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CURRENT LEGAL DEVELOPMENTS

The Principle of Non-intervention

MAZIAR JAMNEJAD AND MICHAEL WOOD*

Abstract
This article examines the existence, nature, and content of the non-intervention principle in contemporary international law, concentrating on the application of the principle to areas other than the use of force. It looks at the historical development of the principle and the sources and evidence of the law, in particular resolutions of the UN General Assembly, the decisions of the International Court of Justice, and the practice of states. The article then considers some specific treaty-based applications of the principle, and explores how far the principle may apply to non-treaty, non-forcible situations. It next considers a number of circumstances that may preclude the wrongfulness of intervention (Security Council authorization, consent, and countermeasures), before drawing some tentative conclusions.

Key words
coercion; consent; countermeasures; diplomatic relations; domestic jurisdiction; economic coercion; extraterritorial jurisdiction; friendly relations; funding of political parties; human rights; humanitarian intervention; interference; internal affairs; intervention; recognition; sovereign equality; use of force

One of the most potent and elusive of all international principles.[1]

On 24 July 1967, President Charles de Gaulle of France concluded a speech in Montreal with the words: 'Vive le Québec! Vive le Québec libre!' Here was the president of the French Republic, in Canada on an official visit, apparently inciting Quebeckers to secede. Canada's federal government described the remarks as

* Maziar Jamnejad is a trainee solicitor with Freshfields Bruckhaus Deringer LLP. This article is written in a personal capacity and the views contained herein are not those of Freshfields Bruckhaus Deringer LLP. Michael Wood is a Senior Fellow, Lauterpacht Centre for International Law, University of Cambridge, and a member of the International Law Commission. This article had its origins in an International Law Discussion Group held at the Royal Institute of International Affairs (Chatham House) on 28 February 2007. The authors thank Elizabeth Wilmshurst for her encouragement and assistance.

1 V. Lowe, *International Law* (2007), 104. For Verzijl, 'intervention' is 'a truly Protean concept'. J. H. W. Verzijl, *International Law in Historical Perspective* (1968), I, 236. Hafner puts it as follows: 'Hardly any other expression used in international law is as vague, blurred, controversial and disputed as the term "intervention"'. G. Hafner, Sub-group on Intervention by Invitation, Preliminary Report, 26 July 2007, (2007) *Yearbook of the Institute of International Law, Santiago Session* 226, at 236. Some 85 years earlier, Winfield wrote in similar terms: 'The subject of intervention is one of the vaguest branches of international law'. P. H. Winfield, 'The History of Intervention in International Law', (1922–3) 3 *British Yearbook of International Law* 130. For a similar view see H. W. Briggs, *The Law of Nations* (1952), 960.

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'unacceptable'. The next day de Gaulle left Canada abruptly. Did the president breach international law? In particular, did he violate any rule of non-intervention? It is not clear that Canada claimed that he did. 'Unacceptable' is not necessarily the same as 'unlawful'.

The principle of non-intervention raises much the same issues today. States frequently condemn the acts of other states as intervention in their internal affairs. In August 2007, for example, Sudan expelled the Canadian chargé d'affaires for 'interfering in its affairs'; apparently she had been engaging in 'unacceptable contacts' with opposition leaders. The Canadian Foreign Ministry spokesperson said that the chargé 'was standing up for *our values* of freedom, democracy, human rights and the rule of law in Sudan' (emphasis added). Also in August 2007, in response to a protest when he was reported as saying that the Iraqi Prime Minister, Nouri Al-Maliki, should resign, the French Foreign Minister, Bernard Kouchner, said, 'if the Prime Minister wants me to apologize for having interfered directly in Iraqi affairs, I'll do it willingly'. When in October 2007 US President George W. Bush attended the ceremony at which the Dalai Lama, the Tibetan spiritual leader, received the Congressional Medal of Honor, the Chinese Foreign Minister said that 'it seriously violates the norm of international relations, and . . . interferes with China's internal affairs'.

The present article considers the existence, nature, and content of the non-intervention principle in contemporary international law. We are concerned with law, not with politics or international relations, and we seek to address the law as it is, not the law as it might be. The emphasis is on intervention which does not involve the use of force. However, in the interests of presenting a more complete picture, we have included a relatively brief section on intervention and the use of force.

It may seem strange, in an era of interdependence and 'globalization', to write about non-intervention. But by seeking to understand the concept, we can perhaps better appreciate the significance of proposals for radical change in the international system, such as calls for a 'responsibility to protect', and better understand the concerns to which such proposals sometimes give rise.

The strong feelings that still surround the non-intervention principle reflect its status as 'a corollary of every state's right to sovereignty, territorial integrity and political independence'.[2] It is closely linked to the concept of domestic affairs (*domaine réservé*) and also to the international legal limits on a state's jurisdiction to prescribe and to enforce. Just as the reach of international law is constantly changing, so too is the line between what is, and what is not, prohibited under the non-intervention principle.[3]

2 R. Y. Jennings and A. D. Watts, *Oppenheim's International Law* (hereafter *Oppenheim*), 428.

3 It should at the same time be recalled that international law does not change merely because politicians say it should. International law does not usually change even if governments act as though it has changed, unless they are explicit about the new legal basis for the action and states generally accept that new basis. In recent years certain politicians have referred a good deal to 'intervention', but it is doubtful how far they have legal considerations in mind, even when their remarks are cloaked in legal language. Shortly before leaving office, the then British Prime Minister, Tony Blair, described his foreign policy as 'very interventionist' (Oral

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After a few preliminary remarks (section 1), we look briefly at the historical development of the principle (section 2), and at the sources of the law on non-intervention, including the actions of states within the UN General Assembly, the case law, and the writers (section 3). Then we turn to the nature of the principle (section 4). After referring briefly to the use of force (section 5), we go on to consider some specific treaty-based rules that may be seen as applications of the principle (section 6), and explore how far the principle may apply to non-treaty, non-forcible situations (section 7). Finally, we consider a number of circumstances that may preclude the wrongfulness of intervention (section 8) – UN Security Council authorization, consent, and countermeasures – before drawing some tentative conclusions (section 9).

