

Changing Dimensions of Intervention Under International Law: A Critical Analysis

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Abstract

The concept of intervention under international law is not new but is as old as the concept of state and was growing slowly and gradually since then. However, after World War II, the law of intervention developed rapidly. Historical analysis shows that states used to intervene in the internal affairs of other states. However, after the middle of 20th century, various developments took place resulting in shrinking of area of domestic jurisdiction. These led to changed concept of intervention under changing dimensions of international law giving rise to the question of legitimacy. Various instances of intervention have taken place since 1990s, which have raised eyebrows all over the globe. This article is a humble attempt to make an analysis of the concept of intervention and its legitimacy under the presently changing dimensions of international law.

Keywords

intervention, international law, WWII, ICJ, Monroe, Hallstein, interference, Brezhnev Stimson, dictatorial

Introduction

After World War II, the law of intervention¹ developed rapidly. Under traditional international law, the principle of non-intervention was followed, which means a state should not intervene either directly or indirectly in the internal affairs of another state. Oppenheim, while supporting this principle, opined, “the interference must be forcible or dictatorial, or otherwise coercive; in effect depriving the State intervened against of control over the matter in question. Interference pure and simple is not intervention.” He further stated that the nonintervention is essential for ensuring every state’s sovereignty, territorial integrity, and political independence (Jennings & Watts, 1996).

Significantly, under modern international law, the principle of nonintervention is an international legal norm under Article 2(4) and Article 2(7) of the United Nations (UN) Charter. The International Court of Justice (ICJ) has also supported the nonintervention principle in the *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*; [1986] ICJ Rep 108). Here, plea of Nicaragua was that the United States had violated its treaty obligations to Nicaragua under Article 2(4) of the UN Charter by involving in training, recruiting, equipping, arming, financing, supplying and supporting, and aiding and directing military and paramilitary actions in and against Nicaragua. In this case, the ICJ also recognizes two

types of interventions, namely direct intervention through military and indirect intervention (any interference) in the domestic affairs of a state.

Under traditional system, various matters were within the jurisdiction of a state. However, globalization has resulted in an international system of cooperation and interdependence, which has decreased the horizon of domestic jurisdiction and increased that of international jurisdiction. Therefore, in the present scenario of changed dimensions of international law, principle of nonintervention is also changing. Practice has shown that on various occasions, states have intervened in the domestic affairs of other states strictly not per law, which raised eyebrows all over the globe. And in such situation, question of legitimacy of intervention arises.

Therefore, moot question is whether the principle of non-intervention has undergone a change in the changed circumstances of international law. However, to answer this question, various dimensions of the issue need analysis, such as What is the principle of nonintervention and how it has evolved? What is modern law of intervention in the context

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of the UN Charter? What is the impact of decreasing horizon of domestic jurisdiction and increasing horizon of international jurisdiction on the principle of intervention? Are there any exceptions to the General Principle of Nonintervention? What types of interventions are legitimate and justified?

This article is a humble attempt to critically analyze whether the principle of nonintervention has undergone a change with the passage of time. This analysis has been done by raising various pertinent questions (mentioned above) and by making efforts to answer them.

Principle of Nonintervention: Historical Evolution

Before the 19th century, intervention was an ordinary policy matter within the foreign affairs of a state. In ancient period, it was adopted as a method of settlement of dispute by the Roman Empire. In the middle ages, it was frequently used to enforce impartial and just rules (Preiser, 2008). Vattel deserves credit to be the pioneer of formulating nonintervention principle in 1758 (*Droit des gens ou principes de la loi naturelle*), but it remained doubtful till the 19th century, whether the states adopted and followed it. The first country that adopted this idea was France, and it incorporated the nonintervention principle in Article 4 of its Constitutional Act (*Sur le droit de paix et de guerre* of May 22, 1790). However, a declaration issued in November 1792 by the French government in which it claimed its right to intervene in certain cases (where interference proved necessary to assist in other people's struggle for liberty) showed that the French codification of the principle did not restrict its own right to interfere in the inner affairs of other states (Kunig, 2008).

At the end of the 18th century, Jurist Kant in his work *Zum ewigen Frieden* also laid emphasis on nonintervention principle. Despite the nonintervention principle, some states continued to formulate law or adopted treaties mentioning the grounds for intervention. In Europe, the Holy Alliance was created, which claimed the right to intervene in cases of European revolutionary governments for reasons of legitimacy. An example of treaty mentioning the right of intervention was a treaty between Austria-Hungary, France, Germany, Great Britain, Italy, Russia, and Turkey for the Settlement of Affairs in the East, allowing European Powers to interfere in the internal affairs of Turkey and Africa.² Significantly, we had examples also where states intervened in the affairs of others like Austria intervened in Naples (1821) and France in Spain (1823).

Subsequently, in the late 19th century, military intervention like situation in Latin America by some European Powers and the United States led to the adoption of various doctrines by the European states, such as Monroe Doctrine,³ Hallstein Doctrine,⁴ Brezhnev Doctrine,⁵ Stimson Doctrine,⁶

and Calvo Doctrine/Calvo Clause⁷ where one or the other state had declared that a particular subject matter was a state interest or that a particular action would be taken in response to a defined situation (intervention) if it arose in the future. After World War I, the United States expressly declared that any change in state borders achieved by forcible means would not be recognized by it. During that time, various efforts were made to formulate law of nonintervention. For example, Article 15(8) of the Covenant of the League of Nations and Article 11 of the "Montevideo Convention on Rights and Duties of States" of 1933 prohibited "interference with the freedom, the sovereignty or other internal affairs, or the processes of the Governments of other nations."

