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Reassessing the Right of Humanitarian Intervention under International Law Between Sovereignty and Responsibility

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Abstract

This study examines one of the most contentious issues in international law: the intervention by sovereign states into the domestic affairs of others through the use of armed force. Structured across seven chapters, the research investigates whether a codified or customary right of humanitarian intervention exists within the global legal framework. The analysis further explores the evolution of United Nations (UN) peacekeeping enforcement operations and the legal responses to international terrorism. The findings reaffirm that Article 2(4) of the UN Charter maintains a foundational prohibition on the use of force, recognizing only three strictly defined exceptions: intervention by explicit invitation for legal purposes, authorization by the UN Security Council under Chapter VII, or the exercise of the inherent right to self-defence. Crucially, the study concludes that while the UN Charter does not expressly recognize humanitarian intervention, the international community—tempered by crises such as Kosovo—has developed the "Responsibility to Protect" (R2P) doctrine. This framework reinterprets state sovereignty not as a shield, but as a responsibility. By establishing criteria rooted in the principles of necessity and proportionality, R2P provides a UN-endorsed guideline for invoking intervention to prevent mass atrocities when a state fails to protect its own population.

Keywords: atrocities, sovereignty, proportionality, foundational, Charter

1. Introduction and Background

1.1 Definition of Humanitarian Intervention:

The Doctrine of “Humanitarian Intervention” has long been a controversial subject and there is no generally accepted definition “humanitarian intervention”. Various scholars have defined humanitarian interventions differently. One writer affirms that “humanitarian intervention is defined a coercive action by States involving the use of armed force in another State without the consent of its government, with or without authorization from the United Nations Security Council, for the purpose of preventing or putting to a halt gross and massive violations of human rights or international humanitarian law”.

Ellery Stowell defines humanitarian intervention as the “justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reasons and justice.”

Contemporary international law scholar Fernando Teson defined humanitarian interventions as “the proportionate trans-boundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.”

One of the main reasons advocated for humanitarian interventions is the prevention of genocide and mass murder of civilian populations by state actors against their own citizens.

Thus, humanitarian intervention connotes rightly

- the use of military force in the internal affairs of a State by another State or group of States, and
- the justification for the use of force depends on human violation in the target State.

Accordingly, humanitarian intervention can be narrowly defined as a State's use of military force against another State, with publically stating its goal is to end human rights violation in that state.

1.2 Humanitarian Interventions in the past:

Humanitarian interventions have been undertaken in order to curtail massive human rights abuses. In the twentieth century the planet earth experienced two world wars and also several international conflicts prompting use of force by one state on the other. Between 1971 to 1979, the Idi Amin government of Uganda committed widespread atrocities and massive human rights violation against its own citizens including committing rape, torture and mass murder. Tanzania intervened in Uganda in 1979 for humanitarian reasons. India intervened in East Pakistan (Now Bangladesh) in order to curtail massive human rights violations, after the Pakistani Army had descended on the civilian populace of East Pakistan in "an orgy of killing, terror, and destruction which led to the loss of at least one million lives". India intervened, citing human rights violation of the West Pakistanis, and the trans-border aggression by Pakistani as reasons for intervention. Bazyler asserted that India's "course of action in the Bangladesh situation probably constitutes the clearest case of forceful individual humanitarian intervention in this century," emphasizing the humanitarian nature of the intervention. It is estimated that approximately ten million East Pakistanis fled to India causing the country tremendous hardship.

Even in the last two decades, states have resorted to use force, unilaterally and in coalitions, outside the collective systems – states have used forces in Panama, Vietnam, East Timor, Afghanistan and Iraq. States have also resorted to enforcement action in Kosovo. There are also continued conflicts in Palestine, Kashmir, and various other regions. The world also saw the effects of such use of force by states in Hiroshima, Nagasaki and also in Kosovo which resulted in death of hundreds of thousands of civilians.

1.3 Legal Framework and UN Charter Regime:

International law has evolved in response to state-to-state wars and regulates the conduct of hostilities (*jus in bello*) and establishes the rules for using force in the first place (*jus ad bellum*). After the World War I, the legitimate use of force was reduced to case of self-defence and defence of international peace and security. This was stipulated in the Pact of Paris (1928) and the UN Charter.

Reflecting the world wars, the Charter of the United Nations (UN Charter) came into force on 24 October 1945 with the primary function to prohibit the use of force in international relations unless it is with United Nations Security Council (Security Council) authorization, or exercise of individual or collective self-defence. Because the UN Charter is an international agreement, it has the status of international law.

The 'Preamble' of the UN Charter clarifies that the UN is determined to save succeeding generations from the scourge of war, maintain international peace and ensure that armed force shall not be used against another state. The purposes of the UN including collective action are set out in Article 1 of the UN Charter. The Article 2 of the UN Charter describes certain fundamental principles binding on the UN and its members.

UN has been significantly more active in international peacekeeping; there are typically 15 or more peacekeeping in place throughout the world and the UN has a stronger engagement with Eastern Europe.

2. Prohibition on use of Force

2.1 International law and use of force:

International law prohibits the use of force. The prohibition is founded both in a multilateral treaty and in customary law.

The UN Charter Article 2(1) provides that:

> 'The organization is based on the principle of sovereign equality of all its members'.

The principle of state sovereignty mandates a state's absolute authority over its own affairs and its independence from the authority or control of other states. International law has adopted a general principle of non-interventions as a corollary of the principle of 'state sovereignty'. Thus the state sovereignty is a principle of customary international law binding all countries regardless of their membership of the UN.

2.2 Prohibition of use of force under Article 2(4) of UN Charter:

Article 2(4) of the UN Charter prohibits the use of force. 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."

Article 2(4) is described by Brierly as 'the corner-stone of the Charter system'.

The International Court of Justice (ICJ) in the *Nicaragua* case confirmed, it is also a *jus cogen* principle of international law from which no derogation is permitted.

On 09 April 1984, Nicaragua filed an application against the United States alleging that it was responsible for certain military and paramilitary activities in, or directed against, Nicaragua. In particular, Nicaragua claimed the US was in violation of Article 2(4) in supporting the Contras, rebels against the left-wing Sandinista Government, and in mining Nicaragua ports. On 10 May 1984, the ICJ indicated interim measures of protection, unanimously requiring the United States to 'cease and refrain from any action restricting, blocking or endangering access to or from Nicaragua ports, in particular, the laying of mines' and to respect Nicaragua's right to sovereignty and political independence.

The ICJ rejected a right of intervention for any reason, concluding that the existence of *opinio juris* regarding the principle of non-intervention was backed by established and substantial practice and was a corollary of the principle of the 'sovereign' equality of states.

In the Nicaragua case, on 27 June 1986, the ICJ gave its judgement on merits. The Court concluded that the United States had violated customary law prohibiting the use of force, and had illegally intervened in the affairs of Nicaragua and violated its sovereignty. Obvious breaches to Article 2(4) imputable to the United States were found in the laying of mines in Nicaragua internal and territorial waters and attacks in Nicaragua ports, oil installations and a naval base.

The Court concluded that:

> "As to the claim that United States activities in relation to the contras constitute a breach of the customary international law ***principles of the non-use of force***, the Court finds that … the United States has committed a prima facie violation of that principles by its assistance to contras in Nicaragua by

> 'organizing or encouraging the organization of irregular forces or armed bands … for incursion into the territory of another State' and 'participating in acts of civil strife … in another State' within the terms of the General Assembly Resolution 2625 [on Friendly Relations]"

The General Assembly Declaration on Friendly Relations of 1970 confirmed that:

> 'No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the international or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the Sate or against its political, economic and cultural elements are in violation of international law.....The use of force to deprive people of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention"

In the *Nicaragu*a case, the ICJ recognized that the Declaration on Friendly Relations constituted evidence of *opinio juris* in relation to the prohibition on the use of force and is a principle of customary international law with *jus cogen* status.

The *Nicaragua* case provides a comprehensive review of the prohibition on the use of force at customary law, albeit in the artificial context of considering international law separately from the UN Charter.

A threat to use force raises the same issues as the use of force itself. On examining Article 2(4) of the UN Charter, it is clear that if the use of force would be contrary to Article 2(4) in the particular circumstances, so too will the treat to use force. This is very important to the policy of mutual deterrence under the possessions of nuclear weapons and the preparedness to use them underline the defence policies of the nuclear weapons States (just as between India and Pakistan). What is to be noted is that if the threat to use nuclear weapons was to be illegal at international law, then the legitimacy of the policy of deterrence was also at risk.

Nuclear Weapons case: By a letter dated 19 December 1994, filed in the Registry on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registry a decision taken by the General Assembly, by its resolution 49/75 K adopted on 15 December 1994, to submit to the ICJ, for advisory opinion, the following question:

> "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"

The resolution asked the Court to render its advisory opinion "urgently". Written statements were filed by 28 States, and subsequently written observations on those statements were presented by two States. In the course of the oral proceedings, which took place in October and November 1995, 22 States presented oral statements.