1. Preliminary observations

The non-intervention principle featured prominently in resolutions of the UN General Assembly from the mid-1960s to the 1980s. It is listed among 'the principles of international law embodied in the Charter' in the preambles to the 1969 and 1986 Vienna Conventions on the Law of Treaties. The principle is also reflected in the Charter of the Organization of American States and the constituent instruments of other regional organizations, as well as in multilateral and bilateral treaties. While 'not, as such, spelt out in the Charter', it is 'a corollary of the principle of the sovereign equality of States' contained in Article 2(1).[4] The principle is often referred to in diplomatic correspondence and protests, and in debates at the United Nations. In assessing state practice, however, one needs to distinguish cases where the language of 'non-intervention' is used as political rhetoric from those where it is used to make a legal argument, although this is by no means easy.

Two elements of an unlawful intervention are sometimes distinguished.[5] First, there must be an 'intervention' by one state in the affairs of another. Second, the intervention must bear on 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely'.[6]

What constitutes an 'intervention' is nowhere set out clearly.[7] This in itself goes far towards explaining the uncertainties surrounding the subject. For our part, we shall use the term chiefly to refer to cases where coercive action is taken by one state to

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Evidence before the Liaison Committee, 6 February 2007, answer to Q1). Already, on 5 March 2004, Blair had proclaimed in a speech at his Sedgefield constituency that '[i]t may well be that under international law as presently constituted, a regime can systematically brutalize and oppress its people and there is nothing anyone can do about it [. . .] unless it come within the definition of a humanitarian catastrophe . . . This may be the law, but should it be?' Speech on the threat of global terrorism, www.number10.gov.uk/Page5461.

4 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14 (hereafter *Nicaragua*), para. 202.

5 J. Verhoeven, 'Non-intervention: "affaires intérieures" ou "vie privée"?', in *Liber Amicorum Michel Virally, Le droit international au service de la paix et du développement* (1991), 493–500; P. Klein and O. Corten, 'Droit d'ingérence ou obligation de réaction non armée? Les possibilités d'actions non armées visant à assurer le respect des droits de la personne face au principe de non-ingérence', (1990) 23 *Revue Belge de Droit International* 368.

6 *Nicaragua*, *supra* note 4, para. 205.

7 The more common term is 'non-intervention', although 'non-interference' is also used. The two seem to be interchangeable, but 'interference' may suggest a wider prohibition, especially when used alongside 'intervention'.

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secure a change in the policies of another. According to *Oppenheim*, 'the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. Interference pure and simple is not intervention'.[8]

Thus the essence of intervention is coercion. The requirement of coercion is clear from the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (Friendly Relations Declaration):

> 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 the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.[9]

The International Court of Justice (ICJ, International Court) emphasized the element of coercion in *Nicaragua*:

> A prohibited intervention must . . . be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention is particularly obvious in the case of an intervention which uses force, either in the form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.[10]

Only acts of a certain magnitude are likely to qualify as 'coercive', and only those that are intended to force a policy change in the target state will contravene the principle. The non-intervention principle is sometimes criticized for apparently precluding all state-to-state interaction; the requirement of coercion properly delimits the principle.

Coercion also goes to the core of the mischief that the non-intervention principle seeks to address. The Friendly Relations Declaration refers to 'the subordination of the exercise of . . . sovereign rights'. Sovereign rights, or 'the sovereign will', are only subordinated where the intervening state acts 'coercively'. If the target state wishes to impress the intervening state and complies freely, or the pressure is such that it could reasonably be resisted, the sovereign will of the target state has not been subordinated.

There is a close relationship between the principle of non-intervention and the rules of international law on the use of force. Many writings on 'non-intervention', particularly in earlier times, dealt solely with the law on the use of force. The large overlap between the non-intervention principle and the law on the use of force can be seen by comparing the first and third principles in the Friendly Relations Declaration. The rules on the use of force are a specific application of the principle

8 *Oppenheim*, *supra* note 2, at 428.
9 UN Doc. A/Res/2625(XXV).
10 *Nicaragua*, *supra* note 4, para. 205. See also Judge Schwebel in his Dissenting Opinion: 'The essence of [such customary international law of non-intervention as there is] long has been recognized to prohibit the dictatorial intervention by one State in the affairs of another' (para. 98).

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of non-intervention, indeed the most important application of the principle.[11] We do not, however, in this article deal with the law on the use of force in any depth. We focus instead on the non-intervention principle as such and on intervention not involving the use of force.[12]

Care is needed not to overstate the scope of the non-intervention principle. The abstract rhetoric of the law, as expressed in resolutions of the UN General Assembly and other bodies, is hardly reflected in the practice of states. It is also an area where there are major differences among states, particularly between those that are members of intrusive regional organizations such as the European Union, the Organization for Security and Co-operation in Europe (OSCE), and the Council of Europe, and others which are not. The former, mostly, seem to be accustomed to outside 'interference' and no longer regard it as abnormal.

There have been great changes in the world since the period of major UN activity on the principle of non-intervention (1965–85). The Cold War has ended. There is now greater emphasis, on the part of many, on democracy, the rule of law, human rights, and sound economic governance, and less on Westphalian concepts of 'sovereignty'. A limited 'responsibility to protect' has been pronounced by the General Assembly and endorsed by the Security Council,[13] although hardly put into practice.[14] It seems inevitable that these developments will leave their mark on the application of the principle of non-intervention.

2. Historical overview

Vattel is sometimes credited with being the first to formulate a principle of non-intervention, although the idea was certainly of earlier vintage;[15] it was inherent in the new world order ushered in by the Peace of Westphalia. But it is questionable how far the principle was reflected in the practice of states before the nineteenth century.