After World War II, the UN Charter laid emphasis on the increasing cooperation among nations which made it slightly easy for the states to intervene in the affairs of other without the use of force, which led to the development of the principle of indirect intervention through political, economic, and diplomatic means.

Modern International Law Relating to Principle of Nonintervention

As discussed earlier, the two important articles relating to the principle of nonintervention provided under the UN Charter are Article 2(4)⁸ and Article 2(7), which prohibited UN as well as states from intervening in the domestic affairs of a state except the collective action under Chapter VII of the UN Charter.⁹ Since its establishment, efforts are made for the development of the nonintervention principle by the United Nations Organization (UNO), and first important effort is United Nations General Assembly (UNGA) resolution on "The Essentials of Peace," in which the UNGA called upon every State "to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people in any State". After WWII, the first institution which considered nonintervention as one of the duties was the International Law Commission (ILC), which in its Draft Declaration on Rights and Duties of States, 1949 under Article 3 provided that every state has the duty to refrain from intervention in the internal or external affairs of any other state.

First declaration mentioning this principle was Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, 1965 in which the UNGA declared that "no State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State" (The UNGA, 1965). Declaration on Principles of International Law concerning Friendly Relations and Cooperation among states in accordance with the Charter of the UN, 1970 reiterated that

armed intervention and all other forms of interference in the form of providing financial or other assistance or to incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State, or interfere in civil strife in another State violate international law.

Furthermore, the Charter of Economic Rights and Duties of States 1974 stated that economic as well as political and other relations among states shall be governed by various principles, and principle of nonintervention is one of them. However, the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, 1981 stated various rights and duties of a member state regarding the principle of nonintervention and noninterference in the domestic affairs, and the most important duty is to refrain from the threat or use of force in their international relations in any form whatsoever to violate the existing internationally recognized boundaries of another state, to disturb the social or economic structure of other states, to overthrow or change the political system of another state or its government, to cause tension between or among states, or to deprive peoples of their national identity and cultural heritage. And finally, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, 1987 reiterated that every state has the duty to refrain in its international relations 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 UN purposes.

It is noteworthy that even cooperation treaty between states as well as the charters of international organizations such as the World Bank also mentions this principle (World Bank Group, 2016). For example, Charter of World Bank provides that neither the bank and its officers will interfere in the political affairs of any member, nor their decisions be affected by the political structure of the member or members concerned. Only economic considerations are relevant to their decisions for assisting the member states in reconstruction and growth of their territories and for providing loan.

The ICJ has also explained and supported the principle of nonintervention in number of cases. For example, in 1949, in the *Corfu Channel case* ([1949] ICJ Rep 35), the ICJ reaffirmed that “the alleged right of Intervention as the manifestation of a policy of force, such as has, in the past, given right to the most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law.” In 1986, the ICJ in the *Nicaragua case* ([1986] ICJ Rep 106 [202]) opined that “the principle of non-Intervention involves the right of every sovereign State to conduct its affairs without outside interference.” It is heartening to note that in this case, the ICJ affirmed that “the principle of non-Intervention is part and parcel of customary international law and is a *jus Cogen*.”¹⁰ The ICJ also talked about UNGA resolutions such as Resolution 1965 and

Resolution 1970 which had played commendable role in development of nonintervention principle as customary law. Again in 2005 in *DRC V. Uganda* ([2005] ICJ Rep 168), the court reiterated that “the principle of nonintervention prohibits a State to intervene, directly or indirectly, with or without armed force for any reason whatsoever, in the internal affairs of another State.”

Intervention: Exceptions to the General Principle of Nonintervention

The Moot question which has become debatable in the changing global scenario and needs discussion is, “Is there any exception to this general principle of nonintervention mentioned under UN Charter?”

Today, principle of nonintervention mentioned under Article 2(4) and Article 2(7) of the UN Charter has become a *jus Cogen* under international law but subjected to two exceptions as mentioned under the Charter. Significantly, these two exceptions are Collective Intervention under Chapter VII (Articles 39-51) where there is threat to peace, breach of peace, and act of aggregation and second self defense by a state. However, before understanding intervention by the UN or a state, it is utmost important to understand types of intervention.

Types of Intervention

Intervention is of two types: direct intervention and indirect intervention.

Direct Intervention: Military Intervention or Intervention by Forcible or Dictatorial Means

Under traditional international law, only military intervention or intervention by forcible or dictatorial means may be in the form of military occupation of territory, embargo, demonstration, blockade, seizure of assets of another state or its nationals, arrest and detention of foreigners, or expulsion of foreign diplomats (Kunig, 2008). As per Article 2(4) of the UN Charter, intervention is prohibited to protect sovereignty, territorial integrity, and political independence of a state.

Indirect Intervention

As discussed earlier that the enhanced cooperation among nations made it possible for the state(s) to indirectly interfere in the affairs of other states without the use of force, a conflict arose between interference in the name of cooperation on one side and need to protect sovereignty and political independence of a state on the other side. Various instruments were adopted in the 20th century to prohibit any kind of interference directly or indirectly, that is, whether through military or through political, economic, and diplomatic

means. Even ICJ in *Military and Paramilitary Activities in and against Nicaragua Case* ([1986] ICJ Rep 106 [2]) laid emphasis on the new type of intervention and gave broader definition of intervention, which prohibits both direct and indirect interference.