The ICJ in the *Nuclear Weapons* case stated the law as follows:

> In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they process weapons to use in self-defence against any States violating their territory or political independence. Whether a signalled intention to use force if certain events occur is or is not a 'threat' within Article 2(4) of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under article 2(4). Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of 'threat' and 'use' of force under Article 2(4) of the Charter stand together in the sense that if the use of force itself in a given case is illegal – for whatever reason – the threat to use such force will likewise must be a use of force that is conformity with the Charter. For the

> rest, no State – whether or not it defended the policy of deterrence – suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

The Court found that 'a threat' constitutes a breach of Article 2(4) of the Charter, if it were to be directed against the territorial integrity or political independence of a State or against the Purposes of the United Nations.

Therefore, that implication is that, a threat for example, which is intended to protect against a humanitarian or environmental disaster might not be a breach of Article 2(4).

In contrast, threats by the People's Republic of China across the Strait of Taiwan prior to the Taiwanese elections in 2000 with the intention of deterring voters from electing Chen Shui-bian as President, and to warn against any independence from China, appear to violate Article 2(4). Similarly, the launch of three missiles across the Strait of Taiwan in 1996 and the continued positioning of strategic missiles aimed at Taiwan will also breach the prohibition on a threat to use force, unless China can demonstrate that the threat was justified on the grounds of self-defence.

Although, since the UN charter of 1945, the right of Sovereign States to threaten or actually resort to forceful measures has been restricted to specific circumstances, the last two decades the world experienced various armed conflicts between States as noted earlier. In this context it is important to understand the circumstances may a state have recourse to use the armed forces against another state.

2.3 Duty of non-intervention:

As a corollary of the principle of State sovereignty, international law has adopted a general principle of non-intervention. Intervention may be both direct and indirect, and may take many forms – economic, political and cultural. When the intervention involves use of force, it will also be in breach of Article 2(4) of the UN Charter.

The 'duty of non-intervention' is stated in the Declarations on Friendly Relations of 1970 as follows:

> "No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the international or external affairs of any other State. Consequently, armed intervention and all other form of interference or attempted threats against the personality of the State or against in political, economic and cultural elements are in violation of international law.
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it advantages of any kind. Also, no State shall organize, assist, formant, finance, incite or tolerance subversive, terrorist or armed activity directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.
>
> The use of force to deprive people of their national identity constitutes a violation of their inalienable rights of the principle of non-intervention."

In the *Nicaragua* case, the ICJ has confirmed that these principles state the customary law on intervention. Since the Second World War, most conflicts have been essentially civil wars. The *Nicaragua* case typifies the complexity of applying the duty of non-intervention in this context. The Court determined that arming and training rebel forces against the government of Nicaragua could amount to the threat or use of force, but the mere 'supply of funds' to the rebels was not. Other forms of aid, such as technical advice and arms, are also accepted in State practice as legitimate.

Civil wars are treated as an internal matter in international law. Therefore, it is for the government to determine how it deals with insurgent groups. At the request of the government, a State may provide assistance in supporting rebels and will not have violated the duty of non-intervention. However, there are exceptions where the State providing assistance may have violated the duty of non-intervention when the requesting State is using force to deny to a national libration group the right to self-determination, committing genocide, or conducting war of aggression.

The 1970 Declaration of Friendly Relations provides that:

> "… no State shall organize, assist, foment, finance, incite, or tolerate, subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in the civil strife of another State."

However, rebellions against a recognized government may be more accurately characterized as civil war where it can become difficult to determine which competing group is the government in control of the territory. For example, in the 1960 Congo crisis, both the President and the Prime Minister sought to dismiss the other. International Law establishes that, if the conflict is a civil war, there is a duty not to intervene unless under the authority of the United Nations or a regional organization.

The United States and the Soviet Union have in practice, resorted to doctrines of regional and ideological security such as the 'Brezhnev Doctrine', prior foreign intervention, request for assistance from regional organizations and protection of nationals. However, it is not clear whether a valid request has been made.

It is axiomatic that a precondition for intervention is, 'there has been an invitation from the State', whose interests will be affected. The ICJ, in the *Nicaragua* case, found that no such request had been made by El Salvador, Honduras and Cost Rica at the relevant time, stating that:

> "… The requirement of a request by a State which is the victim of the alleged attack is additional to the requirement that such a State should have declared itself to have been attacked.
>
> The Court has seen no evidence that the conduct of those States was consistent with such a situation, either at the time when the United States first embarked on the activities which were allegedly justified by self-defence, or indeed, for a long period subsequently …"

States justify their forceful intervention in another State by giving reasons that was a necessary act to protect or advance democracy. In the Panama and Dominican Republic interventions, the United States argued that its acts were justified on the basis of the need to restore democracy. As other bases for the war in Iraq failed, the United and the United Kingdom governments have also made references to the need to establish democracy there through their formal justifications rest with Security Council authorization and, in the case of the United States, the doctrine of pre-emptive attack. No such rights exists at international law.

3. When use of force will be lawfully allowed

3.1 Exceptions to the prohibition on the use of force:

In international law, all countries are bound by the prohibition on the use of force. The few recognized exceptions to the prohibition on the use of force in article 2(4), which are legitimate and lawful, are:

(a) **Intervention by Invitation**: A State invites intervention or consents to interventions.

(b) **Intervention authorised by the United Nations Security Council** – to maintain peace and security (under Chapter VII of the UN Charter).
(c) **Self-defence**: The individual and collective right of self-defence necessitates such intervention.

The legality of use of force, or more generally, when force may lawfully be used under international law, has been expressed as *jus ad bellum.* The use of force by states is controlled by both customary international law and by treaty. States also argue that there are other grounds or exceptions which justify intervention and hence are 'lawful'. These grounds include:

(a) 'Implied' Security Council authorisation
(b) Humanitarian interventions – where no Security Council authorisation exists
(c) Uncertain doctrine relating to use of force in self-defence, where parameters of this self-defence are debatable under certain circumstances.

3.1.1 Intervention by Invitation:

When a state has validly requested for intervention, then such intervention is lawful. However, such request should not be in violation of international legal principles. Invitation from a state requesting another state to assist in committing genocide for example would be unlawful.

An example of such valid intervention by invitation is the deployment of Indian Peace Keeping Force (IPKF) in Sri Lanka on invitation by the Sri Lankan government to tackle the Liberation Tigers of Tamil Elam (LTTE) from 1987 to 1990.

3.1.2 UN Security Council Authorised interventions:

The UN Security Council is authorized to determine the existence of, and take action to address any threat to international peace and threat. Article 1(1) of the UN Charter provides that the 'purposes' of the UN are to maintain international peace and security. The UN Security Council, under the powers granted in articles 24 and 25 and Chapter VII of the UN Charter, may authorize collective action to maintain or enforce international peace and security. Article 24(1) provides that the primary responsibility of the UN Security Council is to maintain and restore international peace and security. Article 24(2) provides that to discharge these duties, the Security Council has been granted specific powers as laid down in Chapters VI, VII, VIII and XII of the UN Charter. Article 25 provides the 'international law obligation' on the international community; accordingly, any resolutions or recommendations passed by the Security Council, binds the international community as a matter of treaty obligation.

Thus, the UN efforts in principle are to resolves issues between States without warfare. Hence, the framers of the UN Charter had attempted to commit member nations to use force only under limited circumstances such as defence purposes.

There are instances where the UN Security Council had authorized the use for force – for example in the Korean War in 1950. The UN Security Council condemned the North Korean intervention into South Korea by 9-0 resolution (with Soviet Union was absent from voting) and called upon its member States to come to the aid of South Korea. The United States and 15 other States formed a 'UN Force' to pursue this action.

The UN Security Council had also issued resolutions in certain circumstances that declared the use of force to be legal under international law. Notably Resolution 678 passed by the Security Council authorized the use of force,

and requested all member States to provide the necessary support to a force operating in cooperation with Kuwait to ensure the withdrawal of Iraqi forces in 1990.

In 2003, the UN Security Council passed Resolution 1441, which recognized that Iraq's non-compliance with other resolutions on weapons constituted a threat to international peace and security and recalled that resolution 678 authorized the use of force to restore peace and security.

(a) Collective measures through the UN:

Security Council can make a determination as to whether there has been a threat to or breach of international peace and security in a particular situation (Article 39). Articles 34, 35, 38, 39, 40, 41 and 42 empowers UN Security Council to investigate disputes among States, make economic and other sanctions and also where required use collective force by UN members.

Typically measures short of armed force are taken before armed force, such as the impositions of sanctions. Under Chapters VI of the UN Charter, collective dispute measures such as negotiation, mediation, judicial settlement, use of regional agencies and arrangements are possible. Chapter VI is thus concerned with the finding a peaceful means of settlement of international disputes and the Security Council is confined to making recommendations only.

(b) Security Council Powers to take action under Chapter VII:

Under Chapter VII of the UN Charter, once determination is made that there is an existence of a threat or breach of peace or act of aggression, article 39 of the UN Charter paves way for the Security Council to adopt appropriate measures in accordance with article 41 (non-military enforcement measures) or article 42 (military measures) to restore international peace and security.

Article 41 provides that the non military enforcement measures could include 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.

