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INTERNATIONAL HUMAN RIGHTS PROTECTION: CHALLENGES TO STATE'S SOVEREIGNTY IN A DEMOCRATIC ERA

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INTERNATIONAL HUMAN RIGHTS PROTECTION: CHALLENGES TO STATE'S SOVEREIGNTY IN A DEMOCRATIC ERA[1*]

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Human right violations are difficult to put to an end since in many cases the state itself is the one violating their citizen's rights. At this point, the international community cannot intervene due to the state's sovereignty principle. State's sovereignty principle is one of the international laws primary principles. However, in terms of human right protections, the state's sovereignty principle usually hinders international communities from giving their assistance in which could be seen as an intervention to the state's sovereignty. Intervention in order to protect human rights if conducted within certain boundaries is in accordance with the UN charter provisions. Nonetheless, decision-making indecisiveness within the UN causes failure to protect the human rights. Therefore, the state's sovereignty principle as a concept should be reviewed. Furthermore, reform is necessary at the institutional level of the UN so that dilatory decision-making can be avoided.

Keyword(s): *human rights violation, state sovereignty, democracy*

I. INTRODUCTION

In 2000, former United Nations Secretary-General, Kofi Annan, released a report which widely known as Millennium Report. In the report, he made important critics about human rights protection and relation with state's sovereignty principle. He asked, "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica - to gross and systematic violations of human rights that offend every precept of our common humanity?"[3]

However, Annan's critic is not something new; it has already become unfinished debate from many international law scholars. The problem today is human rights violations mostly carried out by state. Recently, just look out what happened in Syria. Many civilians was killed and displaced from their home because there is internal war between Syria

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[3] Kofi Annan, *We The People; The Role of The United Nations in The 21st Century*, 2000, pp.217

government and its citizens.[4]

In this case, international assistance is difficult to help civilians because it can be interpreted as intervention to state sovereignty, one of prominent principle in international law. At the other side, human rights protection is already became primary principle in international law too. Article 1 (3) United Nations Charter stipulated that "*...promoting and encouraging respect for human rights and for fundamental freedoms for all...*" is became one of purposes from United Nations members.

In global development, almost every country in the world has the tendency to choose democracy to authoritarianism. In spite of the development of many variant of democratic system, there are universal characteristics to differentiate a country with democratic system with a country that is not. According to Abraham Lincoln[5], one of the main characteristic of a democratic country is the recognition of human dignity.

With this basis in mind can be understand if international community in the year 1948 made the Universal Declaration of Human Rights as a legal ground so that the humanitarian atrocity of the second world war does not happen again in the future.

However, in the international community practices there will be contradiction between international law principles, sovereignty *vis a vis* international human rights protection. Important question is if those principles are conflict, which principle spagel prevail?

The existing differences of the two principles will become the focus of this paper. The purpose of this paper is to examine whether the differences are something that cannot be reconciled or should it be a reinterpretation of the two principles.

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[4] Mary Kaldor has pointed out that ratio of military and civilian casualties at the beginning of the 20th century was 8:1, but in the last decade the ration had been almost exactly reverse. Cited from Ralph Zacklin, "*Beyond Kosovo and humanitarian intervention*", in David Freestone, Surya Subedi, Scott Davidson eds, *Contemporary Issues in International Law; A Collection of The Josephine Onoh Memorial Lecture*, Kluwer Law International, The Netherland, 2002, p. 219

[5] It cited from Abraham Lincoln assertion in United States Declaration of Independence which stipulate that "all men are created equal", Mary Ann Glendon, *The Rule of Law in The Universal Declaration of Human Rights*, Northwestern University Journal of International Human Rights, Vol. 2, April 2004, paragraph. 25. Downloaded from http://www.law.northwestern.edu/journals/jihr/v2/5/ 6/11/2012

II. STATE SOVEREIGNTY AND NON- INTERVENTION PRINCIPLES IN INTERNATIONAL LAW

Term of Sovereignty is undoubtedly one of controversial word in international law. According to James Crawford, sovereignty has a long and troubled history and variety in meanings.[6] However, among international law scholars believes sovereignty principle emerges since Peace Treaty of Westphalia 1648. Although based on Randall research it cannot be sustained after his careful analysis of the treaties themselves and a comparison with older peace treaties. These principles are to be found in none of the three main Westphalia Peace Treaties, at least not as principles of international law.[7] Eventless, Peace treaty of Westphalia has been change international relation landscape in Europe and succeeded create modern concept of nation-state that separating relation between state and church.