Main forms of indirect intervention. Three main forms of indirect interventions are subversive, economic, or even diplomatic intervention.

Subversive intervention. Subversive intervention means any activity by one state with the intention to affect the situation in another state. Such activity is generally conducted through radio or television shows with the aim of encouraging revolt or civil strife in another state or to provide assistance to illegal and violent activities. In general, it is difficult to prove that state was involved in subversive intervention.¹¹

Economic intervention/coercion. Economic intervention involves the imposition of sanctions, embargoes, and boycott by interfering with trade and shipping and by denial of access by land and water. Furthermore, banning export and import or external economic policy impositions (interventions) by International Financial Institutions (IFIs), while taking action under Article 41¹² of the UN Charter, is another form of economic intervention especially when wrongful act is done by that state,¹³ for example, economic sanction against Iraq, 1991, and sanction in Democratic People's Republic of Korea (DPRK), 2016 (recent example), whereby all member states are prevented from transfers to the DPRK any technical training, advice, services, or assistance related to the provision, manufacture, maintenance, or use of nuclear-related, ballistic-missile-related, or other weapons of mass destruction (WMDs)-related items, materials, equipment, goods, and technology.¹⁴ Economic intervention (economic coercion) is a debatable issue, as it is very difficult to draw a line between the legitimate economic sanctions and illegal pressure put upon another state. However, to determine whether economic intervention is legitimate under law, two tests are important: identifying the relationship between the means and the object and following the procedure laid down under Chapter VII (Resolution by United Nations Security Council [UNSC]; Kondocho, 2016). Earlier, the ICJ in *Military and Paramilitary Activities in and against Nicaragua Case* ([1986] ICJ Rep 106 126) stated that the mere refusal or termination of aid to developing countries or the breach of an economic treaty do not constitute a breach of the nonintervention principle as states are free to decide which other states they want to give economic support to.

Diplomatic intervention. The diplomatic measures generally do not amount to an illegal interference, but may be considered as a forbidden intervention, if they involve communications of threatening tone, use of military or other coercive measures. Generally, the diplomatic measures

against other states are declared as unfriendly acts rather than illegal interventions. Therefore, some jurists believe that diplomatic measures, such as good offices, mediation, recall of ambassador, and conciliation, cannot even be regarded as unfriendly acts, as these are permitted under the UN Charter, whereas others consider it as diplomatic intervention. The practice has shown that the maximum number of diplomatic interventions is through mediation by third parties or recalling of ambassador.

The mediators enter into a conflict to amend, modify, change, or influence the result of any situation. The mediator can represent a state or a nonstate actor. The offers to mediate represent an explicit offer from a third party and are recorded on the date of the offer. The recall of an ambassador occurs when the intervening government calls its diplomatic representatives home, either permanently or for consultations, and generally such recall is due to the behavior of the intervened state in its internal conflict. A study has shown that in total there were 403 diplomatic interventions; 332 were mediations and 5 were recalls of diplomatic representation. Each of these observations reflects external efforts to influence the course of the conflict through diplomatic channels (Regan & Aydin, 2006).

Intervention by the UN or a State

Under the UN Charter, only two entities are permitted to intervene: UN and a state. No other entity like private persons, institutions, or multinational companies can violate principle of nonintervention through their behavior as international law provides that state responsibility becomes operative for the acts of private entities if its own organs have cooperated with these entities and thereby contributed to the breach of an international state obligation (Responsibility of States for Internationally Wrongful Acts, 2001, 2005). Let us analyze intervention by the UN or a state.

Intervention by UN: Collective Intervention

The collective intervention under Chapter VII is an exception to the general principle of nonintervention mentioned under Article 2(7) of the Charter where the UNSC is empowered to take collective actions where there is a threat to the peace, a breach of the peace, or an act of aggression has taken place. However, a set procedure is given, that is, first, UNSC determines under Article 39 of Chapter VII of UN Charter whether there exists threat to peace or breach of peace or whether any act of aggression has taken place and makes recommendations or decides what measures are to be taken to maintain or restore international peace and security. If the UNSC is satisfied about the existence of such threat or breach, then it is required to use provisional measures.¹⁵ However, where such measures prove to be inadequate, it can take such action by air, sea, or land forces of the member state as are essential for maintaining international peace and

security.¹⁶ It means UNSC will not straightway use force during collective interventions, and it can employ military force if provisional measures do not prove adequate to deal with the situation. During collective intervention, UNSC can direct uses of force by regional organizations like North Atlantic Treaty Organization (NATO) or “coalitions of the willing,” and they can authorize peacekeeping missions executed and financed by the members of the UN to take action. Such missions play commendable role in maintaining peace/stability. However, General Assembly President Miguel d’Escoto Brockmann (Nicaragua) opined that every action under Chapter VII of the UN Charter should be in accordance with the Charter. Any military action must be taken under Chapter VII of the Charter and only in the situation that causes immediate danger to international peace and security (Department of Public Information, UN, 2013).

Practically speaking, collective intervention ultimately depends upon the effectiveness of collective security system established under the Charter and especially on the willingness of the permanent members (Wood, 2013). Where any permanent member has direct or indirect interest in not taking collective action, it exercises veto power, whereas in other case action is taken immediately. For example, the UNSC took such actions at the beginning of various conflicts: Korean conflict (1950–53), Congo conflict (1961), and conflict in the Gulf War, 1991 (Iraq-Kuwait War, 1990–1991), Libya (2011), and Syria (2012).

Grounds of Collective Intervention

Generally, there are following grounds on which collective action can be taken: humanitarian ground, civil war, and environment catastrophes.