(c) Military Measures:

Unless the Security Council authorizes under the UN Charter, the members of the UN are not allowed to use or threaten to use military force to settle their disputes or even enforce international judgements. However, should the non-military measures provided by the article 41 proved to be inadequate, article 42 of the UN Charter provides that the Security Council may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Thus the core of the collective security system established by UN Charter lies in article 42 concerning military measures. To enable the Security Council to exercise those powers, article 43 provides that all members are to undertake to make available to the Security Council on its call and in accordance with a special arrangement, armed forces, assistance, and facilities including rights' of passage etc.

To enable the Security Council to take urgent military measures, article 45 provides that Members shall hold immediately available national air-force contingents for combined international enforcement action.

It is worth to note that the peacekeeping operations conducted by the UN Security Council would be in a completely different legal framework compared with military operations envisaged in article 42. There is no

specific provision in the UN Charter for peacekeeping forces. However, the UN has been employing such forces whenever law and order have broken down and human rights are at risk.

3.1.3 Self Defence:

The individual and collective self-defence is the only recognized exception to the prohibition on the use of force in article 2(4), aside from the UN Security Council authorization.

The States' inherent right to self-defence against an armed attack, including the right to combat terror, is a cornerstone of international law, enshrined in the UN Charter (Article 51) and numerous Security Council Resolutions. Article 51 of the UN Charter requires that there should have been an 'armed attack' before the right of individual or collective self-defence arises. Interpreted literally, this right only applies to the right to respond to force with force. The ICJ in *Nicaragua* case held, that acts of armed bands must "occur on a significant scale" before they would constitute armed attacks permitting "individual or collective right of self-defence.

Some theorists believe that the effect of article 51 is only to preserve this right when armed attack occurs and that other acts of self-defence are banned by article 2(4). Other extreme view is that the legitimate use of self-defence in situations when an armed attack has not actually occurred is still permitted.

States have used the right of self-defence exemption in various camouflaged manner and had invoked article 51 in many instances – such as the US invasion of Afghanistan after 11 September 2001 and the US, UK and Australian invasion and occupation of Iraq (collective defence against weapons of mass destruction) on March 2001.

Thus "the right of self-defence is not an open-ended right. The recognized traditional customary rules on self-defence derive from an early diplomatic incident between the United States and the United Kingdom over the killing of some US citizens engaged in an attack on Canada, then a British colony – called the *Caroline* case in the 1837.

The *Caroline* Case: Diplomatic Correspondence between Mr Webster, for the United States and Mr Fox, for the United Kingdom, 24 April 1841.

During the Canadian Rebellion of 1837, rebels, with the support of American nationals, attacked British ships as they passed through Canadian waters, and raided the Canadian shore. The rebels were supplied by the *Caroline*, an American ship. On 29 December 1837, the British entered the American port of Schlosser, seized the *Caroline* and sent her over the Niagara Falls, killing two Americans. McLeod, a British National was arrested and charged with murder and arson. Remarkably calm diplomatic correspondence then ensured as to the validity at international law of the British acts.

> Mr Webster argued that Britain was … "required to show a necessity of self-defence, instant, overwhelming, leaving no choice means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supporting the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

> Lord Ashburton replied that: "It is so far satisfactory to perceive that we are perfectly agreed as to the general principles of international law applicable to this unfortunate case. Respect for inviolable character of the territory of independent nations is the most essential foundation of civilisation.

To be a valid act under international customary law, as set down by the *Caroline* case, it is generally required to conform with the three elements:

- was the response necessary?
- was the response proportionate?
- was the response immediate?"

Thus the *Caroline* case established that there had to exist 'a necessity of self-defence, instant and overwhelming, leaving no choice of means, and no moment for deliberation'. Further any action taken must be proportional, must be justified by that necessity, and kept clearly within it.

Notably the *Caroline* Principle limits the right to self-defence by the tests of necessity and proportionality and is strikingly differs from the article 51 of the UN Charter which requires that there should have been an armed attack before the right of self-defence arises. However, it proves that 'self-defence' has a place in international law.

(a) Anticipatory Self Defence:

The threat of nuclear conflict has been a persistent fear within the international community since the world war days in 1945 when atomic bomb was dropped in Hiroshima. This provides evidence that the States cannot be reasonably expected to wait for the first attack and has triggered the debate on self-defence. However, as article 51 permits self-defence only when an armed attack has occurred, then there can be no right to anticipatory self defence. On the contrary, it is suggested by many theorists that the word 'inherent right' in article 51 suggests that the UN Charter has preserved a pre-existing right of self-defence. This is argued to be consistent with customary law along the lines of *Caroline* case, which used to establish the principle of "anticipatory self-defence".

Thus, the *Caroline* test provides that anticipatory self-defence may be justified only in cases in which the "necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment for deliberation".

Juristic writers have had contradicting views. Brownile had concluded that the contemporary state practice has rejected the flexible approach of the *Caroline* case and that article 51 preludes preventative action. However, D.W. Bowett recognized that 'no state can be expected to await an initial attack, which, in the present state of armaments, may well destroy the state's capacity for further resistance and so jeopardize its very existence.'

There have been only few occasions on which the international tribunals have considered the right of anticipatory self-defence; whenever the doctrine of self-defence is invoked, the Security Council and the General Assembly had routinely rejected any such justification on facts.

In the *Nuclear Weapons* case, the ICJ stressed that the right of self-defence may be exercised only within the constraints of 'necessity and proportionality' and the principles of humanitarian law, but did not refer to any right to act pre-emptive. In response to Israel's pre-emptive strike in the six-day war in 1967, the Security Council called for a withdrawal of Israeli forces from occupied territory. In 1975 when Israel attacked the Palestinian camps in Lebanon, the Security Council and the international community condemned the action. In 1981 on the

grounds of anticipatory self-defence, when Israel justified its bombing of the nearly completed nuclear reactor in Iraq, its action was unanimously condemned by the Security Council as clear violation of article 2(4) and the international community including the United States rejected the doctrine of anticipatory self-defence. The UK stated that the attack was not an act of self-defence because it was not a response to an armed attack on Israel by Iraq, there was no instant or overwhelming necessity for self-defence. Thus, there is no right of pre-emptive attack exists at international law.

In summary, state practices and *opinio juris* overwhelmingly suggest that the international law does not recognize a right of anticipatory self-defence beyond that countenanced within the *Caroline* Principles. The Security Council and international community have always condemned where force is used pre-emptively. As already noted there has been ambiguity about the meaning of article 51 with regard to self-defence. However, where there appears to be an acceptable moral or policy reasons for anticipatory self-defence, and where proportionate measures had been adopted relative to the threat, formal commendation from the Security Council could be avoided. Thus it is clear that in determining the legitimacy of self-defence and allow a state to respond proportionally to an imminent and overwhelming threat to its security, the *Caroline* principle continue to play a significant role.

(b) Test of Imminence – for self defence:

The 'imminent threat' is a standard criterion in international law, developed by Daniel Webster as he litigated the *Caroline* case, described as being '*instant, overwhelming, and leaving no choice of means, and no moment for deliberation.*' The criteria are used in the international law justification of *pre-emptive self-defence*: self-defence without being physically attacked first. This concept was introduced to compensate the strict, classical and inefficient definition of self-defence used by Article 51 of the Charter of the United Nations, which states that sovereign nations may fend of an *armed attack* until the Security Council has adopted measures under Chapter VII of the United Nations Charter.

The *Caroline* affair has been used to establish the principle of 'anticipatory self-defence' and is also now invoked frequently in the course of the dispute around pre-emptive strike (or pre-emption doctrine).

The legitimacy of the Israeli bombing of the nuclear reactor in Iraq in 1981 may also be doubted for the failure to satisfy the test of 'immense' under the *Caroline* principles.

It is also argued by the views of the United States (US) and its allies in the Iraq war 2003-04 that there is a right of 'pre-emptive' strike in international law, as the Security Council has not voted to condemn the action.

Had the UK's assertion been true that weapons of mass destruction could be assembled by Iraq in forty-five minutes, international law might more readily have recognized a right to act against the anticipated threat.

Part of the problem of determining the legitimacy of defensive action thus lies in both the accuracy of the evidence and in determining when the armed attack has started. The law cannot require a State to wait until it is actually attacked or forces have crossed the border before it can legitimately take action. If a generous view is taken of the preconditions for an armed attack, there is less need to resort to any right of anticipatory self-defence.

International law will countenance a proportionate pre-emptive strike or 'first-strike' as a legitimate form of anticipatory self-defence, if the evidence demonstrates that an attack is genuinely imminent.

The rise in global terrorism since the terrorist attacks of 11 September 2001 has prompted the Security Council to make a radical departure from precedent, which is apparent in the Security Council adopted Resolution 1373 on 28 September 2001 in anticipation of United States counter-attack on the Taliban regime and al-Qaeda in Afghanistan in 2001:

> Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington DC and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,
> Reaffirming further that such act, like any acts of international terrorism, constitute a threat to international peace and security,
> Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations…

The implication is that, even though the terrorist attacks on the United States were over, there was a continuing right to use of force against another State to deter terrorist attacks in future.

The Security Council did not condemn the subsequent attack on Afghanistan nor the later invasion of Iraq. While the coalition justified the war in Iraq on the legal ground that it was "impliedly" authorized by the Security Council, political justification was sought with the claim that Iraq was harbouring terrorists. Jurists argue that, if taken to an extreme, Resolution 1373 (2001) could justify intervention in Solalia, Liberia, Sierra Leone and Sudan in light of alleged links between the diamond trade and al-Qaeda.