Reference is often made to the Monroe Doctrine, proclaimed on 2 December 1823 by US President James Monroe, who stated that 'any interposition for the purpose of oppressing them [the newly formed states of the Americas] or controlling in any other manner their destiny' would be seen as a threat to the United States. Further, the doctrine pledged that the United States would not intervene in European affairs

11 'While the customary rules of international law relating to intervention have now to a considerable extent to be considered alongside the more general prohibition on the use of force, intervention is still a distinct concept.' *Oppenheim*, *supra* note 2, at 429.

12 During the negotiation of the UN Charter, the Brazilian delegation proposed to extend Art. 2(4) to economic as well as armed force, but the proposal was rejected (6 *UNCIO Documents* 335). An argument is still occasionally heard that the reason for the rejection of the Brazilian proposal was that Art. 2(4) as it stands extends to economic force.

13 UN Doc. A/RES/60/1 (2005 World Summit Outcome), paras. 138–139; UN Doc. S/RES/1674 (2006); and UN Doc. S/RES/1706 (2006).

14 See, for example, the arguments in the Security Council against a draft resolution on Myanmar: S/PV. 5526, S/PV.5619; and against a draft resolution on Zimbabwe: S/PV.5933.

15 E. Vattel, *Droit des gens ou principes de la loi naturelle* (1758), I, para. 37. For a somewhat earlier formulation see C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), paras. 255–257. For a historical overview, see Verzijl, *supra* note 1, at 236–43.

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unless its interests were directly affected. The doctrine has been frequently invoked in contexts as diverse as the United Kingdom's alliance with Texas in 1836, the US occupation of Cuba in 1898 and support by the USSR for socialist governments during the Cold War. But it was never thought of as a legal matter – except perhaps in the Americas.[16]

Also in the Americas, the declaration by President Franklin Roosevelt and Secretary of State Hull of the 'good-neighbour policy', according to which the United States would not intervene in the region, was followed by the Montevideo Convention of 1933 on Rights and Duties of States.[17] Article 8 provides that 'No State has the right to intervene in the internal or external affairs of another'. This 'fundamental principle' was solemnly affirmed in the Additional Protocol Relative to Non-intervention of 1936, in which the parties declared inadmissible 'the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties'.[18]

The Organization of American States (OAS) was the first regional organization to include a prohibition on intervention in its constitution, and it continues to promote the principle of non-intervention in the Americas. The Charter of the OAS of 1948 expressly prohibits members from intervening in each other's internal or external affairs.[19]

The Latin American states were by no means the only advocates of non-intervention during the Cold War. The Eastern bloc and the colonial powers were early supporters, later joined by newly independent states. Many of the non-aligned states, together with China and Cuba among others, continue to be vociferous supporters.

During the 1960s, 1970s, and 1980s the UN General Assembly was particularly active, and this has to a degree continued even into the present century. Some thirty-five resolutions specifically addressing intervention and interference have been adopted by the General Assembly since 1957,[20] and there are many others

16 See G. Nolte, 'Monroe Doctrine', (1997) 3 *Encyclopedia of Public International Law* 460; T. Grant, 'Doctrines (Monroe, Hallstein, Brezhnev, Stimson)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2008, online edn). The British Law Officers did not think that the Monroe Doctrine was a legal doctrine: A. D. McNair, *Law Officers' Opinions*, I, 118–21. Art. 21 of the Covenant of the League of Nations referred to it as a 'regional understanding'.

17 159 LNTS 199. A US declaration accompanying the Convention said that it prohibited 'interference with the freedom, the sovereignty or other internal affairs, or the processes of the Governments of other nations'.

18 188 LNTS 31.

19 Charter of the Organization of American States (amended by the protocols of 1967, 1985, 1992 and 1993), Arts. 3 and 19.

20 Peaceful and Neighbourly Relations among States, UN Doc. A/1236 (XII) (1957); Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, UN Doc. A/2131 (XX) (1965 Declaration); Status of the Implementation of the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Security, UN Doc. A/Res/2225 (XXI) (1966); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc. A/Res/2625(XXV) (1970); Charter of Economic Rights and Duties of States, UN Doc. A/Res/3281(XXIX) (1970); Declaration on the Establishment of the New International Economic Order, UN Doc. A/Res/3201 (S-VI) (1974); Non-interference in the Internal Affairs of States, UN Doc. A/Res/31/91 (1976 Declaration); Non-interference in the Internal Affairs of States, UN Docs. A/Res/32/153 (1977), A/Res/33/74 (1978), A/Res/34/101 (1979), A/Res/35/159 (1980); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, UN Doc. A/Res/36/103 (1981 Declaration); Solemn Appeal to States in Conflict to Cease

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touching on the matter, albeit less directly. But very few are authoritative, and many were adopted by a heavily divided vote. The three most significant are the 1965 Declaration on the Inadmissibility of Intervention, the 1970 Friendly Relations Declaration, and the 1981 Declaration on the Inadmissibility of Intervention and Interference.

3. Sources of the law on non-intervention

Before turning to the nature and scope of the principle, we consider the sources of the law of non-intervention. As with any area of international law, the principal sources are treaties (section 3.1) and customary international law (section 3.2). ICJ judgments give important guidance (section 3.3). The writings of learned authors have dealt both with the general subject and with particular aspects (section 3.4).

3.1. Treaties

The non-intervention principle is reflected in treaties – multilateral, regional, and bilateral. Some of the more important are described in section 6 below. Often the principle is stated baldly, without shedding light on its content, and sometimes the treaty provision, although at first glance connected with the principle of non-intervention, may in fact deal with a distinct matter, as is the case with Article 2(7) of the UN Charter (a limitation on the powers of the United Nations) and Article 41 of the 1961 Vienna Convention on Diplomatic Relations (a special rule of conduct for diplomatic agents).

3.2. Customary international law

The determination of the rules of customary international law can be an uncertain process, especially in a world of almost 200 states.