Collective intervention on humanitarian ground. Today, human rights law has become a part and parcel of international law; therefore, humanitarian intervention has become a debatable issue. Humanitarian intervention in a strict sense means an international intervention through the use of force for the protection of the inhabitants of another state who are subjected to human rights violation.¹⁷ A renowned jurist has opined that threat or use of military force must be proportionate to danger so as to end tyranny and anarchy in the intervened state.¹⁸ As per this definition, humanitarian intervention is justified when it is for a specific objective of ending tyranny or anarchy.

It is noteworthy that simply on the ground of human rights violations, the UN cannot intervene in the affairs of any member state, but it is only in case of aggravated violations where the national authorities either are unwilling or unable to protect its nationals and the situation affects international peace and security, provisions of the Chapter VII will be applicable. The example of intervention by the UN is in Iraq on behalf of the Kurdish people in 1991.

Ian Hurd believes that a number of other international treaties adopted after the Charter also permit collective intervention. For example, the Genocide Convention 1948, Article I, provides that “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.” Significantly, Article I is interpreted as undertaking by the states to prevent and punish crimes of genocide, and it is an authorization to use force across state boundaries; hence, it encourages or permits intervention against genocidal regimes. As per narrow interpretation, it only permits prosecuting, punishing, or extraditing accused of genocide who are there in that state.¹⁹

Unilateral intervention on humanitarian ground. Some jurists believe that international human rights law has become a significant branch of international law in 21st century; therefore, whenever there is a massive human rights abuse, the implementation of international law, interventions by a single state or a group of states, or regional organization without UNSC authorization as a last resort must be permitted provided abuses have posed a threat to international peace and security. Significantly, such intervention is known as unilateral intervention or “unauthorized intervention.” Significantly, there are two views on the legality of unilateral or unauthorised humanitarian intervention: first view is that it is permitted, and the supporters of this view believe that the development of international human rights law provides legal validity to it (Simons, 2016). Jurist Fernando Teson is in favor of unilateral humanitarian intervention, but believes that it is morally justified in appropriate cases. Whenever there is human rights violation by the government or those in power, humanitarian intervention is permitted by the other states or governments provided a major purpose of intervening states and governments is to protect human rights.

However, critics of this intervention believe that any customary right of unilateral intervention which may have existed was extinguished by the UN Charter. In their opinion, unilateral humanitarian intervention is in contradiction with the provisions of the UN Charter and more prone to misuse by some states in the name of protection of human rights. Ryan Goodman believed that humanitarian intervention requires Security Council approval, and in the past 5 years, more than 133 states had rejected the legality of unilateral humanitarian intervention.²⁰ While justifying this argument, jurist Simon Chesterman opined that the right of unilateral intervention existed before the Charter of the UN, which prohibits the use of force, with the only exceptions being self-defense and enforcement actions authorized by the Security Council.²¹ Louis Henkin (1999) stated that to legalize unilateral humanitarian intervention could be dangerous as it can be misused.

In the past, there are various examples of unilateral intervention: NATO in Kosovo (1998–1999) and the “coalition of

the willing” in Iraq (Iraq–United States War, 2003). Practically speaking when states tried to justify their interventions on humanitarian grounds, there were always many other states that condemned such actions and protested. Rightly opined by Louis Henkin Kosovo conflict has forced us to rethink about law of “humanitarian intervention.” In Kosovo in 1998–1999, various crimes like crimes against humanity, war crimes, and mass expulsions were ruthlessly committed, as a result of which intervention by NATO’s military force was welcomed, but at the same time it was also criticized as it was not legally authorized by the UN (Henkin, 1999). Regarding this, the ICJ opined in its *Legality of Use of Force (Yugoslavia v United States of America; Provisional Measures* [1999] ICJ Rep 803)²² that whenever there is a threat to peace, breach of peace, or act of aggression, the UNSC has special responsibilities under Chapter VII of the UN Charter to take collective action and hence denied legal validity of unilateral intervention. It means that there is no legal justification for unilateral intervention on humanitarian grounds by single state or a group of states under modern international law.

Furthermore, the International Commission on Intervention and State Sovereignty (ICISS) established in 2000 by the UNGA stated in its report “The Responsibility to Protect, 2001” that where a state or a group of states under authorization of UNSC intervenes in the affairs of another state on humanitarian ground, then instead of right to intervention, the states must consider it as responsibility to protect. Significantly, Responsibility to Protect was further reiterated by 2005 World Summit Outcome document adopted by the UNGA, where it stated that each individual state has the responsibility to protect its populations from serious international crimes like genocide, ethnic cleansing war crimes, and crimes against humanity, and entire globe must encourage and help states in fulfilling this responsibility and must provide every necessary assistance to the UN in establishing an early warning capability (The UNGA, 2005).

Collective intervention on ground of civil war. Whenever anything happens in a state, it is quite natural that it has some effect on other states also. If there is a civil war in a state, it is likely to affect directly or indirectly other states. However, a moot question is that if civil war takes place in a state, can UN intervene?