Gillian D Triggs, suggested that neither the 1945 pre-Charter position nor a strict interpretation of Article 51 adequately describes the Contemporary law of self-defence.

Despite contradictory views on anticipatory self-defence and various interpretations of article 51, what is clear is that when there is an overwhelming and imminent threat of force against a state, the *Caroline* principles, permit that state to use necessary and proportional force to repel the attack and deter others.

International norms that are evolving for permitting anticipatory self-defence may depend upon the idea that the 'whole is greater than the sum of its parts' and has been considered in international law as the 'accumulation of events' theory.

(c) Accumulation of events theory:

Considering the problems posed by an asserted right of anticipatory self-defence, jurists have suggested to view frequent cross-border guerrilla activities and terrorist attacks as part of an 'accumulation of events.' This based on the view that an act of self-defence against single attack is not anticipatory. It will be more appropriate and acceptable as a proportionate and necessary response to a series of illegal acts. However, this concept has been rejected by the Security Council in the Harib Fort Incident.

In the *Nicaragua* case, the ICJ provided a limited definition of an 'armed attack' under Article 51. The Court state that, it did not believe the concept of an 'armed attack' including assistance to rebels in the form of the provision of weapons or logistical or other support. Thus, the Court recognized the cumulative effect argument.

Cautious support for the 'cumulative effects' approach to self-defence was given by the ICJ in the *Oil Platforms* case of November 2003 in which Iran alleged that the United States has attacked and destroyed three offshore oil-

production complexes. The ICJ in considering whether the United States was justified in using force in self-defence against attacks on its ships, stated:

> "On the hypothesis that all the incident complained of are to be attributed to Iran, … the question is whether that attack, either in itself or in combination with the rest of the 'series of … attacks' cited by the United States can be categorized by the United States as an 'armed attack' on the United States justifying self-defence … Even taken cumulatively … these incidents do not seem to the Court to constitute an armed attack on the United States."

Although the Court rejected United States' defence, assessment of the legitimacy of force by reference to an accumulation of events was recognized, thus the scope of self-defence doctrine was expanded. Triggs points out that, in view of Security Council Resolution 1373 on terrorism, international community should not contemplate that a right to use force in self-defence may arise in response to a series of events which taken separately would not justify force. It must be remembered that the international law condemns use of force under all circumstances.

(d) Collective self defence:

Article 51 of the United Nations Charter recognises the right of both individual and collective self-defence. Where one state has decelerated itself to be the victim of an armed attack and requests assistance from a third state, customary international law permits a collective right of self-defence; the state can seek and obtain military assistance of all other states under article 51.

Examples of collective self-defence in state practice include the Soviet interventions in Hungary (1956), Czechoslovakia (1968), the US and Australia in Vietnam (1961-1975), the US in Nicaragua (1983) and Afghanistan (1979). In August 1991 immediately after the intervention of Kuwait's territory by Iraqi forces, on a request from the Kuwait government the US and the UK intervened military and argued that it was on the basis of article 51.

The war in Iraq (2003) might also be categorized as a collective defence against threatened use of force, though the US, UK and Australia relied upon an implied Security Council authorization as giving them the power to intervene in 2003.

In the Vietnam war, the US, France and Australia appeared to have no individual interest in the conflict. In the *Nicaragua* case, the court stated that, there must have been an armed attack on the victim state under article 51, while the assisting state need not be under any threat to itself. Thus, the right of collective self-defence does not require that the assisting state is additionally defending itself.

(e) Defence of nationals abroad:

States have justified the use of force to protect their nationals on the basis of a right of self-defence, in the sense that an attack on nationals is also an attack on the 'state' itself. US invasion of Grenada in 1983 – it was alleged that some American students were under threat. In its invasion of Panama in 1989, the US justified its act on the basis of defence of the American nationals. The facts were that one American in Panama had been killed and others harassed.

In 1986 the US justified the bombing of Libya as self-defence against alleged Libyan role in an attack on US serviceman in West Berlin. In 1993 the US launched missiles against military intelligence headquarters in Baghdad, allegedly to protect nationals. However, there is little judicial precedent available on the issue. Hence in the absence of Security Council action, state practice supports a limited right to use force against another state

to protect nationals, where force is necessary to save their lives and proportionate to this objective. Once objective is achieved, the force must be discontinued and the action must be reported to the Security Council.

(f) Self-defence and the twin tests of 'necessity' and 'proportionality':

The *Caroline* formula, despite dated from 1838, continues to present a balanced and realistic approach. Accordingly, the use of force in self-defence must be respectful of the principles of proportionality and necessity.

Further, the ICJ has repeatedly stressed the importance of the twin requirements of necessity and proportionality as being the core principles of the right of self-defence.

In the *Nuclear Weapons* case, the ICJ maintained that the principles of proportionality and necessity, being inherent in the very concept of self-defence, limit the exercise of self-defence both under international customary law and under article 51.

Proportionality is assessed by comparing the objective of the reaction and the force employed to achieve this – must be justified as exception to the general prohibition on the use of force.

3.2 Implied Authorisation:

On any matter relating to military intervention (for human protection purposes) the Security Council should be contacted first before any action taken. However, whenever the veto is used, the Security Council is unable or unwilling to fulfil the role expected of it. This situation has led US, UK and other states to argue that they can rely on the implied authorisation of the Security Council. The recent occasion of relying on implied authorisation is the Coalition of US, UK and Australia justified the invasion of Iraq on the Security Council Resolution (SC Res) 688 of 1991, SC Res 687 of 1991, SC Res 678 of 1990 and Res 1441 of 2002 together had the effect of authorising the use of force in Iraq. However, there is no legal authority for the use of force on any such implied basis.

3.3 Armed attack within the meaning of Article 51:

The notion of armed attack in the world war times might have been clear. However, the nature of conflicts since the world war has exposed further ambiguities in the application of Article 51 of the UN Charter. Today force is frequently employed in minor cross-border skirmishes, sporadic guerrilla attacks, inter-ethnic violence, precision operations, targeted assassinations, regime changes, and suicide bombing rather than formal declaration of war and deployment of battalions of regular troops in the field. Notably, the use of force against State can be individuals or groups whose acts are apparently not attributable to any State under the usual rules of State Responsibility in international law.

Article 51 provides:

> 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.

The international community's key question in these circumstances is, 'was the deliberate crashing of aircraft into the twin towards in New York and the Pentagon in Washington on 11 September 2001 and 'armed attack' within

the meaning of article 51, so as to trigger a right to employ proportionate force in response against Afghanistan which was thought to be harbouring al-Qaeda? This leads to the question, 'does the State support for irregular armed bands and rebels constitute an armed attack?'

ICJ in the *Nicaragua* case found that:

> "… in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of 'armed attack' includes not only acts by armed bands where such acts occur a significant scale, but also assistance to rebels in the form of the provisions of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states … the Court is unable to consider, that, in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State."

According to ICJ, depending on the 'scale and effects', sending an armed irregular force across borders can be an armed attack. The Court excludes the provision of weapons or logistical support to rebels from an 'armed attack'.

Sir Robert Jennings in a dissenting opinion argued that:

> "… to say that the provisions of arm, coupled with 'logistical or other support' is not armed attack is going much too far. Logistical support may itself be crucial. This looks to me neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like. The original scheme of the United Nations Charter, whereby force could be deployed by the United Nations itself … has never come into effect … In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defence …"

In the *Nicaragua* case, the ICJ stressed that, where there is no armed attack, a third state may not take measures against a State assisting the rebels. Thus, the right of collective self-defence depends upon existence of an 'armed attack' within the meaning of Article 51.

The right of self-defence has the burden of demonstrating it on the facts. The ICJ will dismiss the defence where the Court finds the evidence of an armed attack to be weak. In the *Oil Platforms* case, the United States argued that it was entitled to adopt 'Operation Praying Mantis' taking extensive military action against Iranian targets, including the Salman and Nasr oil installations, in defence against alleged attacks against United States ships.

The Court found that:

> "… in order to establish that it was legally justified in attacking the Iranian platforms in exercise of the right of individual self-defence, the United States has to show that attacks had been made upon it for which Iran was responsible; and that those attacks were of such a nature as to be qualified as 'armed attacks' within the meaning of that expression in Article 51 of the United Nations Charter, and as understood in customary international law on the use for force. The United States must also show that its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence."

The Court was unconvinced with the evidences examined, and concluded that the United States had not discharged the burden of proving that the alleged incidents constituted an armed attack. The Court was willing to consider that an attack may in principle, be constituted by the cumulative effect of acts rather than merely isolated incidents considered individually.

It must be noted that, when a State has been the victim of an illegal intervention that does not amount to an 'armed attack', it may not employ force as a right of defence may not arise. Nevertheless, the State has the right to take 'proportionate countermeasures' including economic and political sanctions.

4. Humanitarian Intervention

4.1 Doctrine of Humanitarian Intervention:

The doctrine of humanitarian intervention in international law typically refers to the threat or use of force by a state, group of states, or international organization primarily for the purpose of protecting the nationals of a particular state from widespread deprivations of internationally recognized human rights, including genocide and crimes against humanity. Because the doctrine is not expressly recognized in the Charter of the United Nations as a permissible basis for using force, many states and scholars oppose its use, at least when exercised without authorization by the UN Security Council.