Sovereignty is supreme authority in a state.[8] In Bodin's term sovereignty used for particular purpose, namely, to place the ruler at the apex of pyramid of authority.[9] Then, in international law sovereignty became an essential aspect that all states have supreme control over their internal affairs, subject to recognized limitations imposed by international law.[10] Thus, state's sovereignty is not absolute and has certain boundaries if linked to inter-states' relationship.

According to Mochtar, understanding of the state's sovereignty as the utmost in international law is a mistake of understanding the reality of the international community.[11] Mochtar's opinion is relevant with states' relationship nowadays when the utmost state's sovereignty become limited. The utmost state's sovereignty exists in limited field within their own state's boundaries.

Anne Peters said that state's sovereignty principle nowadays should

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[6] Stephane Beaulac, *The Power of Language in the Making of International law; the word sovereignty in Bodin and Vattel and The Myth of Westpalia*, Martinus Nijhoff, Leiden, 2004, p.2

[7] Randall Lesaffer ed., *Peace Treaties and International Law in European History*, Cambridge University Press, New, York, 2004, p.9

[8] Oxford Dictionary of law

[9] *op.cit.*, p.122

[10] Oxford Dictionary of law

[11] Mochtar Kusumaatmadja dan Etty R. Agoes, *Pengantar Hukum Internasional*, Alumni, Bandung, 2003.

be redesign. It related with the development within international community that no longer put the state as the center and shifted to the fulfillment of basic human rights.[12]

If so, then state's sovereignty should be seen from two aspects, internal and external. Internal aspect is related to the power owned by the states within their territorial which include right to determine their system of politic, law, and economic. This aspect related with the state's status as an actor or subject in international laws that later on resulted with the external aspect, which is equality among states to interact with each other. As a result, every state does not have the right to intervene others.

Non-intervention principle is one the international laws foundations which exist after the state's sovereignty. Nation-state post Westphalia had full sovereignty based on equality and independence. That mean, every state had their sovereignty and free from other states, also had their equality with each other.[13]

Non-intervention principle is an obligation of each sovereign state to not intervene each other internal affairs on interstates relations. In Corfu Channel case, International Court of Justice (ICJ) states that "Between independent states, respect for territorial sovereignty is an essential foundation of international relations."[14]

The UN charter put non-intervention principle in Article 2 (7). That article states intervention to a state's domestic jurisdiction is in violation of the UN charter. Editorial of the article is a revision of Article 15 (8) of League of Nations Covenant. That article says:

If disputes between the parties is claimed by one of them, and is found by the council, to arise out of a matter which by international law is solely within domestic jurisdiction of that party, the council spagel so report, and spagel make no recommendations as to its settlement.

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[12] Anne Peters, *Humanity as A and Ω of Sovereignty*, The European Journal of International Law, Vol. 20 No. 3, 2009, p.514

[13] Mochtar Kusumaatmadja dan Etty R. Agoes, *Pengantar Hukum Internasional*, Alumni, Bandung, 2003, page.19.

[14] D.J. Harris, *Cases and Materials on International Law*, Fifth Edition, Sweet & Maxwell, London, 1998, page 876.

Comparing the two articles then the term domestic jurisdiction spagel be keep. Domestic jurisdiction definition later on became a source of a debate in San Francisco Convention. Australia thinks Article 2 (7) is not representing the participant's interests. The comment was made due to the stipulation has limited the UN's authorities as a peacekeeper. In the end however, the charter give a limited opportunities though adding a final editorial within Article 2 (7), which states UN's non intervention to domestic jurisdiction does not diminished the use of binding force as regulated by Chapter VII. [15]

D'Amato also criticizes domestic jurisdiction for being no longer in line with recent international laws' development. He explains, if a state conducts an atrocity (genocide, gross human rights violation) to their citizens within their domestic jurisdiction, will international laws has jurisdiction to such event?[16]

Relation between non-intervention principle and domestic jurisdiction stipulated in Article 2 (7) can be reconciled by not neglecting the UN's authorities to uses binding force as regulated by Chapter VII. In reality, the force of Security Council mentioned in Chapter VII tend to become ineffective due to the veto right of permanent members to veto a resolution.