The assessment of customary law prohibitions can be particularly difficult. State practice will consist of inaction rather than action. The result is a greater reliance on what states say about the law. With respect to the principle of non-intervention, a

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Armed Action Forthwith and to Settle Disputes between Them through Negotiations, and to States Members of the United Nations to Undertake to Solve Situations of Tension and Conflict and Existing Disputes by Political Means and to Refrain from the Threat or Use of Force and from any Intervention in the Internal Affairs of Other States, UN Doc. A/Res/40/9 (1985); Economic Measures as a Means of Political and Economic Coercion against Developing Countries, UN Docs. A/Res/39/210 (1984), A/Res/40/185 (1985), A/Res/41/165 (1986), A/Res/42/173 (1987), A/Res/44/215 (1989), A/Res/46/210 (1991), A/Res/48/168, (1993); Unilateral Economic Measures as a Means of Political and Economic Coercion against Developing Countries, UN Docs. A/Res/52/181 (1997), A/Res/54/200 (1999), A/Res/56/179 (2001), A/Res/58/198 (2003), A/Res/60/185 (2005), A/Res/62/183 (2007); Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in Electoral Processes, UN Docs. A/RES/44/147 (1989), A/RES/45/151 (1990), A/RES/46/130 (1991), A/RES/47/130 (1992), A/RES/48/124 (1993), A/RES/50/172 (1995), A/Res/52/119 (1997), A/RES/54/168 (1999); Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in Electoral Processes as an Important Element for the Promotion and Protection of Human Rights, UN Doc. A/Res/56/154 (2001). The principle of non-intervention continues to be referred to in resolutions of the UN General Assembly, for example in the annual resolution on the US embargo against Cuba. See, e.g., UN Doc. A/RES/62/3, 30 October 2007, which was adopted by 184 votes to 4 (Israel, Marshall Islands, Palau, United States), with 1 abstention (Federated States of Micronesia) and three states absent (Albania, El Salvador, Iraq). For the debate see A/62/PV.38. The Security Council has also affirmed the importance of non-interference in internal affairs: Resolution 1790 (2007).

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significant part of the *opinio juris* is to be found in the debates and resolutions of the General Assembly and other bodies, in particular the Friendly Relations Declaration of 1970 and the Helsinki Final Act of 1975.

In reality, a rigid distinction between state practice and *opinio juris* is often not possible. What counts as state practice will vary depending on the area of international law concerned. While some authors may still argue that one should have regard only to what states actually do under a conviction that what they do is required or permitted by law, a more modern approach (reflected for example in the judgments of the ICJ) is to have regard to what states say, what they do, and what they say about what they do, in so far as this reflects their legal beliefs.[21] In the case of intervention not using force (the primary subject of this article), it is necessary to have regard to all forms of state practice and the actions and reactions of states, in so far as they are available.[22] But the clearest and most accessible evidence of the views of states in this field has most often taken the form of individual and collective statements in and through the UN General Assembly.

Writing in 1989, Damrosch pointed to 'a rather serious gap between what a broad view of the nonintervention norm would require and what states actually do'.[23] This is perhaps even more the case today. A thorough study of state practice would require a large research project, and would in any event probably be inconclusive. The International Court has relied in large measure on one or two declarations of the General Assembly,[24] but even when these have been adopted by consensus they do not necessarily reflect the law.[25] In any event, they are for the most part too general to offer clear answers to specific problems.

The 1957 resolution on Peaceful and Neighbourly Relations among States mentions 'non-intervention in one another's internal affairs' as one of the bases for relations between states. This was followed by the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection

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21 M. Wood, 'State Practice', *Max Planck Encyclopedia of Public International Law*, *supra* note 16.

22 Brownlie has a non-exhaustive list of sources of custom:

> [D]iplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc., comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly. (I. Brownlie, *Principles of Public International Law* (2008), 6–7)

23 L. F. Damrosch, 'Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Matters', (1989) 83 AJIL 1. According to Lowe, '[t]he most interesting question regarding the principle of non-intervention in international law is why on earth anyone should suppose that it exists.' V. Lowe, 'The Principle of Non-intervention: Use of Force', in V. Lowe and C. Warbrick (eds.), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (1994), 66 at 67.

24 *Nicaragua*, *supra* note 4, paras. 202–203.

25 Judge Ago expressed some surprise 'at the assurance with which the Court in its [*Nicaragua*] Judgment (para. 202) has felt able to assert that "the existence in the *opinio juris* of States of the principle of non-intervention is backed by established and substantial evidence": *Nicaragua, supra* note 4, para. 184, footnote. For a more positive view, see the 1975 statement by the US Department of State: 'To the extent, which is exceptional, that [GA] resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practice of States, such resolutions are evidence of customary international law on a particular matter.' 1975 *US Digest of International Law* 85.

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of Their Independence and Sovereignty, adopted by 109 votes to none, with one abstention (the United Kingdom). It emerged from the First (Political) Committee of the General Assembly, not the Sixth (Legal) Committee. In *Nicaragua*, the International Court did not challenge the US assertion that the 1965 Declaration was no more than a statement of political intent.

The 1965 Declaration was championed by Latin American countries and the Soviet bloc. It would therefore be somewhat misleading to attribute the pressure for restatement of the non-intervention principle exclusively to non-aligned countries. Although twenty-six non-aligned states voted for the 1965 Declaration, and therefore provided crucial support in the General Assembly, they were neither the most active supporters nor the initiators of the work.

The Friendly Relations Declaration is the most important of the resolutions.[26] Adopted by consensus, it is the only resolution to express on its face that it reflects international law.[27] Its restatement of the non-intervention principle consists of a series of broad statements calculated to mask the divisions that existed among states as to the application of the core principle. The original draft on non-intervention, submitted by Australia, Canada, France, Italy, the United Kingdom, and the United States,[28] was criticized by non-aligned states as being limited to forcible measures. The Latin Americans sought the wholesale adoption of the language of the 1965 Declaration. Eventually, that language was incorporated with insignificant changes.