Undoubtedly, civil war is internal affairs of a state; therefore, under Article 2(7), UN cannot intervene. However, where civil war affects the maintenance of international peace and security, then provisions of Chapter VII will be applicable. First, under Article 39, the Security Council first determines whether civil war in a state poses a threat to the peace or breach of the peace or amounts to an act of aggression and then it intervenes. For example, in Congo, UN played commendable role and succeeded in ending the civil war and in establishment of law and order (Dhokalia, 1971). Some other examples of such intervention by the UNSC are

(a) intervention in Iraq on behalf of the Kurdish people, (b) intervention in civil war of Yugoslavia, and (c) intervention in civil war of Somalia. Another example is of Libyan civil war where the UNSC (1973) adopted resolution to create a Libyan no-fly zone in 2011 and to take action against Gaddafi. Recent example is civil war in Syria. In June 2012, various authorities declared violence in Syria as Non-International Armed Conflict (NIAC).

Collective intervention on ground of environment catastrophes. In recent years, a discussion has been started as to whether environmental catastrophes can pose a threat to international peace and whether a collective intervention according to Chapter VII of the UN Charter is permitted on this ground. Till now, the UNSC has not taken any collective action on an environmental matter. However, some jurists believe that environmental catastrophes may lead to collective interventions in the future²³ as practice has shown that the definition of threat to peace is widening with time. For example, before WWII, individual and collective human rights violations or the absence of state organizational structures was not considered as a threat to peace and hence not legitimate ground for collective action. However, after WWII, with the development of international human rights law, violations of human rights and absence of organization structure were brought within the purview of threat to peace. In past, we have examples where intervention on these ground was permitted: Northern Iraq in 1991 on the ground of violations of human rights and Somalia Conflict in 1992 on the ground of the absence of state organizational structures. Similarly, in Libya, in 1992, the UNSC stated that the nonmilitary interferences in the social, economic, political, humanitarian, and ecological fields have become threats to peace and security.²⁴ Therefore, considering grave consequences of environmental casualties for the entire globe, the environment catastrophes may be considered as threat to peace, and hence, legitimate collective action by the UNSC may be taken.

Intervention by a State

Principle of nonintervention by a state is justified under Articles 2(3) and 2(4) of the UN Charter, where Article 2(4) prohibits the use of force by a state in the affairs of another state. Although Article 2(3) of the UN Charter, which provides that disputes which arise between two states shall be settled by peaceful means in such a manner that international peace, security, and justice are not endangered, was included in the UN Charter to strengthen the judicial settlement of international disputes, indirectly it also supported the principle of nonintervention. However, exception to Article 2(4) is Article 51 (right of self-defense).

Intervention on ground of self-defense. According to the rules of international law, whenever a state intervenes in the internal affairs of another state violating nonintervention

principle, the affected state can react to such breach with a reprisal, which is permitted under Article 51 of the Charter.²⁵ Therefore, according to Article 51 of the UN Charter, whenever arms attack occurs against a state, the affected state can use force against the wrongdoer state on the ground of self-defense. Grotius and others believe that self-defense has been a valid ground of intervention for long time in the field of public international law, and in the 17th-century Europe, it was existing already.²⁶ Unfortunately, that time it acted as political justification and not as legal exemption as was pointed by Michael Byers who believe that “prior to laws banning war, self-defense acted as a political justification rather than a legal exemption since, without laws to demarcate between legal and illegal wars, the justification of self-defense is politically useful and not legally necessary.”²⁷

However, in the case of *The Caroline* (1841), Mr. Webster, the Secretary of United States of America, laid down a very important principle for exercising the right of self-defense: the necessity of self-defense should be instant, overwhelming, and leaving no choice of means and no moment for deliberation. This principle was affirmed by Nuremberg Tribunal in 1946²⁸ and by the ICJ in the *Corfu Channel* case.²⁹ This limitation of the use of force applies to individual states as well as to collective military measures. Significantly, the main condition for exercising the right of self-defense is that force must be used by the wrongdoer state or it has violated principle of nonintervention. However, where the wrongdoer state has not violated principle of nonintervention and has behaved in discourteous manner, then less interfering measures such as retorsions (Rattan & Rattan, 2014) are allowed and intervention on the ground of right of self-defense is not permitted.

It is noteworthy that the principle of proportionality which involves a limitation of means as well as a limitation of time is an important rider on right of self-defense. The means adopted must be confined to the removal of the breach of the principle of nonintervention and must be reasonably proportioned to that object. Furthermore, in such situation, UNSC can also take action under Chapter VII of the UN Charter where such violation by the wrongdoer state poses threat to international peace and security. Therefore, in such situation, the intervention on the ground of self-defense may not be continued after the UNSC has taken effective action to maintain peace. For example, while exercising right of self-defense, if State II uses WMDs that poses threat to international peace and security, then the UNSC may intervene. Hence, at this stage, when UNSC intervenes, any action on the ground of self-defense by State II must be put to an end.

An important question is whether under Article 51 nuclear and thermonuclear weapons can legitimately be used in self-defense against a non-nuclear armed attack? International lawyers are divided upon this crucial question, some holding that using such weapons is disproportionate to seriousness of the danger of a conventional attack, while others say that in

some circumstances, a country may be unable to defend itself adequately without recourse to its nuclear armory. A more crucial point is the extent to which states involved in a nuclear “crisis” may resort to measure of self-defense, as did the United States when it proclaimed a “selective” blockade of Cuba during the Cuban missile crisis of 1962. Obviously, such a situation was beyond the contemplation of the authors of Article 51 of the UN Charter (Shearer, 2005).

The same question was raised by World Health Organization (WHO) in *Legality of the Threat or Use of Nuclear Weapons* ([1996] ICJ Rep, [1]) and requested ICJ to give advisory opinion that “in view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under International Law, including the WHO Constitution?” The court held by 11 votes to three that the threat or use of nuclear weapons would be contrary to the rules of International Humanitarian Law. However, in the present era of nuclear weapons, the court cannot say with certainty whether the threat or use of nuclear weapons, while exercising the right of self-defense, would be legal or illegal especially in an extreme case when very survival of a affected state is at stake.