It is based on the interstate relations based on freedom and equality. Prohibition to intervene stipulated in Article 2 (4) of UN Charter that states:

All members spagel refrain in their international relation from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations.

There are several keywords in the article, namely threat of use of force, territorial integrity, political independence, and inconsistent with the purpose of the United Nations.

The editorial word, which later on became open to multiple interpretations, is whether stated criteria is a limitation to non intervention? Whether if the action of a state does not qualify those criteria should

[15] Goodrich dan Hambro, *Charter of The United Nations Commentary and Documents*, World Peace Foundation Boston, 1949, page. 110-121.

[16] Antony D'Amato, "Domestic Jurisdiction", *Encyclopedia of Public International Law*, 1992, page.1090-1096.

be interpreted as an intervention? To find out, court decisions related to that article, and the practices of states should be examine.

The editorial process should also be compare with the preceding, which is Article 10 of League of Nations that states: "To respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the league."

Compared with stipulation above, there are several addendum and omission. Article 2 (4) deletes the term aggression because there is no commonly acceptable definition achieved of the term in the San Fransisco meetings.[17] The article was revised to "against territorial integrity or political independence of any state". The proposal of that sentence was a response to weak state's voices to ensure them from the use of armed violence usually conducted by the stronger states.[18] Interpretation of the use of force in the convention is the use of armed force. Whereas, the use of economical or psychological means cannot become a reference, however the use of force is prohibited by Article 39.[19]

Jessup states, prohibition of use of force which stated by Article 2 (4) is not absolute, if that use of force is not a threat to the integrity of region or political freedom of a state. That requirement can avoid boundaries used by the first sentence of the article. Later, it should be confirmed that the action does not violates the purpose of the UN.[20]

Similar opinion also stated by Higgins. Use of force prohibited in international laws when there is a will of a state to become hostile, and there is a military activity.[21] Each state can use force to recover their national's asset in self-defense if the threat is imminent, however this is only apply if the sovereign state is no longer protect their state's interest. This condition happened in Entebee case.[22]

A use of force can be justified in international laws. However, the use of force should be linked with the self-defense principle stipulated

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[17] Goodrich dan Hambro, *op.cit.*, page.103.

[18] *Ibid.*

[19] *Ibid.*, page. 104.

[20] Philip C. Jessup, *A Modern Law of Nation –An Introduction-*, The MacMillan Company, New York, 1951. page. 162.

[21] Rosalyn Higgins, *Problem and Process International Law and How We use it*, Oxford University Press, England 1994, page. 246.

[22] *Ibid*

in Article 51 of the UN Charter which says:

Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Despite the self-defense written editorial in the article, in *travaux preparatoires* stated that the right is inherent. Such stipulation has a precedence if linked with Kellog-Briand Pact 1928.In the agreement, the right to defend is not stated implicitly, however according to Mr. Kellog, The US' state secretary, the right of self defense is inherent as a result it was unnecessary to state it explicitly.[23]

The right to self-defense is regulated by the article can be conducted by states with several limitations. First, this right can be implemented if there is an armed attack. The phrase armed-attack is used and not forces as written in Article 2 (4) are a progress. Armed attack does not open to interpretation. Second, after the UN's Security Council take the necessary action for peacekeeping. This requirement should be fulfill by every nation conducting the self-defense.

The self-defense implementation if linked by Article 2 (4), then it will be clear that a state in preserving their right cannot use the act of threat and power that disturb the integrity of a region and the political freedom of other state. However, the action taken cannot violate the UN' purpose which is to achieve security and world peace. Article 51 stipulation does not say a mean that can be conducted to defend itself. The article usually associated with the right to use limited armed forces.