The Friendly Relations Declaration deals with non-intervention at length. The preamble includes the following:

> *Convinced* that the strict observance by States of the obligation not to intervene in the affairs of any other State is an essential condition to ensure that nations live in peace with one another, since the practice of any form of intervention not only violates the spirit and the letter of the Charter, but also leads to the creation of situations which threaten international peace and security,
> *Recalling* the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any other State,
> *Considering* that it is essential that all States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

26 On the Friendly Relations Declaration see R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', (1971) 65 AJIL 713; M. Šahović (ed.), *Principles of International Law Concerning Friendly Relations and Cooperation* (1972); M. Šahović, 'Codification des principes du droit international des relations amicales et de la co-opération entre les Etats', 137 RCADI 243; G. Arangio-Ruiz, 'The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations', 137 RCADI 419; I. M. Sinclair, 'Principles of International Law Concerning Friendly Relations and Co-operation among States', in M. K. Nawaz (ed.), *Essays on International Law in Honour of Krishna Rao* (1976), 107; in Lowe and Warbrick, *supra* note 23; H. Keller, 'Friendly Relations Declaration', *Max Planck Encyclopedia of Public International Law*, *supra* note 16.

27 The General Assembly declared that

> [t]he principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of their strict observance' (Friendly Relations Declaration, section 3)

28 UN Doc. A/AC 123/L 13 (1966).

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> of any other State, or in any other manner inconsistent with the purposes of the United Nations . . .[29]

The third principle (distinct from the first on the non-use of force) has an unwieldy title: 'The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter'. The principle reads in full:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its 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 the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organise, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State.
> The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.
> Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.
> Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.[30]

This principle, like the others in the Declaration, does not stand alone. In the words of section 2 of the Declaration,

> [I]n their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles.

Other instruments adopted by the Assembly have much less legal significance (if any), being controversial and adopted with negative votes. The Charter of Economic Rights and Duties of States, adopted (by a split vote) and solemnly proclaimed by the General Assembly in 1974,[31] is an iconic instrument of the 'New International Economic Order'. It provided in Chapter I that '[e]conomic as well as political and other relations among States shall be governed, *inter alia*, by the principle of . . . non-intervention.'

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29 According to Rosenstock, the length of the preamble resulted, *inter alia*, from 'a compromise between Latin American insistence on special emphasis on non-intervention and the views of most of the rest of the members that all the principles were equal and interrelated.' Rosenstock, *supra* note 26, at 717.

30 This formulation essentially repeats the main paragraphs of the General Assembly's 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, UN Doc. A/RES/2131 (XX). That in turn followed closely the OAS Charter (section 6.2 *infra*).

31 UN Doc. A/3281 (XXIX). See also the Declaration on the Establishment of the New International Economic Order, UN Doc/A/3201(S-VI) of 1 May 1974, para. 4. The Definition of Aggression (UN Doc. A/3314 (XXIX), annex) provides in Art. 5(1) that 'No consideration of whatever nature, whether political, economic, military or other, may serve as a justification for aggression.' This has been said to reflect the principle of non-intervention: B. B. Ferencz, 'Aggression', (1992) 1 *Encyclopedia of Public International Law* 58, at 62.

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The 1976 Declaration on Non-interference was wider than the Friendly Relations Declaration, and had a clearer exception for acts done in pursuance of the right of self-determination. It did not explain any distinction between interference and intervention, although the wording of its paragraphs 1 to 3 hinted that there might be one.

The 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States likewise did not define 'interference', but it did attempt to describe the scope of intervention in more detail than had previous resolutions. It embodied a very broad concept of non-interference and cannot be said to reflect customary international law.[32] It began by stating the basic principle in language not so different from the Friendly Relations Declaration: 'No State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States'. But it then went on to assert that this principle 'comprehends' no fewer than twenty-three 'rights' and 'duties'. These include, for example, a sweeping condemnation of military alliances, '[t]he duty of a State to abstain from any defamatory campaign, vilification or hostile propaganda for the purpose of intervening or interfering in the internal affairs of other States', and '[t]he duty of a State to refrain from the exploitation and distortion of human rights issues as a means of interference in the internal affairs of States, of exerting pressure on other States or creating distrust and disorder within and among States or groups of States'.

Documents similar to the Friendly Relations Declaration have been drawn up outside the UN framework. In particular, the 1975 Helsinki Final Act of the Conference on Security and Co-operation in Europe contains a Declaration, Principle VI of which is on 'Non-intervention'. The language is similar to the Friendly Relations Declaration. It reads,

> The participating States will refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations.
> They will accordingly refrain from any form of armed intervention or threat of such intervention against another participating State.
> They will likewise in all circumstances refrain from any other act of military, or of political, economic or other coercion designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind.
> Accordingly, they will, inter alia, refrain from direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State.[33]

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32 Not least because it was adopted by 102 votes to 22 with 6 abstentions. West European and Other Group states voted against the resolution, in the face of support from the Non-Aligned Movement and the Soviet bloc, mainly because of the references to armed insurrection.

33 Helsinki Final Act of the Conference on Security and Co-operation in Europe (CSCE) of 1 August 1975 (sixth of the ten principles in the 'Declaration on Principles Guiding Relations between Participating States'), (1975) 14 ILM 1292. Like the Friendly Relations Declaration, the Helsinki Declaration was cited by the Court in *Nicaragua*, *supra* note 4 (para. 204).

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3.3. Case law

The International Court considered intervention in *Corfu Channel*, the first case to come before it. It rejected the United Kingdom's claim to a right to intervene to secure evidence, saying that

> [t]he Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to the most serious abuses and as such cannot, whatever be the present defects in international organization, find a place in international law.[34]

Twenty years later, the Court enlarged on the principle of non-intervention in its 1986 *Nicaragua* judgment:

> The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law. . . . international law requires political integrity . . . to be respected.

The Court went on to say that

> the principle forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States

and that

> a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. . . . the element of coercion . . . defines, and indeed forms the very essence of, prohibited intervention.

