ..... Legitimacy , in contrast with legality, is not a black-and-white category- it is highly subjective, built up by a sufficient degree of common agreement , and can change over time ....”<sup>37</sup>

The legality – legitimacy debate becomes more apparent when we analyze the concept of Responsibility to Protect . The concept had its origins because of the challenge that was thrown to the world community by the then Secretary General of United Nations , Mr. Kofi Annan . He said :

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<sup>34</sup> Vesselin Popovski , ‘ Legality and Legitimacy of International Criminal Tribunals.’ in Legality and Legitimacy in Global Affairs (ed Richard Falk , Mark Juergensmeyer, et al (Oxford) , Oxford University Press, (2012) , page 388.

<sup>35</sup> *ibid*

<sup>36</sup> *Ibid*, page 389.

<sup>37</sup> *ibid*

“ If humanitarian intervention is indeed an unacceptable assault on sovereignty , how should we respond to a Rwanda , to a Srebrenica- to gross and systemic violations of human rights that offend every precept of our common humanity ?”<sup>38</sup>

The challenge was taken up by International Commission on Intervention and State Sovereignty (ICISS) , when it introduced the concept of Responsibility to Protect . According to Gareth Evans , this concept ‘ described the obligations of states to prevent and respond to human rights catastrophe in a potentially much more acceptable way .’<sup>39</sup> It is said that the Responsibility to Protect made the following contributions to the field of international law and international relations:

It invented a new way to talk about humanitarian intervention . The semantics changed from the ‘ right’ of States to ‘responsibility’ of States . If rights were involved , they were indeed of those people whose human rights had been denied . The shift from the language of humanitarian intervention was necessary as it was inherently tied only to military intervention . The non consensual element of military intervention could have had catastrophic effects. The new terminology of Responsibility to protect found new ways to engage the recalcitrant state to engage into tools of diplomacy and other ways to avert an imminent crises.

The report by ICISS found a new way to talk about Sovereignty . The report was based on the concept of ‘Sovereignty as Responsibility’ a term coined by Francis Deng . The states have the primary responsibility to protect their citizens . But when they fail to do so , the secondary responsibility falls on the world community .

The third contribution was that it gave a three dimensional approach to solving a problem at an international level:

Responsibility To Prevent : How to control a situation before it culminates into a Crises ?

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<sup>38</sup> Kofi Annan, Millennium Report of the Secretary – General of the United Nations , 2000 quoted in Gareth Evans , ‘ Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All ‘ (Washington D.C.) Brooking Institutions Press (2008), page 31.

<sup>39</sup> Supra note 38 , page 31 .

Responsibility To React : How to control a situation after it could not be prevented ?

Responsibility to Rebuild : How to rebuild a state after the intervention is over ?

Of these , Responsibility to Prevent is the most desirable as it tends to de escalate a conflict into negotiations and does not give a chance for something to become a conflict in the first place . Usually the tools available under Chapter VI of UN Charter are applied.

D ) The fourth contribution was providing the yardstick as to

When the most drastic measure , military action , would be

Employed . The legal criterion dealt with the decision that

Security Council was the body that could take decision .

The legitimacy criterion were the seriousness of the threat ,

Motivation for military strike, whether peaceful alternatives

Were available , proportionality of response and balance of

Consequences .40

Following are the Core Principles of Responsibility to Protect :

Basic Principles

State Sovereignty implies responsibility , and the primary responsibility for the protection of people lies with the state itself.

Where 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

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<sup>40</sup> Gareth Evans , ' Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All ' (Washington D.C.)  
Brooking Institutions Press (2008), pages 39-43



unable to halt or avert it , the principle of non intervention yields to the international responsibility to protect .

Foundations .

The foundations of Responsibility to protect lie in :

(A). obligations inherent in the concept of Sovereignty;

B) The Responsibility of the Security Council , under Article 24 of UN Charter , for the maintenance of international peace and security .

C ) Specific legal obligations under human rights and human protection declarations , etc.

D ) Developing Protection of States .

Elements

Responsibility To Prevent : to address both the root causes and direct causes of internal conflict

Responsibility to React : to respond to situations of compelling human need with appropriate measures which may include humanitarian intervention in extreme conditions .

Responsibility To Rebuild : To provide recovery , reconstruction and reconciliation after an intervention has taken place .

#### 4 . Priorities

Prevention options should always be exhausted before intervention is contemplated .

Responsibility to prevent and react should first use less intrusive and coercive measures .<sup>41</sup>

These above mentioned developments have made it clear that in order to find a workable solution to the problem of ethnic cleansing , human rights violations , international legal community had to find a way to legitimize its methods in order to save strangers in other countries . Military Intervention was unable to do so as it could not muster the unanimity of the international legal community and it

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<sup>41</sup> ICISS , The Responsibility To protect , page xi .quoted in Gareth Evans , ‘ Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All ‘ (Washington D.C.) Brooking Institutions Press (2008), pages 40 – 41 .

became difficult to legitimize the principle of military intervention .Responsibility to protect , changed everything and metamorphosed Sovereignty as we know it . Sovereignty was made relative . The shift was from Right of States to Responsibility of States . This shift was accepted by everyone. The question of functional approach of definition which was mentioned in the first section of this paper , is now to be mentioned . Friedrich Kratochwil has emphasized on the functional aspect of knowledge and has raised three issues while investigating the role of sovereignty in the 21st Century

Historical issues : Whether Westphalian Sovereignty was indeed the foundation of Sovereignty ?

Appropriateness of Concept : Whether the present concepts actually act as true maps or guide , or do they need a new approach ?

The third is the epistemological quest which tends to test whether the current tools of gaining knowledge are adequate to investigate a concept ? 42

The author further elaborates his point by saying that a concept is to be accepted or rejected not for its accuracy of representations but for the purpose it serves .43 Similarly , sovereignty is to be understood for the purpose it serves . As the social world is not natural, but artificial , there is nothing like pre existing reality .44 This reality has to be construed in a social constructivist model . This means that the concept of sovereignty has to be interpreted according to the changing notions of the society and it has to evolve according to the changing scenario . This brings in legitimacy to the concept . By evolving itself according to the needs of the society , ICISS adopted the concept of Responsibility To protect . The report of the ICISS has made the transition from right of states to responsibility of states . This will make the new concept legitimate and will improve upon the legality

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<sup>42</sup> Friedrich Kratochwil , “ Leaving Sovereignty Behind ? : AN inquiry into the politics of Post modernity .” in Legality and Legitimacy in Global Affairs (ed Richard Falk , Mark Juergensmeyer, et al (Oxford) , Oxford University Press, (2012) , page 388.

<sup>43</sup> Supra note 42 , page 128.

<sup>44</sup> Ibid , page 130.

issue , which humanitarian intervention could not resolve . Luke Glanville has summed up the situation in the following words :

“ .....The commission claimed that , whereas the idea of the right to humanitarian intervention suggested that international society was in confrontation with the sovereign state, the language of the responsibility to protect was instead more of a linking concept that bridges the divide between intervention and sovereignty ...”

45

#### Conclusion

The article has argued throughout that the concept of intervention and sovereignty is delicate and should not be interpreted in a pedantic manner . The concepts of International Law evolve in a societal context , and have to be interpreted accordingly . For this the legality – legitimacy debate is quintessential . Legitimacy provides the necessary psychological construct within which a particular legal culture cultivates and nurtures its values . Only the cherished values are to be accepted as legal. Forced legality itself creates nothing but Sands of Rope .

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<sup>45</sup> Luke Glanville , ‘ Sovereignty and Responsibility To protect : A New History’ (Chicago), University of Chicago Press (2014) , page 191.