Higgins says, the UN' charter has granted limited permission to use armed forces in terms of the right to self-defense, individually or collectively. UN also take into consideration the act can be a mechanism to

[23] Goodrich and Hambro, *op.cit.*, page.299.

demand legal right and to achieve social and political justice.[24]

Using armed forces to defend itself is an adoption of Caroline Case. In that case a famous statement made by the former foreign minister of United States of America. He said the need of self-defense should comply with several criteria, namely instant, overwhelming situation, leaving no choices of means, no moment for deliberation.[25] Those requirements should be fulfilled by a state or several states if they want to claim their rights to defend their selves using armed forces.

Several scholars of international laws and states' practices have interpreted the right of self-defense to an extent of self-preservation, which is a broad interpretation. Bowett for once states that Article 51 can be interpreted as a protection to self-defense rights and not to limit it. According to him, there is no relation between armed aggressions with the right of self-defense. There is no state, which can wait to the point of armed attack happening, to defend their selves.[26]

Bowett opinions later on became a basis for the *anticipatory self-defence* doctrine or what the American often said as a pre-emptive strike such as conducted in Afghanistan and Iraq.

There are two views regarding the right of self-defense. First cumulative theory which claims that a strike conducted by guerrilla near the border can be seen as a whole. Therefore, a pre-emptive strike can be launch to prevent possible attack in the future. Prevention attack can be justified as an anticipatory self-defense. The action should be based on constant attack and the belief continuation of the attack.[27]. This action often conducted by Israel to Palestine and Lebanon.

Second, the rights of self-defense conducted if there is an armed attack, this view agree with Article 51 stipulation. Henkin states that in the early draft of Article 51 could not be found a broad interpretation of what it is a self-defense. The article explicitly says that the right of self-defense exists when there is an armed attack. That article cannot be interpreted as a state can launch a pre-emptive strike based on self-defense assumption.[28]

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[24] Rosalyn Higgins, *op.cit.*, page. 238.

[25] J.L. Brierly, *The Law of Nations*, Clarendon Press, Great Britain, 1955, page. 316.

[26] D.J. Harris, op.cit., page. 897.

[27] *Ibid.*, page. 898.

[28] *Ibid.*, page. 897.

Self-defense concept in Article 51 stipulation can be implemented individually or collectively. The stipulation requires every act of self-defense conducted must be reported to the security council of the UN who has the authorities to restore international peace and security. It is hard to carry out this obligation, because usually the report sent after the self-defense attack happened.

Some international laws scholar have argued that the humanitarian intervention doctrine contradict international laws due to the doctrine is in violation with one of the fundamental principles in the international laws which is non intervention.

Non intervention principle according to some expert has come to the stage of *peremptory norm* (jus cogens).[29] When an international principle has reached Jus Cogens level then the principle no longer excluded from any circumstances. However, Jus Cogens is still debated in international laws since it is difficult to determine what is the factor that makes an international law principle a Jus Cogens.

According to Schwarzerberger, in order to make an international jus cogens, an international laws regulation should has a universal characteristic or fundamental principles. For instance, the principles should have extraordinary impact aside to the significant of other principles. Besides, that principle is an essential part of the existing international laws system or has a reflection of characteristics of existing international laws. If such characteristics are implemented then will emerge the purpose of the fundamental principle within the body of international laws, which is sovereignty, recognition, agreement, good faith, self-defense, international obligations, and freedom in offshore ocean.[30]

Vedross has different views, according to him there are three main characteristics to become a jus cogens in international laws, which are:

1) Common interests among international community.
2) Existing for humanitarian purposes.
3) In line or in accordance with the UN' charter.[31]

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[29] Jianming Shen, *Then Non Intervention Principle and Humanitarian Intervention under International Law*, International Legal Theory, 2001. page.1.

[30] Yudha Bhakti Ardhiwisastra, *Hukum Internasional* (Bunga Rampai), P.T. Alumni, Bandung, 2003, page. 171.

[31] Ibid., page. 176.