The Court further considered whether

> there might be indications of a practice illustrative of a belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of the internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

The Court noted that, in cases where states had acted contrary to the principle of non-intervention, they had 'not sought to justify their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition'. The Court thus concluded that 'no such general right of intervention, in support of the opposition within another State, exists in contemporary international law'.[35]

Another twenty years passed, and in *DRC* v. *Uganda* the Court noted that in *Nicaragua* it had 'made it clear that the principle of non-intervention prohibits a State "to intervene, directly or indirectly, with or without armed force, in support

34 *Corfu Channel (United Kingdom v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Rep. 9, at 35. The principle has also been considered by arbitral bodies, notably in *Spanish Zone of Morocco Claims (Great Britain v. Spain)* (1924), 2 RIAA 615.

35 *Nicaragua*, *supra* note 4, paras. 202, 205, 206, 208, 209.

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of an internal opposition in another State"'. On the evidence, the Court concluded that

> Uganda had violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war raging there. The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4 of the Charter.[36]

The principle of non-intervention has also been recognized by arbitral tribunals and domestic courts.[37]

3.4. Writings

The principle of non-intervention tends to be dealt with briefly in general works on international law.[38] There have, however, been several writings on the subject over the last fifty years or so. Some have dealt with intervention in general.[39] Most have looked at the principle in specific contexts such as intervention involving the use of force or Article 2(7) of the United Nations Charter (and corresponding provisions applicable to regional organizations), and these are referred to in the relevant sections below.

4. The nature of the non-intervention principle

In this section we consider some general issues concerning non-intervention. Does non-intervention have legal content, or is it merely a political mantra? If it has legal

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36 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Rep., paras. 164 and 165.

37 See, e.g., *R v. Hape*, [2007] S.C.J. No. 26, (2007) 46 ILM 813, para. 65; *R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence*, Judgment of 19 December 2008, [2008] EWHC 3098 (Admin), paras. 68–69; and see also the *Tadić* decision of the *Bundesverfassungsgericht* (cited by Judge Guillaume in his Separate Opinion in *Arrest Warrant (Democratic Republic of the Congo v. Belgium)*, [2002] ICJ Rep. 3, at para. 12), and *F Hoffman-La Roche Ltd et al. v. Empagran SA et al.*, (2004) 124 S. Court 2359, 2366.

38 D. O'Connell, *International Law* (1971), 299–306; *Oppenheim*, *supra* note 2, 427–51; Brownlie, *supra* note 22, at 292–4; M. Shaw, *International Law* (2008), 1147–58; A. Cassese, *International Law* (2005), 53–5; P. Daillier and A. Pellet, *Droit International Public* (2002), 283–8; P. M. Dupuy, *Droit international public* (2004), paras. 106–110; D. J. Harris, *International Law* (2004), 916–20; V. Lowe, *International Law* (2007), 104–10.

39 A. Thomas and A. J. Thomas, *Non-Intervention: The Law and Its Import in the Americas* (1956); R. A. Falk, 'The United States and the Doctrine of Non-Intervention in the Internal Affairs of Independent States', (1959) 5 *Howard Law Journal* 163; A. Gerlach, *Begriff und Methoden der Intervention im Völkerrecht* (1967); Verzijl, *supra* note 1; T. Farer, 'Problems of an International Law of Intervention', (1968) 3 *Stanford Journal of International Studies* 20; N. Ouchekov, 'La compétence interne des Etats et la non-intervention dans le droit international contemporaine', (1974) 141 RCADI 5; R. J. Vincent, *Nonintervention and International Order* (1974); O. R. Young, 'Systemic Bases of Intervention', in J. N. Moore (ed.), *Law and Civil War in the Modern World* (1974), 111; R. Wehser, 'Die Intervention nach gegenwärtigem Völkerrecht', in B. Simma and E. Blenk-Knocke (eds.), *Zwischen Intervention und Zusammenarbeit* (1979), 24; J. Noël, *Le principe de non-intervention: Théorie et pratique dans les relations inter-américains* (1981); R. Higgins, 'Intervention and International Law', in H. Bull (ed.), *Intervention in World Politics* (1984), 29, reproduced in R. Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (2009), 269; B. Conforti, 'The Principle of Non-intervention', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects* (1991), 467; M. Schroeder, 'Non-intervention, Principle of', (1997) 3 *Encyclopedia of Public International Law* 619 and the works cited therein; T. Redmond, 'The Rules and How They Were Broken: The Changing Face of State Sovereignty', (2002) 10 *Irish Student Law Review* 50; P. Kunig, 'Intervention, Prohibition of', *Max Planck Encyclopedia of Public International Law*, *supra* note 16. For classic works, see J. S. Mill, *A Few Words on Non-Intervention* (1859), and E. C. Stowell, *Intervention in International Law* (1921).

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content, is it better viewed as a principle or as a rule of law? Is it a *jus cogens* norm? Is its breach criminal under international law?

Often enough, references to non-intervention are no more than pro forma incantations, with political, not legal, import. But the practice of states and the case law of the International Court indicate that the principle of non-intervention is also seen as a matter of law. As Judge Jennings said in *Nicaragua*, '[t]here can be no doubt that the principle of non-intervention is an autonomous principle of customary law; indeed, it is much older than any of the multilateral Treaty regimes in question.'[40]

Non-intervention is a principle of international law (like the sovereign equality of states, with which it is closely related), and a basis for more specific rules.[41] When the International Law Commission (ILC) included non-intervention in its 1949 Draft Declaration on the Rights and Duties of States,[42] it said that '[t]he articles of the draft Declaration enunciate general principles of international law, the extent and the modalities of the application of which are to be determined by more precise rules.'[43] The preamble to the 1969 Vienna Convention on the Law of Treaties includes 'non-interference in the domestic affairs of States' among the 'principles of international law embodied in the Charter of the United Nations'.[44] Non-intervention is one of the 'basic principles of international law' embodied in the Friendly Relations Declaration. The International Court in *Nicaragua* similarly referred to 'the customary-law principle of non-intervention'.[45]

Non-intervention is not itself a norm of *jus cogens*, although specific rules that fall within the principle may be, in particular the prohibition of aggression.[46] It was not listed by the ILC when it described the content of *jus cogens* in the context of

40 *Nicaragua*, *supra* note 4, at 534 (Judge Jennings, Dissenting Opinion).