Right to anticipatory or pre-emptive self-defense. A moot question is whether a right to anticipatory or pre-emptive self-defense exists. The concept of anticipatory self-defense is of utmost importance in the 21st century considering the modern weapons that can launch an attack with tremendous speed, which may allow the target state little time to react to the armed assault before its successful conclusion, particularly if that state is small (area wise).³⁰ We have an example where states have employed pre-emptive strikes in self-defense. Israel in 1967 launched a strike upon its Arab neighbors, following the blocking of its southern port of Eilat by Egypt and the conclusion of a military pact between Jordan and Egypt.³¹ Jurists believe that the Egyptian blockade itself constituted the use of force, thus legitimizing Israeli actions without the need for “anticipatory” conceptions of self-defense, especially when taken together with the other events. Significantly, the UN did not blame for the outbreak of fighting and did not condemn the exercise of self-defense by Israel. This shows that in modern time, self-defense is not restricted to response of actual armed attacks but also when there is a threat of complete destruction of the state (Shaw, 2007). Therefore, when there is a threat of use of nuclear or modern weapons by a state, then the other state may use right of self-defense.

Other traditional grounds of intervention by a state. Under traditional international law, apart from ground of self-defense, various other grounds of intervention by a state were recognized: intervention by invitation by the government, intervention to provide assistance to insurgents during NIAC or to those exercising right to self-determination, and intervention

to protect nationals abroad. However, these grounds are not recognized under the Charter.

Intervention to eliminate existing government in a state: Bush Doctrine. The Bush Doctrine declared that America could launch first strikes to defend it from terrorists and countries that supported terrorists so as to prevent possible attacks before they actually occurred. The doctrine was adopted in response to the terrorist attacks of September 11, 2001 and provided the rationale for invading Afghanistan by the United States and its allies. The conflict was known as U.S. war in Afghanistan to destroy Al Qaeda headed by Osama Bin Laden who launched the attack and who was provided safe haven by Taliban Government in Afghanistan. After Afghanistan's attack, it was alleged that Osama Bin Laden shifted his family to rural mountain areas of North East Pakistan where U.S. forces attacked in 2011 during the regime of President Barack Obama to kill him.

Subsequently, the doctrine provided a ground for the invasion of Iraq (whose secular government was not aligned with Islamic terrorists) on the grounds that Iraq might have WMDs, which could threaten the United States.³² With the Iraq war in 2002, the question has arisen that whether a military intervention by another state or by a group of states, which is not authorized by the UNSC, can be justified according to international law, if it is enforced against a so-called wrongdoer state to eliminate its government.³³ During the Iraq conflict, the United States and Great Britain, supported by a "coalition of the willing," occupied Iraq and abolished its existing regime.

This coalition was not justified as self-defense according to Article 51 of the UN Charter, as the Iraqi government had not made any assault on them. It is also not justified as collective action under Chapter VII of the UN Charter as a resolution of the UNSC, which could have authorized their attack, did not exist. However, this action of the United States in Iraq in 2002 is different from action taken in 1990-1991 which was in accordance with UNSC Resolution of 1990 (The UNSC, 1990). The said resolution was issued in the context of the Iraqi occupation of Kuwait and authorized military intervention only to the end of liberating Kuwait from this occupation.

Earlier, also in the Kosovo conflict in 1997, the United States directed NATO in March 1999 to take action. Subsequently, in June 1999, the UNSC resolution established the United Nations Administration Mission in Kosovo (UNAMIK). When question was raised in the UNGA in 1999 regarding legitimacy of NATO bombing in Kosovo, the then U.S. President Clinton told the UN General Assembly in September 1999 that "by acting as we did, we helped to vindicate the principles and purposes of the UN Charter."³⁴ Practically speaking, it had acted without authorization.

Significantly, some jurists believe that in 2002, U.S.-Great Britain Coalition intervened Iraq to eliminate the Iraqi

government and change the existing regime for reasons of "democratization."

Therefore, the moot question is whether international law permits military interventions against the wrongdoer states especially when no ground of intervention exists.

The White House report *The National Security Strategy of the United States of America* of September 2002 strongly supported this new doctrine, stressing that "rogue States and terrorists do not seek to attack us using conventional means" but "instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction." In order "to forestall or prevent such hostile acts," the report announced that "the United States will, if necessary, act pre-emptively especially when any state or terrorists use Weapons of Mass Destruction against America."³⁵ In the *National Security Strategy Report* of March 2006, the United States again claimed a right to use force pre-emptively, but also laid emphasis on alternatives to military pre-emption and reliance on multilateral actions: "Our strong preference and common practice is to address proliferation issues through international diplomacy, in concert with key allies and regional partners."³⁶

So far, the new doctrine of pre-emptive strikes especially on the basis of terroristic activities or for throwing the legitimate government has not become part of customary international law. Despite attacking Afghanistan in 2001, intervening Iraq through coalition of the willing in 2002 and intervening Pakistan to attack Bin Laden in 2011 were supported by many, but actually UNSC had not adopted any resolution in these matters, and hence, many states have protested against the attack through formal or other means usually used in reaction to illegal behavior by another state. This shows that concept of intervention changes with the changing dimensions of international law.