There is a huge possibility of jus cogens in international laws if the stages required by several experts above have been passed. However, in the international laws development, every stipulation and norm always evolving in accordance with recent development. So how to determine if a principle should be keep as a norm that cannot be excluded in the practices of states according international laws?

Shen based his opinion on the non-intervention principle which entering the jus cogens category, based on international laws instruments and international court decision. [32] Article 2 (4) of the UN' charter according to Shen is the main basis that has to be referred when determining a non intervention principle is a jus cogens. The charter's stipulation later on supported by the declaration made by the UN's general assembly regarding *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* (G.A. Res. 2131/XX, December 21, 1965). The first paragraph of the declaration states that every states who do not have the right to intervene, directly or indirectly, for any reason, on internal and foreign state's affairs.

The declaration reaffirmed by the international community through a declaration of UN's general assembly, which later on known as *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* (G.A. Res. 2625 (XXV), October 24, 1970). This declaration not only condemns the act of intervention but also declares it as a violation to the international laws, as a result an act of intervention become an international responsibility.

Non intervention principle also reaffirmed by ICJ when making a decision on the Nicaragua Vs United States of America case. The ICJ decides:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. Between independent States, respect for territorial sovereignty is an essential foundation of international relations and international law re-

[32] Jianming Shen, Ibid., page. 3-4.

quires political integrity also to be respected.... The existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States.

Based on those factors, non-intervention principle can be categorized as a jus cogens. However, not all experts agree that the non-intervention principle can be categorized as a jus cogens. Non-intervention principle is not absolute at all. It is possible to intervene such as, in humanitarian missions.

Among intervention advocates, their argumentations also based on the interpretation of Article 2 (4) of the UN's Charter.[33] Article 2 (4) is not an absolute prohibition but a limitation so that intervention do not breach *territorial integrity, political independence and in any other manner inconsistent with the Purposes of the United Nations*. D'Amato research shows that if intervention is conducted without violates the limitation stipulated in Article 2 (4) it is allowed.[34]

Teson also agrees with D'Amato, according to Teson, armed violence only prohibited by the UN if :

(a) *when it impairs the territorial integrity of the target state*;
(b) *when it affects its political independence; or*
(c) *when it is otherwise against the purposes of the United Nations*.[35]

III.INTERNATIONAL HUMAN RIGHTS PROTECTION: CHALLENGES AND PROSPECT

At the Hague Academy of Public International law one decade ago, Tomuscat delivered lecture about international human rights protection. He stated that:

The international legal order cannot be understood any more as being based exclusively on State sovereignty. ... States are no more than instruments whose inherent function it is to serve the interests of their citizens as legally expressed in human rights. At present time, it is by no

[33] Yoram Dinstein, *War, Aggression and Self-Defence*, Second Edition, Cambridge University Press, Australia, 1994, page. 89.
[34] Anthony D'Amato, *There is no Norm of Intervention or Non Intervention in International Law*, International Legal Theory, ASIL, 2001, page.20.
[35] Eric Adjei, *Ibid.*, page.29.

means clear which one of the two rivaling Grundnorms will or should prevail in case of conflict. Over the last decades, a crawling process has taken place through which human rights have steadily increased their weight, gaining momentum in comparison with State sovereignty as a somewhat formal principle. The transformation from international law as a State-centred system to an individual-centred system has not yet found a definitive new equilibrium. [36]

Tomuscat's statement above is relevant until this date. Protection and enforcement of human rights in international laws still hindered by the perception that the principle should honor state's sovereignty principle. This obstacle due to human rights violation this days usually created by the state's omission or commission. Civilian casualties happened in Syria today or mass murder of Rohingya ethnicity in Myanmar can be prove of the difficulty that the states having to provide human rights protections to its people.

This human rights violation creates concerns among international community. International community actually want to provide humanitarian aids, but that intention cannot be fulfill because event that happened such as in Syria and Myanmar is conceive as an internal affairs. Deadlock between human rights protection and the enforcement of state's sovereignty principle needs a solution so that there will be no more casualties in the future. Humanitarian assistance such as humanitarian intervention needs to be done by the international community.