The basic UN Charter paradigm is that states are prohibited from using force against other states (article 2(4)), but may do so when they are acting in self-defence against an armed attack occurs (article 51) or when authorized by the UN Security Council to maintain international peace and security. The Security Council, in turn, is only empowered to act when there is a 'threat to the peace,' (Chapter VII) which was originally conceived as transnational threats. The doctrine of humanitarian intervention does not fit easily within this paradigm, since a state that uses force to protect the human rights of another state's nationals is not acting in self-defence against an armed attack and, in many instances, the deprivation of human rights may not entail a threat to transnational peace. There is little judicial guidance as to the legality of humanitarian intervention. Many jurists are of the opinion that international law does not support a right of humanitarian intervention, and if any a limited right to use force to protect human rights in extreme cases.

The UN Charter contains important provisions that restrict international authority to intervene in the internal affairs of sovereign nations. Accordingly, the UN should leave nations alone to resolve purely internal problems. However, the exception here is important. The UN Security Council may use or authorize force to counter threats to international peace and security as contained in the Chapter VII of the charter. Further, given the principle of sovereign equality of nations, it is solely a matter for the Security Council to decide under the charter. The notion of 'international peace and security' is flexible enough to allow for a broad range of interpretations.

One situation where the Security Council authorized intervention for humanitarian purposes under the international peace and security formula was in Somalia. Such instances do not however provide legal support for unilateral or coalition use of force without authorisation.

In the absence of Security Council authorization, the lawfulness of the use of force on humanitarian grounds remains controversial. Intervention on this ground has often been justified as 'moral', rather than lawful. Often states had invoked the doctrine of humanitarian intervention to justify forceful intervention in another state, using the doctrine in conjugation with other defences such as invitation or implied Security Council authorization. Examples of such humanitarian intervention include Vietnam's invasion of Cambodia in 1978 to end genocide of

the Pol Pot regime, Tanzania's intervention in Uganda to overthrow the military regime of Idi Amin in 1979, US intervention in Entebbe, Uganda to rescue its nationals in Tehran Hostage crisis and India's intervention in East Pakistan in 1971 to support the right of Bangladesh. However, there has to be a widespread and repetitious state practice of similar international acts over time for humanitarian intervention to become a principle of customary international law.

The NATO States justified their intervention in the former Yugoslavia as being lawful pursuant to the principle of humanitarian intervention. '*Kosovo*' is the most important case on intervention on humanitarian grounds as it fuelled the debate as to the legitimacy of humanitarian intervention.

4.2 Criteria for Conducting Humanitarian Intervention:

The phrase humanitarian intervention conflicts more than one idea. Lack of express guidelines by the international law on humanitarian intervention has created many limitations on application of international law in humanitarian crisis. The NATO bombing over Kosovo provides a cautionary lesson that even legitimate and genuine humanitarian intervention in another state can rapidly escalate into further human tragedy that is out of proportion with the original aims and is thus illegal at international law.

In the wake of the *Kosovo* incident various scholars have sought to delineate criteria that should govern the resort to humanitarian intervention:

First, there must be a just cause for the intervention, which can arise when there is serious and irreparable harm occurring (or likely to occur) to human beings. Second, the primary purpose of the intervention must be to halt human suffering. All non-military options for resolution of the crisis must first be explored. The scale, duration, and intensity of the intervention should be dictated by what is necessary to achieve the humanitarian objective. There must be a reasonable chance of success in halting the suffering, such that the consequences of action are not likely to be worse than those of inaction. Third, before embarking on such intervention, states must formally seek Security Council authorization. Finally, intervening military must have a clear and unambiguous mandate and the resources to support that mandate.

Two Conclusions – Necessity and Proportionality: It can be observed from the above examination that armed humanitarian intervention is particularly bound by the constraints of 'necessity' and 'proportionality' as explained by the *Caroline* principle.

4.3 Objectives of Military Interventions:

There are certain situations that may warrant interventions and need for protecting the civilians in conflicting Satiations:

4.3.1 Protecting Human Rights:

To protect the civilian population from the pervasive and widespread suffering, humanitarian intervention takes place. A "proportionate" approach requires that the harm inflicted by military intervention should not outweigh the harm prevented by it – in accordance with the 'do no harm' principle. The prevention of genocide – the deliberate examination of a large group of people, especially those of a particular religious or ethnic group – is seen as one of the leading examples of when intervention is justified. Although genocide is often described as the most fundamental of all crimes against humanity, what is to be realised is, if genocide were the only trigger for military intervention, this would clearly set the bar too high. Interventions could also be justified where an assault on the right of life takes place more generally including, but not restricted to, massacres, large-scale attacks on

civilians and extra-judicial executions of political prisoners. Accordingly, violations of the right of freedom from torture may provide grounds for humanitarian intervention.

4.3.2 Prevention of Genocide:

History has shown that genocide and ethnic cleansing often occur in the early phases of inter-state conflict. Therefore, a quick response is vital to prevent genocide. External intervention can often mitigate violence against civilians, because it forces potential perpetrators to divert time and resources away from the slaughter of civilians and towards defending themselves, although it is not successful in stopping the war straightaway. The devastating loss of life could have been prevented by earlier intervention instead of international inaction in the *Syria civil war* 2011.

The unrest in Syria, which began on 15 March 2011 as part of the wider 2011 Arab Spring protests, grew out of discontent with the Syrian government and escalated to an armed conflict after protests calling for Syrian president Bashar al-Assad's removal was violently suppressed. The war is being fought by several factions: the Syrian Armed Forces and its domestic and international allies, a loose alliance of mostly Sunni opposition rebel groups (such as the Free Syrian Army), Salafi jihadist groups (including al-Nusra Front and Tahrir al-Sham), the mixed Kurdish-Arab Syrian Democratic Forces (SDF), and the Islamic State of Iraq and the Levant (ISIL). A number of foreign countries, such as Iran, Israel, Russia, Turkey, and the United States, have either directly involved themselves in the conflict or provided support to one or another faction.

Genocide Watch issued its first Genocide Alert for Syria in June 2011, pointing out the regime's widespread attacks on civilians, the detention and execution of its political opponents, as well as the genocide – massacres of whole villages of Sunni Muslims. As of August 2013, the total number of overall causalities in the conflict was estimated to be at least 106,000 and a further 1.9 million people have been displaced.

Iran, Russia, and Hezbollah support the Syrian Arab Republic and the Syrian Armed Forces militarily, with Russia conducting airstrikes and other military operations since September 2015. The U.S.-led international coalition, established in 2014 with the declared purpose of countering ISIL, has conducted airstrikes primarily against ISIL as well as some against government and pro-government targets. They have also deployed Special Forces and artillery units to engage ISIL on the ground. Since 2015, the U.S. has supported the Autonomous Administration of North and East Syria and its armed wing, the Syrian Democratic Forces (SDF), materially, financially, and logistically. At different times, the Turkish state has fought the SDF, ISIL, and the Syrian government since 2016, but has also actively supported the Syrian opposition and occupied large swaths of north western Syria while engaging in significant ground combat. Between 2011 and 2017, fighting from the Syrian civil war spilled over into Lebanon as opponents and supporters of the Syrian government travelled to Lebanon to fight and attack each other on Lebanese soil, with ISIL and Al-Nusra also engaging the Lebanese Army. Furthermore, while officially neutral, Israel has exchanged border fire and carried out repeated strikes against Hezbollah and Iranian forces, whose presence in south western Syria it views as a threat.

International organizations have accused virtually all sides involved, including the Ba'athist Syrian government, ISIL, opposition rebel groups, Russia, Turkey, and the U.S.-led coalition of severe human rights violations and massacres. The conflict has caused a major refugee crisis. Over the course of the war, a number of peace initiatives have been launched, including the March 2017 Geneva peace talks on Syria led by the United Nations, but fighting has continued. What is more, with the use of chemical weapons by the Assad regime, there is a grave potential for these acts to escalate further into full-scale act of ethnic cleansing.

4.4 Role of Deterrence:

The example of Syria also serves to illustrate the importance of the deterrence aspect of humanitarian intervention. For the humanitarian intervention to have a successful deterrent effect, it is necessary for the international community to adopt a principled and consistent stance on when it will intervene. Where large-scale gross human rights violation are being perpetrated or where a State uses chemical or biological weapons against its people, the failure to intervene by international community in these circumstances leads to loss of credibility and undermines the effectiveness of military intervention as a deterrent to a State against which it is threatened as well as other similar regimes.

4.5 Protecting Civilians During Military Intervention:

One of the principle aims of humanitarian interventions is to protect civilians. However, if carried out improperly, it may exacerbate the suffering of the local population, as civilians may be left unprotected and get caught between the warring factions. For example, during the military intervention in Iraq, the intervening US and UK forces ultimately found themselves unable to ensure the security of the country they had invaded. The foreign forces failed to prevent widespread looting and civil disobedience in Iraq and Afghanistan for example, and they remained powerless to protect the local population from sectarian violence and the rising insurgency.

4.6 Consequence of Military Intervention:

Military intervention may have a number of negative impacts on the intervening State.