Conclusions and Suggestions

On the basis of above analysis, it is concluded that principle of nonintervention is not new and is fairly old dating back to the Roman Empire. However, in modern times, it has become a binding principle of international law and has become a *Jus Cogen*. Neither the UN under Article 2(7) of the Charter nor a state under Article 2(4) of the Charter can intervene in domestic jurisdiction of another state. However, this principle is not absolute and in exceptional cases intervention is permitted. Significantly, intervention can be direct (military) or indirect (subversive, economic, diplomatic, etc.). Undoubtedly, under the UN Charter, either UN (collective action under Chapter VII) or a state (under Article 51, right of self-defense) can intervene in the affairs of another state, but no private entity can intervene; otherwise question of state responsibility arises.

For intervention by the UN (collective action), provisions of Chapter VII of the UN Charter must be fulfilled and there must be some justification to show that situation has endangered international peace or security. While taking collective

action, the UNSC may direct regional organization such as NATO or a group of states to take action. Furthermore, main ground for collective action could be humanitarian ground, civil war, or presently it could be environment (as claimed by some jurists), which poses threat to international peace and security. However, for intervention by a state on the grounds of self-defense, all conditions laid down in *Caroline's case* must be fulfilled. It was laid down by the ICJ in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, where the court upholds the importance of the principle of sovereignty and supporting general principle of nonintervention by the state.

Legally speaking, where collective action is to be taken by the regional body like NATO, authorization by the UNSC must be there; otherwise it may lead to a chaotic situation. However, regarding intervention on humanitarian ground by a state or a group of states with authority of UNSC, it was admitted by the ICISS in its report on September 30, 2001 under the title "The Responsibility to Protect" that sovereign states have a responsibility to protect their own citizens. However, when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. The commission stated that instead of right to intervention, the states must consider it as responsibility to protect.³⁷ Significantly, responsibility of a state to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity was also recognized by the 2005 World Summit Outcome, which also imposed responsibility on the international community to support the UN in establishing an early warning capability.

In the past, there were various occasions when conditions for collective intervention were not fulfilled but still a state or alliance intervened without authority of the UNSC. In such case, intervening state claimed customary grounds and questions of legitimacy of unilateral intervention arose. Significantly, the discussion of the legitimacy of unilateral interventions becomes all the more important during the Kosovo conflict, and NATO intervened without the authorization of the UNSC under Chapter VII of the UN Charter.

Another issue relating to intervention which has emerged in 21st century is Bush Doctrine, that is, intervention to eliminate existing government in a state, where the states intervened without the authorization of the UNSC under Chapter VII of the UN Charter, and good examples are the U.S. intervention in Iraq conflict 1991 and 2002 and in Pakistan in 2011 for attacking Osama Bin Laden due to September 11, 2001 terrorist attack. Therefore, debatable issue which needs discussion is whether on the basis of terroristic activities in a state (which involves human rights violation), can affected state intervene in the affairs of the wrongdoer state as was done by the United States.

Therefore, in 21st century, discussion about legitimacy of unilateral interventions has become important. Main reason for this discussion is increasing horizon of international law.

Due to globalization and international cooperation, horizon of international law increases and that of domestic law decreases. Various matters which were originally regarded as within the domestic jurisdiction of a state are now a part of the international law, and one such example is human rights. Some jurists believe that as human rights have gained a more prominent standing within the international community, the nonintervention principle is losing its importance. Hence, today, legitimacy of intervention, especially when it is not as per the provisions of the Charter, has become a debatable issue that needs further discussion. But the author believes that if unilateral intervention by the state on such ground is permitted, it would affect international peace and security as every state will try to justify intervention on this ground. Therefore, based on the above analysis, the following are suggested:

1. There is an urgent need to have a well-defined international law on intervention under the changing dimensions of international developments and the international law.
2. Domestic jurisdiction needs a relook and needs to be redefined keeping the current international and national developments in view.
3. Intervention on humanitarian grounds needs to be under a concern of responsibility to protect and not as a right to intervene.
4. International community must support the UN in establishing an early warning capability to prohibit human rights violation.

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Notes

1. Intervention means "interference" and nonintervention is "noninterference."
2. Convention between the United States and Panama (Panama Canal), November 18, 1903, <http://teachingamericanhistory.org/library/document/convention-between-the-us-and-panama-panama-canal-1,903/>. Also see History of International Law, 1815 to World War I, <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e708>
3. When former colonies of Spain and Portugal became independent, Monroe, the then President of the United States (1817-1825), made it a foreign policy to prevent European states from establishing new footholds against the newly formed independent states of the region. This is Monroe Doctrine, <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e697>