Black's Law Dictionary defines humanitarian intervention as an intervention conducted by the international community to reduce human rights violations within a state, even if the intervention violates the state's sovereignty.[37] Parry and Grant define humanitarian intervention as an arbitrary act of a state to its people, especially minority, more accurately atrocity and crime that shock human consciousness. Moreover, other state which usually the stronger, take actions on that event with the use of threat and force with intention of protecting the violated minority.[38]

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[36] Tomuscat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, cited from Anne Peters, loc.cit.

[37] Bryan A. Garner ed., *Black's Law Dictionary* , Seventh Edition, Book 1, West Group, ST. Paul, Minn, 1999, page. 826

[38] Parry and Grant, *Encyclopaedic Dictionary of International Law*, Oceana Publica-

Some international law scholars argued that humanitarian intervention doctrine contradicts the international laws. However, according to Teson there are several things considered common within international customary of humanitarian intervention. First, use of armed forces from one state to other state's domestic affairs. Second, humanitarian reasons, which used as a justification of armed forces.[39]

Humanitarian intervention obtains its legitimacy from the interpretation of Article 1 (3) and 2 (4) of UN's Charter.[40] Article 1(3) stipulated that in accordance to achieve United Nations purposes, it can be done by promoting and encouraging respect for human rights and fundamental freedoms. It means that international human rights protection is considered as one of fundamental purposes among other UN objectives.

Article 2 (4) is not an absolute restriction, it is a limitation so that intervention does not violate a *territorial integrity, political independence, and in any other manner inconsistent with the Purposes of the United Nations*. According to D'Amato, the purpose of territorial integrity is so that the state does not lose their territory permanently, whereas the state who does the humanitarian intervention does not permanently take another state's territory, the intervention only intended to restore the human rights.[41]

Humanitarian intervention has its merit if conducted without violating the limitation stipulated in Article 2 (4). According to D'Amato, ever since 1945 and the birth of prohibition of genocide convention, a Universal Declaration of Human right, state's authorities to act unjustly to its people has been reduced. Territorial boundaries are no longer a problem in the human rights promotion and protection.[42]

State's sovereignty that usually became the reason that humanitarian intervention cannot be justify reaffirmed by the international laws, contextually had failed. Hans Kelsen shares this view; according to him

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tion, Inc., Newyork, 1986, page. 190-191.

[39] Eric Adjei, *The Legalitiy of Humanitarian Intervention*, Thesis, University of Georgia, 2005, page. 8.

[40] Yoram Dinstein, *War, Aggression and Self-Defence*, Second Edition, Cambridge University Press, Australia, 1994, page. 89.

[41] Anthony D'Amato, *There is no Norm of Intervention or Non Intervention in International Law*, International Legal Theory, ASIL, 2001, page.20.

[42] Anthony D'Amato, *Ibid.*, page.21

the purpose of international laws is to restrict state's sovereignty.[43] Ever since individuals became an international subject, state's sovereignty obtained from individual who delegate their authorities to the state.[44] So, when a state breaches individual rights, they can ask for help to other state to restore their rights. At that moment, humanitarian intervention exists and there are some obligations of state to cooperate among themselves to protect and promote human rights.

Existing practices among states also create a precedent; humanitarian intervention can be seen as an international customary. Humanitarian intervention is an obligation of each state. The doctrine is not a right such as the right to self-defense. The doctrine exists when there are violations to human rights. This intervention can be conducted individually or collectively.

International community has a common understanding that humanitarian intervention can only conducted collectively through the general assembly authorities with forming an international cooperation. This is based on the UN's Charter chapter VII, which provides exception to the use of armed force. However, humanitarian intervention that conducted unilaterally or collectively without the general assembly authorities still debated.

Critics highlight the legitimacy of use of violence in the name of humanitarian intervention; usually the act is misused by a strong state to oppress the liberty and independence of weaker states. Shen explains, humanitarian intervention is not a legal debate, this doctrine is related with an interest, power, and dominance issues.[45]

The legitimacy of humanitarian intervention advocates faces these critics with an analogy of police with its office. If a police officer abuses its authority and its power, should we close the whole police station? The answer of course is no. Similar with the humanitarian intervention, international laws and international community duties are to protect and promote human rights, so that when state intervene another state by reason of humanity but then abuse it just to expand power , it can not be use as justification to expunging the humanitarian intervention.