- Firstly, there is financial burden on the intervening State, and varies immensely depending on duration.
- Secondly there are security costs, because the intervening State may have to fear reprisal attacks on its citizens in foreign soil, and also may increase the risk of domestic terrorist attacks by national terror networks.
- Military intervention may also come at a political cost, which can manifest itself both at national and international level. The international community may perceive differently with regard to the legitimacy. The death of soldiers in foreign soil can bring negative domestic political reactions. Further the conflict might potentially have a destabilizing effect in the region, where terror network is spread across the borders.
- Potential civil liability may be incurred during intervention.

4.7 Unauthorized interventions:

There are several instances where States or groups of States, without the advanced authorization of the UN Security Council, have intervened with force in response to alleged extreme violations of human rights. The recent examples include the intervention after the Gulf war to protect Kurds in northern Iraq as well as NATO intervention in Kosovo.

In the absence of UN Security Council's authorization, there are four distinct approaches to the legitimacy of humanitarian interventions:

1. **Status Quo:** This approach categorically affirms that only if authorized by the UNSC or it qualifies as an exercise in the right of self-defence, the military intervention in response to atrocities is lawful. Accordingly, NATO's intervention in Kosovo constitutes a clear violation of Article 2(4) of the UN.
2. **Excusable Breach:** Humanitarian interventions without a UN mandate may be technically illegal under the UN Charter, but may be justified morally and politically in certain exceptional cases. Circumstances such as when an "emergency exists" for protecting human rights, which justify the intervention morally and politically.

3. **Customary Law:** This approach involves reviewing the evaluation of customary law for a legal justification of unauthorized humanitarian intervention in rare cases. This approach examines whether the humanitarian intervention can be understood not only ethically and politically justified, but also whether the intervention is legal under normative framework governing the use of force.
4. **Codification:** This approach calls for the codification of a clear legal doctrine or the "right" of intervention – established through some formal or codified means such as a UN Charter amendment or UN General Assembly declarations. The major argument advanced for codifying this right is that it would enhance the legitimacy of international law, resolve the tension between human rights and sovereignty principles contained in the UN charter.

4.8 Use of force against Non-State actors in self-defence:

Since the September 11th terrorist attacks, the discussion on use for force against non-state actors has been increasing. In wake of the 9/11 terrorist attack, the UN Security Council, for the first time, passed a resolution stating that "force could be used against terrorist organizations". This cemented the growing notion that self-defence can be used against non-state actors. Whilst there may be growing consensus within the international community over the use of force against non-state actors, there is little to no agreement on how this should be implemented.

On the face of it, using force against non-governmental groups or individuals is not legal – as the rules on force only allow it to be used against another State. However, if a State is subject to an armed attack from a non-state actor then how do they defend against it? This is a complicated matter, as even if the right of self-defence were triggered, the State wishing to exercise that right would have to violate the territorial integrity of another State in order to do so. However, this issue could be circumvented if the intervening State has the permission of the other State to do so.

It is important to understand that, when attacking non-state actors, that whilst it might necessarily violate the *just ad bellum* (the law governs when States can resort to warfare), it will not automatically bring the *just in bello* (the law that governs how warfare is conducted) provided there is no nexus between the attack and an armed conflict. This is an important issue to consider within the context of drone strikes against terrorists.

In some instances, the use of force by a non-state actor can be attributed to a State and thus the exercise of self-defence against that State is perfectly justified. In order for an action on a non-state actor to be attributed to a State, that State must have effective control over the actions of that actor. The meaning of effective control was discussed in the ICJ judgement of *Nicaragua* case.

Nicaragua Case: Nicaragua alleged that the United States was responsible for certain military and paramilitary activities in, or directed against Nicaragua, claiming that US was in violation of Article 2(4) in supporting the Contras, rebels against the left-wing Sandinista Government, and mining Nicaraguan ports.

The Court established that the US had carried out an indirect use of force against Nicaragua due to their support to the rebels. Effective control thus meant that the State in question must do more than merely finance the non-state actor. This issue comes into play when terrorism is concerned. It has been proven in the past that certain States have financed certain terrorist organizations, but without further evidence of effective control, the actions of those terrorist organizations cannot be attributed to that State.

Important issue is, whether a non-state actor is capable of carrying out an armed attack within the scope of Article 51. The ICJ in the *Nicaragua* case set out that, only the gravest forms of armed attack would be enough to trigger the right to self-defence. However, since *Nicaragua*, the possibility of an accumulation of events doctrine has opened up. In the *Oil Platforms* case, the ICJ affirmed the high threshold for an armed attack in *Nicaragua* and stated that, "even taken cumulatively", the events in this case would not have reached it. This has inferred that there is a possibility that the Court would accept that a series of small-scale-attacks, like terrorist attacks, could amount to enough to justify triggering self-defence. There is one important counterargument to this viewpoint: the whole purpose of self-defence doctrine is to allow States to defend themselves from ongoing attack, but in the case of a series of terrorist attacks, the attacks are normally over before the State can do anything in defence. If the international community was to accept an accumulation of events doctrine, then that would place the world in a permanent state of armed attack as a State could claim self-defence any time another terrorist attack takes place.

It must be noted that, the use of force against non-state actors is a legal grey area, and appears to be illegal under international law as States can only traditionally use force against other States and not a non-state actor. However, there is growing acceptance of the practice of the fight against terrorist, provided a State does not intervene illegally in another State in order to carry out such attacks.

4.9 Self-defence against terrorism:

After 11 September 2001, international terrorism has exposed the limitation created by the approach to the pre-condition of an 'armed attack' for the purposes of Article 51. The terrorists associated with al-Qaeda and the Taliban regime of Afghanistan attacked the World Trade Centre in New York and the Pentagon in Washington. In these circumstances, the key question is, was the United Stated-led coalition war against Afghanistan on 7 October 2001 justified as an act of self-defence?

It should be noted that, previously international law has permitted a State to invade the territory of another State on evidence that it has supported or harboured terrorists. The September 11 dramatic events has forged new international strategies that attracted support from some developed States, but yet to become normative.

President Bush described the terrorist attacks of September 11 as an 'act of war'. Claiming the right to end the use of Afghanistan as a terrorist base, the United States invoked the right of individual self-defence in Operation Enduring Freedom. The United States also mentioned various acts of terrorism including the bombing of the World Trade Centre in 1993, the attack of the US military facility in Dhahran in 1996, the bombing of the US Embassy in 1998, and of the USS Cole in 2000.

The US Permanent Representative to the UN, in the letter to the Security Council dated 7 October 2001, linked the continuing nature of terrorist activities with the right of self-defence:

> "The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operations ... In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States."

However, whether the prerequisites of Article 51 were satisfied was the question raised by commentators. Applying the *Nicaragua* case, where it was held that provision of weapons or logical support for rebels does not amount to 'armed attack', the key question is: can a single attack by a terrorist group justify a unilateral act of

self-defence against another State? The Security Council characterized the September 11 attach as 'threat to international peace and security', but did not characterize it as 'armed attack'.

Further, the evidences were weak to hold that the terrorists were acting on the instructions of, or under the directions or control of Afghanistan within the meaning of the International Law Commission Articles on State Responsibility.

Simpson notes that 'if a right of self-defence existed on the facts of 11 September 2001 events, then the civilian deaths and destructions of property within Afghanistan inflicted by the open-ended 'war against terrorism' conducted over many months were disproportional to the original attack". Further, the additional consequence of the bombing was the overthrow of Taliban, and creating the conditions for election of a democratic government – are the outcomes well beyond those permitted by a limited right of self-defence.

However, the unusual feature of this conflict is that, States have generally supported the use of force against Afghanistan as a valid exercise of a right of self-defence, which recognizes the legal preconditions for the use of force were considered to have been met.

In the Security Council's resolutions on terrorism on 12 and 28 September 2001, specifically recognized the inherent right of individual or collective self-defence against terrorist acts. These resolutions have expanded the scope of Article 51. In the past, international law has not recognized a State's right to use force against another State in response to terrorist attacks upon its nationals although the United States and Israel have repeatedly have used force against States thought to be responsible for such acts. For example, in 1985, the Security Council unanimously condemned Israeli action against the headquarters of the PLO in Tunis in response to an attack on a secret service agent in Cyprus.

Post September 11, the Security Council in its unprecedented resolutions, appears to recognize that a terrorist attack by non-State actor can constitute an 'armed attack', justifying intervention against a State which believed to have supported the terrorists. Further, the Security Council resolution suggest that, where the attack is finished, there is a right to take pre-emptive action to prevent future attacks, as claimed by the United States and the United Kingdom. If the above claim is applicable, the right of 'anticipatory self-defence' is rather wider than that permitted under the Caroline principles has been confirmed by the Security Council. Since 2001 the world has seen heightened terrorism with attacks in Bali, Spain, Africa, Jakarta, Russia, London, the Occupied Palestinian Territory, and the coalition occupation of Iraq. However, despite such world terrorist attacks, it is still premature to assume that the Security Council resolutions dealing with terrorism have widened the general principles governing the right of individual and collective self-defence.

4.10 The Role of the International Criminal Court (ICC):

The international community had long been emphasising for a world criminal court capable of prosecuting and punishing persons responsible for crimes of international concern, such as genocide, crimes against humanity and war crimes.