4. In the first decades after 1949, it was the view of the Federal Republic of Germany ("FRG") that the German Democratic Republic ("GDR") was not a state and that recognizing it as such was not consistent with the international legal position of post-war Germany. According to Chancellor Konrad Adenauer, addressing the Union of Soviet Socialist Republics ("USSR") on September 22, 1955, the Federal government was still as before the only free and lawfully constructed German government. Walter Holstein, as State Secretary for Foreign Affairs of the FRG, reiterated Adenauer's Statement the next year, and the position became known as the Holstein Doctrine, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e697>
5. This doctrine was expounded by Leonid Brezhnev in November 1968 affirming the right of the Soviet Union to intervene in the affairs of Communist countries to strengthen Communism. It in part resembles the Monroe Doctrine: both are assertions that change within a certain geographic sphere will not be tolerated by the dominant regional state. However, the Brezhnev Doctrine differs in its rejection of the separateness of internal from international affairs, and its position that intervention to preserve socialist government is justified, as against "antiso-cialist" and "legalistic" concepts of independence.
6. After the armed forces of Japan established Manchukuo as a putative new state in the territory of China, the United States declared that it would not recognize territorial changes resulting from aggression (Territorial Change, Effects of), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e697>
7. Legal principle, applicable in international disputes, that aliens have no more rights than the citizens of a sovereign state. Therefore, such disputes lie within the purview of the domestic laws and only the courts in the host country have the jurisdiction to hear the case. This doctrine is an integral part of many national constitutions and treaties (especially in Latin America) and forms the basis of Calvo clause. Named after the Argentine diplomat and historian Carlos Calvo (1824-1906) who propounded it in his 1868 book "Derecho Internacional Teórico Y Práctico De Europa y América."
8. Article 2(4) provides that "all members shall refrain in their international relations 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 purposes of the United Nations." That means under the said Article, a state is not permitted to intervene in the affairs of another state.
9. Article 2(7) of the Charter of the United Nations (UN) provides that "nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."
10. That body of peremptory principles or norms from which no derogation is permitted; those norms recognized by the international community as a whole as being fundamental to the maintenance of an international legal order.
11. Philip Kunig, *Supra* note 53.
12. When wrongful act is done by a state, then under Article 41 of the UN Charter, provisional measures (interruption of economic relations and communications by air, sea, land, radio, telegraph, etc.) for maintaining peace and security can be taken by the UNSC, but there must be sufficient connection between the reason and object.
13. International Intervention: Conflict, Economic Dislocation, and the Hegemonic Role of Dominant Actors, http://www.gmu.edu/programs/icar/ijps/vol6_2/Conteh-Morgan.htm
14. Non-proliferation/Democratic People's Republic of Korea (DPRK), Adopted by the UNSC on March 2, 2016 at its 7,638th meeting, UN Doc. S/RES/2270. Also see DPRK, Adopted by the Security Council at its 3,212th meeting, on May 11, 1993, UN Doc. S/RES/825; Condemning North Korea's ballistic missile launches, Adopted by the Security Council at its 4,956th meeting, on April 28, 2004 UN Doc. S/RES/1695; Regarding North Korea, Adopted by the Security Council at its 6,141st meeting, on June 12, 2009 UN Doc S/RES/1874; Security Council Condemns Use of Ballistic Missile Technology in Launch by DPRK, Adopted by the Security Council at its 6,904th Meeting, UN Doc. S/RES/2087; and Security Council Strengthens Sanctions on DPRK, in Response to 12 February Nuclear Test, Adopted by the Security Council at its 6,932nd Meeting, UN Doc S/RES/2094, as well as the Statements of its President of October 6, 2006 where it urged DPRK not to carry out nuclear test, S/PRST/2006/41.
15. Under Article 41 of the UN Charter, which includes complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication and the severance of diplomatic relations.
16. As per Article 42 of the UN Charter.
17. Gross and Systematic Human Rights Violations, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1732?prd=EPIL>
18. Fernando Teson, The Liberal case for Humanitarian Intervention, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=291,661
19. Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World, http://faculty.wcas.northwestern.edu/~ihu355/Home_files/is%20hi%20legal.pdf.
20. Ryan Goodman, Humanitarian Intervention and Pretexts For War, <http://www.law.harvard.edu/faculty/rgoodman/pdfs/RGoodmanHumanitarianInterventionPretextsforWar.pdf>
21. Simon Chesterman, Just War or Just Peace? <http://www.oup.canada.com/catalog/9,780,199,257,997.html>
22. [1999] ICJ Rep 803.
23. Duty to Protect in Cases of Natural Disasters; Humanitarian Assistance in Cases of Emergency, <https://www.google.co.in/?gws_rd=ssl#q=Duty+to+Protect+in+Cases+of+Natural+Disasters%3B+Humanitarian+Assistance+in+Cases+of+Emergency
24. Note by the President of the Security Council, http://www.un.org/en/sc/repertoire/89-92/Chapter%208/GENERAL%20ISSUES/Item%2028_SC%20respons%20in%20maint%20IPSPdf
25. Which provides that "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 to maintain or restore international peace and security.”

26. Gray, International Law and the Use of Force, http://faculty.wcas.northwestern.edu/~ihu355/Home_files/is%20hi%20legal.pdf
27. Byers (2002).
28. The Nuremberg Tribunal observed: “It must be remembered that preventive action in foreign territory is justified only in case of an instant and overwhelming necessity of self defense, leaving no choice of means and no moment of deliberation,” 11 *The Caroline’s case*, *Moore’s Digest of International Law* 412.
29. [1949] ICJ Rep 4.
30. Anticipatory self-defense under International Law in American University International Law Review, 19(1), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1,160&context=auilr>
31. Moore (1974).
32. Bush Doctrine, <http://www.chegg.com/homework-help/definitions/bush-doctrine-43>
33. UN Role in Iraq, <https://www.globalpolicy.org/political-issues-in-iraq/un-role-in-iraq.html>
34. Address by President Bill Clinton to the UN General Assembly, September, 1999, <http://www.state.gov/p/io/potusunga/207,554.htm>
35. The National Strategy to Combat Weapons of Mass Destruction and the National Strategy for Combating Terrorism, <http://2001-2009.State.gov/s/ct/rls/wh/71803.htm>
36. The National Security Strategy March, March 2006, <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006>
37. The Responsibility to Protect, <http://responsibilitytoprotect.org/ICISS%20Report.pdf>

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