[43] Ibid., page.20.

[44] Hans Kelsen, *General Theory of Law and State* (alih bahasa oleh Somardi), Bee Media, Jakarta, 2007, page.414-415

[45] Jianming Shen, *Ibid.*, page.9.

Practices of states in humanitarian intervention can be found in the coalition force of US, Britain, and France in Iraq back in 1991. This coalition use the security council' resolution 688 that condemn the Iraq's government to the Kurdi. In the resolution, the Security Council does not say the use of armed forces action collectively. However, several months later the three states launched "Safe Hands" operation in Northern Iraq with reason of humanitarian assistance. Secretary General of UN, at that time, Perez de Cuellar states that the operation can violate Iraq's sovereignty, if there is no clearance from the Iraqi government or the Security Council's authorization. However, the secretary general also expresses the importance of the actions for morality and humanitarian reasoning. To legitimate the coalition's actions, finally the Iraqi' government gave their permission to the UN to sent humanitarian aids to northern Iraq.

Case above can be cited as an example of humanitarian intervention. As said by the British's government, intervention to northern Iraq was not mandated by the UN. However, we act on it in northern Iraq based on humanitarian intervention as regulated by international laws customary.[46]

Humanitarian intervention also happens in Yugoslavia and Somalia in the year 1992. Although the Security Council has the legitimacy to use armed force based on Chapter VII of the UN's Charter, what happened was a state or several states intervene with humanitarian reasons and then legitimated by a security council's resolution.

The coalition's actions should be base on a strong legal basis. With the Security Council's resolution, it suggests that the actions taken by the coalition force was an exception to the prohibition of the use of armed force by a state unilaterally or collectively without the Security Council's authorization. The practices conducted by states once again prove that humanitarian intervention is an exception, although in the charter cannot be find an explicit stipulation regarding humanitarian intervention.

Humanitarian intervention does not have an explicit stipulation in the UN's Charter. However, the stipulation of prohibition of the use of armed forces regulated in the UN' Charter can be interpret differently,

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[46] Eric Adjei, *Ibid.*, page. 58.

whether the prohibition of the use of armed force is absolute or only within certain limitation.

The court's decision also does not legitimize a humanitarian intervention. ICJ's decision in the Nicaragua vs. US case, overrule US reasoning that says their used of armed forces was legal on the ground of human rights protections.[47]

However, the ICJ' decision does not interprets that humanitarian intervention contradicts international laws. ICJ overrules the US reasoning because it is absurd. According to ICJ the use of armed forces with humanitarian reason should be in accordance with its purpose, whereas what US did was exploded piers, oil refineries which have no correlation with the protection of human rights. That is why the ICJ overrules the US's argumentations. ICJ does not explicitly state that humanitarian intervention contradicts international laws.

Polemic on legitimacy of humanitarian intervention makes international community find another solution to protect human rights. In 2001, **International Commission on Intervention and State Sovereignty (ICISS) is established, which later on gave birth to the concept of responsibility to protect (R2P).**

Responsibility to Protect has three main pillars in providing human rights protection, namely:

1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations.[48]

Based on this concept the international community has an obliga-

[47] Jianming Shen, *Ibid.*, page.12.
[48] A/RES/60/1, para. 138-140

tion to conduct actions in order to prevent human rights violations happened in a state. In my opinion, there is nothing something new in R2P. It just reaffirmed the concept of humanitarian intervention. However, with the states' commitment to approve R2P concept then ethically this action can be justified according to international laws.

IV. INTERNATIONAL LAW IN TRANSITION

Based on current interstates relationships the absoluteness of the principle of state's sovereignty on human rights protections become more and more challenging. It becomes common because international laws pattern putting more emphasize on the model to strengthen states. [49] International laws in essence only regulate interstate's relations. However, the tendency is no longer realistic.