41 The Friendly Relations Declaration's strained reference to 'The principle concerning the duty . . .' in the heading of the third principle presumably reflects the wish of some to present non-intervention as a rule of law, and the insistence of others that it be seen essentially as a principle. For a jurisprudential examination of the difference between principles and rules in this context see Lowe, *supra* note 1, at 101. Lowe also points to another aspect of non-intervention: 'Certain matters cannot be investigated by international tribunals because they are not regulated by international law.' He sees this as introducing 'the element of non-justiciability into the principle of non-intervention'. Lowe, *supra* note 23, at 72–3.

42 Art. 3 read, 'Every State has the duty to refrain from intervention in the internal or external affairs of any other State'. *Yearbook of the International Law Commission* (1949); A. D. Watts, *The International Law Commission 1949–1998* (1999), III, 1650.

43 *Yearbook of the International Law Commission*, *supra* note 42; Watts, *supra* note 42, at 1655; Cf. Lowe, *supra* note 1, at 101 (discussing the principles embodied in the Friendly Relations Declaration).

44 Sixth preambular paragraph. Also included in the preambles to the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, and the 1986 Vienna Convention on the Law of Treaties between States and International Organizations.

45 *Nicaragua*, *supra* note 4, para. 245. It has even been suggested that non-intervention is a 'master principle,' that 'includes large areas of law' (Brownlie, *supra* note 22, at 290), and one of the 'fundamental principles governing international relations' (Cassese, *supra* note 38, ch. 3, title).

46 Judge Sette-Camara in his Separate Opinion in *Nicaragua*, however, stated that the non-intervention principle 'would certainly qualify' as *jus cogens*: *Nicaragua*, *supra* note 4, at 199.

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state responsibility,[47] or in the Conclusions of the Work of the Study Group of the International Law Commission on Fragmentation.[48]

The ILC also considered whether a breach of the non-intervention principle was a crime under international law. It included a provision on non-intervention in its 1991 draft of a Code of Offences against the Peace and Security of Mankind, but this was omitted from the final draft articles of 1996.[49] One reason given was that uncertainties over the scope of the law of intervention made it unsuitable for criminalization – the dangers of violating the principle of *nullum crimen sine lege* were too great. It was at no point proposed that a violation of the non-intervention principle (as opposed to aggression) should be included as a crime in the Rome Statute of the International Criminal Court, and there is no basis for suggesting that, as a matter of current international law, such a violation of itself involves international criminal responsibility.[50]

5. Intervention with force

5.1. Article 2(4) of the Charter of the United Nations

The focus of the present article is on aspects of the principle of non-intervention not involving the use of force. In this section we deal only briefly, for the sake of completeness, with the law on the use of force.[51] The prohibition of the threat or use of force in international relations, set out in Article 2(4) of the Charter and in customary international law, is the most significant aspect of non-intervention, yet nowadays the international law on the use of force is not generally thought of in terms of non-intervention but as a self-standing chapter of international law. On the other hand, threats to use force will often be seen as contravening the

47 'Those peremptory norms that are clearly accepted and recognised include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right of self-determination': para. (5) of the commentary to Art. 26 of the 2001 Articles on State Responsibility, J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), 188. The Commission's list was cited by the English Court of Appeal in *R (on the application of Al-Jedda) v. Secretary of State for Defence*, [2006] 3 WLR 954 at 976, para. 66.

48 The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid, and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination. (2006 Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.702, para.14 (33))

The Draft Conclusions had contained a more general statement of the content of *jus cogens* (UN Doc. A/CN.4/L.682/Add.1). The full report of the Study Group (finalized by Martti Koskenneimi) had a more elaborate list, stating that

> [t]he most frequently cited candidates for the status of *jus cogens* include: (a) the prohibition of aggressive use of force; (b) the right of self-defence; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and the slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and *apartheid*; and (i) the prohibition of hostilities directed at civilian populations. (UN Doc. A/CN.4/L.682, para. 374).

49 It had also been included in the 1954 draft Code.

50 J. Linarelli, 'An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes against the Peace and Security of Mankind', (1995) 25 *Suffolk Transnational Law Review* 1.

51 See generally Lowe, *supra* note 23.

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principle.[52] Enforcement measures taken or authorized by the UN Security Council under Chapter VII of the Charter do not contravene the prohibition on the use of force or the principle of non-intervention. Much that may be seen as 'intervention' in a 'very interventionist' world is action authorized by the Security Council under Chapter VII of the Charter. Nor does action in self-defence, or action taken with the consent of the territorial state, contravene the principle.[53]

5.2. Humanitarian intervention

More controversial is so-called 'humanitarian intervention'.[54] It has sometimes been argued that it is not contrary to international law to use force in order to prevent humanitarian atrocities. In the past such arguments were treated with scepticism;[55] instances of state practice were rare and were justified as self-defence rather than on humanitarian grounds. However, the arguments have been made with greater force since the operations to protect the Kurds in northern Iraq in 1991 and the Shia in the south in 1992, and especially since the Kosovo conflict in 1999.[56] There have been no purported applications of the principle since 1999 and a large number of states rejected the idea in the lead-up to the 2005 World Summit Outcome,[57] so it may be questionable how far the notion has gained traction.[58]

The 2005 World Summit Outcome did, however, highlight the notion of 'responsibility to protect'. This places primary responsibility on the territorial state, but goes on to say that 'the international community, through the United Nations, also has the responsibility to use appropriate ... peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations'.[59] And it then foreshadows 'collective action, in accordance with the Charter, including Chapter VII, should peaceful means be inadequate'. It is clear from this wording, with its repeated references to the Charter, that the General Assembly intended that action should be fully in accordance with the Charter and was not anticipating some new and independent right of intervention.[60]

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52 See N. Stürchler, *The Threat of Force in International Law* (2007); M. Wood, 'Use of Force, Prohibition of Threat', *Max Planck Encyclopedia of Public International Law*, *supra* note 16.