The International Criminal Tribunals for Yugoslavia (ICTY) and the International Criminal Tribunals Rwanda (ICTR) were set up ad-hoc in 1993 and 1994 to deal with atrocities committed in these countries, further highlighted the need for a permanent international criminal court to deal with violations of this kind quickly and effectively.

The ICC became the first independent and permanent treaty based international criminal court, established to help end impunity for perpetrators of the most serious crimes of concern to the international community. The ICC only tires those accused of the gravest crimes – war crimes, crimes against humanity, genocide and aggression. It must be noted that ICC is a court of last resort and it will not act if a case is under investigation by a national judicial system.

However, only 122 countries are currently State parties to the Rome Statue which established the ICC. Thus, not all States recognize the jurisdiction of ICC, most notably the US have so far refused to ratify the Rome Statute. The other states that have not signed up to the ICC include India, China, Israel and Russia. The absence of such major actors from the community of the ICC, weakens the Court's legitimacy and its operational effectiveness.

5. Collective Security under the UN Charter

5.1 Roles of the Security Council:

The UN Charter's regime under Articles 42 to 49 which deal with the regulation of force in international affairs was crippled by the use of 'veto' during the Cold War. The Security Council has no standing army at its disposal and the wide powers granted to it under Chapter VII have not been the explicit basis for most of its recommendations and decisions. Until the end of the Cold War, the only occasion on which the Security Council resorted to forcible action was after North Korea invaded South Korea in 1950. When the USSR made the strategic error of being absent from meetings, the Security Council authorized the United Nations force on the basis that a failure to cast a vote is not a veto. With this inauspicious beginning, the Security Council was unable to authorize any further enforcement action over the following 40 years until 1990 when Iraq invaded Kuwait. The practice of the Security Council under Chapter VII is thus of a contemporary origin. Since 1990, the Security Council has been able to achieve a working consensus in response to many international and civil conflicts to enable a response to the Iraq – Kuwait invasion and humanitarian crises in Somalia and Yugoslavia and to create peacekeeping forces in East Timor, Kosovo, Macedonia, Afghanistan and Iraq.

'Implied authorization' from the Security Council was argues by States, and have developed elaborate fictions of requests for self-defence. With its own powers under Chapter VI of the UN Charter, and the Uniting for Pease Resolution 1950, the General Assembly took action. Forging a link between humanitarian crisis and threats of peace under Article 39, the Security Council enabled relatively cohesive responses to the threat of global terrorism. Although each conflict appears to be *sui genesis*, the Security Council constitutes to evolve in response to contemporary challenges.

5.2 What is threat to international peace and security?

It is crucial to decide upon the binding enforcement action under Chapter VII of the Charter by determining that there has been a 'threat to peace, breach of the peace or act of aggression'. The 'armed attack upon the Republic of Korea by forces from North Korea ...' was determined by Security Council to have constituted a 'breach of peace' and provided the basis for Resolution of 25 June 1950, which:

> "Calls for the immediate cession of hostilities; and calls upon the authorities of North Korea to withdraw forthwith their armed forces to the 38th parallel ...
> Calls upon all members to render every assistance to the United Nations in the execution of the resolution and to refrain from giving assistance to the North Korean authorities."

Determinations by the Security Council that there has been a breach of peace since the Korean crisis have been few – the Falkland Island War, the Iran-Iraq War, and the Iraq's invasion of Kuwait. However, the Security

Council had made a number of lesser determinations that a situation constituted a 'treat to international peace and security'. It musts have be noted that most of such situations have arisen in the context of civil war or internal conflicts, and the Security Council has linked breaches of human rights and humanitarian law with a threat to international peace and security. The Security Council, concluded in 1992 that the 'human tragedy' in Somalia and the deteriorating war in Liberia were threats to international peace. In 1994, the genocide in Rwanda was determined as threats to international peace. The primary stimulants for Security Council action in Haiti are the humanitarian crisis and mass displacement of people, where a civilian mission was authorized and an oil and arms embargo imposed in 1993.

The readiness of the Security Council to find that an international humanitarian conflict constitutes a threat to international peace and security necessarily modifies the principle of non-intervention under Article 2(7) of the UN Charter and qualifies the exclusive territorial jurisdiction of States at international law.

Where a State has failed to comply with earlier Security Council resolutions with respect to terrorism may also arise threats to international peace and security. In the 1992 *Lockerbie* case, when Libya failed to extradite the alleged bombers, the Security Council found it was a threat under the Article 39. Where Sudan failed to extradite suspects wanted in relation to the assassination attempt against the President of Egypt, the Security Council decided this constituted a threat to international peace and security. The Security Council resolved that the 11 September 2001 terrorist attack, 'like any act of international terrorism, constitute a threat to international peace and security'. On this basis, the Security Council resolved that it was acting under Chapter VII and proceeded to take decision binding on all States to prevent and suppress terrorism.

5.3 United Nations Peacekeeping and Enforcement Operations:

The UN Charter makes no provision for peacekeeping forces. However, the contemporary practice of the UN has been to employ such forces whenever law and order have broken down and human rights are at risk. In the absence of any standing army, creating *ad hoc* peacekeeping forces has become a means by which Security Council delegates its enforcement powers to an individual State or coalition of States. The first peacekeeping force was established by the General Assembly in 1956 to supervise the cease-fire in the Middle East after the invasion of the Suez by France and the United Kingdom, they are now exclusively a matter for the Security Council under the administration of the Secretary-General and Department of Peacekeeping Operations.

Peacekeeping forces comprise troops made available voluntarily by States, though they serve under United Nations command. In other cases, the Security Council may authorize one of the States to take command. By August 2005, there were 100 states contributing nearly 59,000 military personnel and civilian police to 16 peacekeeping operations in East Timor, Cyprus, Lebanon, Western Sahara, Georgia, Kosovo, Sierra Leone, Congo, Ethiopia and Eritrea, Liberia, Cote d'lovire, Haiti and Burundi. In addition, the UN has established the Truce Supervision Organization, the Ministry Observer Group in India and Pakistan and the Disengagement Observer Force.

The traditional mandate for peacekeeping forces is that they are 'non-combat' operations to foster and maintain peace in the territory. UN forces are required to remain neutral and to use force only in self-defence. In more recent practice, there has been a tendency towards 'mandate drift' where peacekeeping becomes 'peace enforcement' on the authority of the Security Council under Chapter VII and is no longer a consensual operation. For this reason, many peacekeeping operations acquire mixed functions that may include the right to use force for specified purposes. Examples include the UN authorization of NATO to enforce the arms embargo against the former Yugoslavia and to enforce the no-fly zone over Bosnia in 1994.

It has been UN practice that any peacekeeping force can be stationed in the territory of a State only with its consent. As peacekeeping forces become mixed operations with enforcement powers, the need for consent can be less important today where the territorial State must accept the continued presence of the force that has a legal capacity to enforce its objectives.

Since 1989 there has been over 40 peacekeeping operations authorized by the Security Council, many of them with enforcement powers. UNOSOM II was given enforcement powers in Somalia, and UNPROFOR was entitled 'to take necessary measures, including the use of force, to reply to bombardments against safe areas. Others, such as the UN Transitional Authority in Cambodia (UNTAC), have had mandates to rebuild systems for governance and law. The UN peacekeeping operations in East Timor provides an example of the various tasks that may be undertaken by a force that has differing functions during each phase of a conflict.

A panel on UN Pease Operation was appointed in August 2000 by the Secretary-General reported that the United Nations has 'repeatedly failed to meet the challenge' posed by the UN Charter to 'save succeeding generations from the scourge of war'. It makes many recommendations for the reform of UN peace operations including the need for fact-finding missions, the funding of 'quick impact projects' within a mission and a 'doctrinal shift' towards 'rule of law elements' to strengthen legal institutions and protect human rights in post-conflict environment. The reforms apply only to peacekeeping and the Secretary-General assured the General Assembly that they are not intended to turn the 'United Nations into a war-fighting machine or to fundamentally change the principles according to which peacekeepers use force. Providing UN peacekeeping operations can attract the political will of the members, they will continue to play a crucial role in regulating the use of force in the future.

5.4 General Assembly:

The Charter of the United Nations provides that the Security Council has the primary responsibility for the maintenance of international peace and security. The failure of the Security Council to take enforcement action over the first five years of its life – in which the right of veto was used 50 times – stimulated efforts to find a role for the General Assembly. The General Assembly does have limited powers in respect of international peace and security. Under Article 14, it may recommend measures for the peaceful adjustment of any situation, providing the Security Council is not dealing with the same matter. When a question relating to maintenance of international peace and security requires action, it must, however, be referred to the Security Council. In response to the Korean war, the General Assembly adopted the Uniting for Peace Resolution in 1950 to strengthen its 'secondary' powers whenever the veto has stymied the possibility of action by the Security Council.

The General Assembly has relied on the Uniting for Peace Resolution in respect of Korea in 1950, Suez in 1956, the Hungarian Uprising in 1956, Lebanon and Jordan in 1958, Congo in 1960, the Middle East in 1967, Bangladesh in 1972, Afghanistan in 1980, Palestine in 1980 and 1982, Namibia in 1981 and the occupied Palestinian territories in 1982.