State is no longer the only international laws subject. Individual has become one significant subject in international laws. That is why the development of international laws forward should be able to provide the maximal protection to individual subjects.

This assumption does not mean that state's authorities should be weakening at all by international laws. However, international laws must provide boundaries and limitations for the states so they cannot abuse its power and violates human rights of its citizens. Current human rights violations have proven that state have a significant role in human rights protection within a region. If so, then the international community should take initiative to alter the face of international laws so that it sided to the protection and fulfillment of human rights.

International law's transition happening today that put more emphasize on human rights protection is an effect on emerging democracy post world war two.[50] Since then democracy concept has been spreading all around the world, promoted by the victors. Democracy concept within those states is influenced by liberalism which is the embryo of democracy.

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[49] Frank J. Garcia, *Globalization and The Theory of International Law*, Research Paper, Boston College Law, 2005, p.1

[50] Thomas Ohlson and Mimmi Soderberg, *From Intra-State War to Democratic Peace in Weak States*, Uppsala University Paper, Downloaded from http://www.pcr.uu.se/digitalAssets/18/18593_UPRP_No_5.pdf 5/11/2012

According to M. W Doyle, there are three commitment to rights that became the foundation of liberalism. Firstly, negative freedom which is the freedom from the ruler arbitrary.[51] Practical implementation of this freedom is giving people the right to express their thought, freedom of press, and equality in law and ownership. Secondly, positive freedom that is the right to protect and fight for their freedom.[52] Positive freedom context includes the rights of social and economic, education, health and employment.

International law transform based on this negative freedom. Stated from an absolute state sovereignty to a state that respects human rights. In this liberalism context every citizen became the basis of argumentation on why state's sovereignty principle can end as a government conducted human right violations.[53]

Those orientation changes of international laws are not completely accepted by all state. This suspicion is understandable as explained by Cassese[54] and Koskenniemi[55] who said that international law is not only a set of neutral rules. International law is also a political contest from international relation actors.

Thus, international law transition into the strengthening of human rights protection conceives as stronger states effort to put pressure and dictate to weaker states. On one hand, this suspicion is understandable as an effort to protect human right within a state by other state usually includes military force. Weaker states do not possess this factor. Nevertheless, that reasoning cannot became an obstacle for doing appropriate measure in a timely manner against a state's abuse of power to its people.

As Kofi Annan said earlier in this paper, if the state's sovereignty always be used as a shield to justify a state's injustice against its people then millions of life will vanish without any protection.

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[51] M.W. Doyle, "Liberalism and Foreign Policy". In S. Smith, A. Hadfield & T. Dunne (eds), *Foreign Policy: Theories, Actors, Cases*, Oxford University Press, Oxford, 2008, p.442, cited from Abubakar Eby Hara, Pengantar Analisis Politik Luar Negeri: Dari Realisme sampai Konstruktivisme, Nuansa, Bandung, 2011, p. 61

[52] ibid.

[53] This view was shares by Hans Kelsen to lookup relation between state's sovereignty priciple and human rights protection.

[54] Antonio Cassese, *International law in Divided world*, Oxford University Press, 1987

[55] Martti Koskenniemi, *From apology to utopia*, Cambridge University Press, 2005.

V. CONCLUSION

In essence, law aims to create human welfare as well as international law. To achieve human welfare the basic human rights should be protected and fulfilled. International law should be able to bring that into reality. Currently, human rights protection in international laws always hindered by the state's sovereignty principle.

Recent democracy state concept development post world war two has strengthened individual's right, inspired by liberalism. Thus, people have rights to voices their human rights protection if abuses happened. State's sovereignty ended when a state abuses the right of its people, at the same time international community's responsibility exist to protect its rights.

International laws' transition should not be seen as an effort to weaken a state's power but as an initiative to limit the state's power to prevent abusing their people. A doctrine humanitarian intervention and responsibility to protect should be able to be implemented, of course with putting limitation so it cannot be exploited by the stronger states to weaken the weaker states. Limitation humanitarian intervention and responsibility to protect is can achieve through United Nations by strengthened it power and effectiveness as an international organization among states.

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