5.5 Dealing with International Terrorism:

There has been no international legal offence of 'terrorism' as such. The practice of the United Nations has been to encourage states to negotiate specific multilateral treaties that define certain criminal acts as subject to extradition or national prosecution. The tragedy in Beslan, among other terrorist acts, prompted Russia to introduce Resolution 1566 (8 October 2004), adopted unanimously, which provides a general definition of terrorism. The resolution,

> "... Recalls that criminal acts, including against civilian, committed with the intent to cause death or serious bodily injury, or taking of hostage, with the purposes to provoke a State or terror in the general public or in a group of persons or particular persons, intimate a population or compel a government or an international organization to do or abstain from doing any act, and all other acts with constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature ..."

Pending the conclusion of the draft conventions on international terrorism and for the suppression of acts of nuclear terrorism, that can provide a focus for cooperative State anti-terrorist activities. Resolution 1566 also establishes a working group to consider practical measures to be imposed on:

> "... individuals, groups or entities involved in or associated with terrorist activities other than those designated by the Al-Qaida / Taliban Sanctions Committee, including more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition, freezing of their financial assets, preventing their movement through the territories of Member States, preventing supply to them of all types of arms and related material, and on the procedures for implementing these measures.

The resolution recognizes the range of measures that must be taken to counter terrorist organizations. It also asks the working group to consider the establishment of a fund to compensate victims of terrorist acts, funded partly through assets seized from terrorists groups.

International terrorism as a means of achieving political ends has been a common global phenomenon and incidents such as Dawson's Field hijacking in 1970, the Entebbe incident in 1976 and the terrorist attacks in the Rome and Vienna Airports in 1989 have prompted efforts by the UN to strengthen international procedures for prosecution. However, terrorist attacks of September 11 and a subsequent rise in global terrorism, including against the UN headquarters in Bagdad on 19 August 2003, have been a catalyst compared with earlier initiatives. Shortly after September 11, the Security Council unanimously passed Resolution 1373 (2001). The Security Council, acting under Chapter VII, linked terrorism with the right of individual and collective self-defence and appeared to recognize for the first time, that a State might legitimately defend itself against terrorist act by using force on the territory of another State.
The Security Council also established a Counter-Terrorism Committee to monitor implementation of its decisions on terrorism, and in 2004, established its analytical support and Sanctions Monitoring Team.

5.6 Multilateral treaties on terrorism:

An important element in international cooperation in responding to terrorism lies in the ratification and implementation in domestic laws of the 12 existing multilateral treaties dealing with specific forms of terrorism such as hijacking, hostage-taking, and bombings. These conventions set out in the chronological order, illustrate the forms of terrorism that have been primarily concern to the international community over the past 40 years:

(1) Convention on offenses Committed on Board Aircraft, 1963;
(2) Convention for suppression of Unlawful Seizure of Aircraft, 1970;
(3) Convention for suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971;

(4) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons including Diplomatic Agents, 1973;
(5) Convention Against the Taking of Hostages, 1979;
(6) Convention on the Physical Protection of Nuclear Material, 1980;
(7) Convention for the Suppression of Unlawful Acts of Violence at Airports, Protocol, 1988;
(8) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988;
(9) Convention for the Suppression of Unlawful Acts Against Fixed Platforms on the Continental Shelf, Protocol, 1988;
(10) Convention on the Marketing on Plastic Explosives for the Purpose of Identification, 1991;
(11) Convention for the Suppression of Terrorist Bombing, 1997;
(12) Convention for the Suppression of the Financing of Terrorism, 1999.

These treaties deal with diverse acts, generally imposing an obligation on parties to establish jurisdiction over the offence where possible, and, in any event, to prosecute or extradite.

Several regional agreements with respect terrorism have also been negotiated since the late 1970s such as the SAARC Regional Convention on Suppression of Terrorism 1987 by the state of the South Asian Association for Regional Cooperation (SAARC). This agreement recognizes the impact terrorism on the security and stability of the region and lists offences that are to be regarded as terrorist acts and thus not capable of benefiting from the political offence exception in extradition treaties. Many such offences are defined by reference to the relevant multilateral treaty; others constitute criminal offences in most legal system. States parties agree to make the offence extraditable. If on receipt of a request for extradition the person is not extradited, the party is bound to try the acts by its domestic authorities.

5.7 United Nations Counter-terrorist Activities:

In addition to promoting the negotiation of treaties responding to particular forms of terrorism, the General Assembly and Security Council have attempted to deal with terrorism in an integrated and comprehensive way, unrelated to the precise form the violence take. Implementation of Resolution 1373 (2001) by the Counter-Terrorism Committee (CTC) has, however, proved difficult. In its report of January 2004, the CTC stressed the impediments to responding effectively to terrorism, including problems encountered in blocking the financing of terrorism, the links between organized crime and terrorism and the lack of political will in prosecuting under national laws. It concludes that 'implementation of Resolution 1373 is encountering serious problems' and that comprehensive interaction between the committee and states if necessary.

For its part, the Security Council has linked international terrorism to the terminology of Chapter VII by characterizing it as a threat to 'international peace and security'. It did so, for example, in *Lockerbie* case, where Libya failed to comply with requests for extradition. Similarly, in response to the situation in Sudan, the Security Council resolved that the 'suppression of acts of international terrorism, including those in which States are involved, is essential for the maintenance of international peace and security'. Resolutions 1373 (2001) and 1566 (2004), post-September 11, also confirm that all acts of international terrorism constitute a threat to international peace and security. The Security Council thus founds the legality of the responses to terrorism within the enforcement powers of UN Charter.

6. Responsibility to Protect

6.1 Emergence of Responsibility to protect:

As often the Security Council is unwilling or unable to act, the international community intervenes to prevent or limit massive human rights violation on moral grounds rather than strict legal grounds. Although usually considered to be categorically distinct from most definitions of humanitarian intervention, the emergence of 'Responsibility to Protect' deserves mention. The 'International Commission on Intervention and State Sovereignty' (ICISS) in their report 'The Responsibility to Protect' (R2P) in 2001 argued that there is an international responsibility to protect the population when the state is unwilling or unable to do so. This is formed from the basic principle of 'state sovereignty' – which implies state responsibility – 'the primary responsibility for the protection for its people lies with the state itself.'

An important aim of R2P core principles is to provide a legal and ethical basis for humanitarian intervention – where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it – the principle of non-intervention yields to the international responsibility to protect. Thus, the R2P principle shifts the paradigm from 'the right to intervene' to 'the responsibility to protect'.

In the UN Summit held in September 2005, the UN has endorsed the R2P principle. Clause 139 of the Final Outcome Document provides that the international community through the UN, has the responsibility to take collective action in a timely and decisive manner, through the Security Council in accordance with the UN Charter, including Chapter VII – should peaceful means be inadequate and national authorities manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The R2P embraces three specific responsibilities:

- The responsibility to prevent,
- The responsibility to react, and
- The responsibility to rebuild.

Prevention is the single most important dimension of the responsibility to protect. As military intervention for human protection purposes is an exceptional and extraordinary measure, to be warranted, the R2P principles for military intervention are as follows:

(1) The Just Cause Threshold – such as large-scale loss of life, ethnic cleansing etc.
(2) The Precautionary Principles: includes right intention, last resort, proportional means, and reasonable prospects.
(3) Right Authority – UN Security Council authorisation.
(4) Operational Principles – clear objectives, acceptance of limitations, rules etc.

It can be said that the foundation of the responsibility to protect, as a guiding principle for the international community lie in obligations inherent in the concept of sovereignty and that the responsibility of the Security Council, under article 24 of the UN Charter for the maintenance of international peace and security.

The General Assembly Resolution 60/1 further evidences the UN endorsement to the R2P and carries a great political and ethical value.
However, the above UN endorsement merely confirms that the UN Security council can authorise member states to use military force on humanitarian grounds, but not oblige. R2P is not an UN Security Council resolution,

neither a customary law and cannot yet form a legal basis to legitimate forceful intervention. Procedures for invoking R2P procedures are still being worked out and at its best can be framework on moral grounds.

Conclusion

International law prohibits use of force, as provided by UN Charter article 2(4). The exceptional situations where use of force may be lawful in international law are when a state makes invitation for legal purposes, when UN Security Council authorizes such intervention or as a self-defence. However, article 51 of the UN Charter requires that there must be an armed attack before a right of self-defence arises. This prevents the pre-emptive strike by a state as an anticipatory self-defence. Customary law such as *Caroline* Principles provides guidelines for self-defence and advocates 'necessity' and 'proportionality'. Along with these principles, test of imminence and accumulation theory are also providing guidelines for use of force as self-defence. States have also used implied authorization of the Security Council for anticipatory self-defence as seen in the 2001 coalition attack on Iraq. Because the UN Charter does not expressively recognize the right of humanitarian intervention (and also due to the ambiguity surrounding article 51 of the UN Charter), in view of various humanitarian circumstances such as Kosovo, the international community has developed certain criteria for humanitarian intervention, which is based on principles of necessity and proportionality. This is based on the doctrine of 'Responsibility to Protect' (developed from the principles of 'state sovereignty') which has an endorsement of the UN and serves as a guideline to invoke humanitarian intervention.

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