53 Works on 'intervention by invitation' include G. Nolte, *Eingreifen auf Einladung* (1999), and Hafner, *supra* note 1.

54 For writings on 'humanitarian intervention' see the bibliography in the report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, Vol. 2; S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996); S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001). The term has also sometimes been used to refer to the rescue of nationals abroad, on which see N. Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (1985).

55 See, e.g., UK Foreign Office Policy Document no. 148, (1986) 57 *British Yearbook of International Law* 614.

56 The strict nature of 'humanitarian intervention' is apparent in the speech by the United Kingdom Secretary of State for Foreign and Commonwealth Affairs (Robin Cook) of 19 July 2000, (2000) 71 *British Yearbook of International Law* 646.

57 UN Doc. A/Res/60/1.

58 M. C. Wood, 'The Law on the Use of Force: Current Challenges', (2007) 11 *Singapore Year Book of International Law* 1, and works cited therein.

59 UN Doc. A/Res/60/1, paras. 138–139.

60 See also the references to the principle of non-intervention in the ILC's consideration of the topic 'Protection of Persons in the Event of Disasters': ILC Report 2008, Chapter IX. In May 2008, the refusal of the authorities in Myanmar to allow the prompt entry of aid and aid workers in the aftermath of the devastating Cyclone Nargis led some to threaten to drop food aid with or without the government's consent.

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5.3. Support for insurgents or terrorists

There is a distinction between forcible action and non-forcible support for forcible action by non-state actors. Uses of force, or support such as to make the forcible actions of non-state actors attributable to the state,[61] are liable to breach Article 2(4). But where non-forcible supportive action is taken, such as providing a territorial base or transferring money or providing manuals, as in *Nicaragua*,[62] this may still contravene the non-use of force principle.[63]

The Friendly Relations Declaration provides (in the non-use of force principle) that

> Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.
> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

It goes on to state (in the non-intervention principle) that

> [N]o State shall organize, assist, foment, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[64]

The Friendly Relations Declaration thus sets out three rules specifically regulating the conduct of states with regard to insurgent or terrorist groups. The first prohibition is against 'organizing' such groups.[65] The second is against encouraging, inciting, or assisting such groups. These forms of action are what we would broadly consider 'support' and would cover the conduct in *Nicaragua*. The third prohibition relates to 'tolerating' armed groups and, as well as being specifically mentioned, is implicit in the first paragraph quoted above. This third prohibition goes beyond the other two by making a failure to act illegal where the state is aware that armed groups are using its territory for training or as a base. The third prohibition does not, however, create an obligation on states to search out such groups. It applies where states are actually aware that their territory is being used for this purpose.

These obligations are set out in more detail in the 1981 Declaration, which lists in its Section 2

> (f) The duty of a State to refrain from the promotion, encouragement or support, direct or indirect, of rebellious or secessionist activities within other States, under any

61 In accordance with the rules on attribution set out in Part One, Chapter 2 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC State Responsibility Articles), *Report of the 53rd Session, ILC* (2001), GAOR 56th Session, *Supp.* 10. See Crawford, *supra* note 47.

62 Though the state could be liable under international law for aiding and assisting acts in breach of Art. 2(4): ILC State Responsibility Articles, Art. 16.

63 See *Nicaragua*, *supra* note 4, para 195.

64 The wording of the 1965 Declaration was identical. The 1976 Declaration frames the duty in somewhat more precise terms at para. 5. The fullest treatment of this point is in the 1981 Declaration at para. II (b) and (m).

65 In addition, organizing an armed group that carries out acts against another state may well make the actions of the group attributable to the state.

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pretext whatsoever, or any action which seeks to disrupt the unity or to undermine or subvert the political order of other States;

...

(g) The duty of a State to prevent on its territory the training, financing and recruitment of mercenaries, or the sending of such mercenaries into the territory of another State and to deny facilities, including financing, for the equipping and transit of mercenaries;

...

(h) The duty of a State to refrain from organizing, training, financing and arming political and ethnic groups on their territories or the territories of other States for the purpose of creating subversion, disorder or unrest in other countries.

6. Treaty-based rules reflecting the non-intervention principle

The non-intervention principle is reflected in numerous treaties, although often in general terms that shed little light on its content. Some of the more important are mentioned in the present section.

6.1. Article 2(7) of the Charter of the United Nations

Article 2(7) of the Charter of the United Nations provides that

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[66]

Practice under Article 2(7) has evolved over time. Its significance is now considerably reduced.[67]

Article 2(7) was not intended to state a general principle of international law. It is part of the law of the United Nations and defines the organization's competence. Action in breach of Article 2(7) is *ultra vires* the United Nations, but is not necessarily wrongful under general international law. In any event, it is doubtful if a recommendation emanating from the General Assembly could ever be

66 Art. 15(8) of the Covenant of the League of Nations provided, 'If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which, by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.'

67 R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), 58–130; J. S. Watson, 'Autointerpretation, Competence and the Continuing Validity of Article 2(7) of the United Nations Charter', (1977) 71 AJIL 60; A. Verdross, 'Le principe de la non-intervention dans les affaires relevant de la compétence nationale d'un Etat et l'Article 2(7) de la Charte des Nations Unies', in *Mélanges offerts à Charles Rousseau* (1974); D. Gilmour, 'The Meaning of "Intervene" within Article 2(7) of the United Nations Charter – An Historical Perspective', (1967) 16 ICLQ 330; G. Nolte, in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002), 148 at 148–71; G. Guillaume, in J.-P. Cot, A. Pellet and A. Forteau (eds.), *La Charte des Nations Unies: Commentaire article par article* (2005), 485 at 485–509; K. Ahmed, 'The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View', (2006) 10 *Singapore Year Book of International Law* 175.

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'coercive', and 'enforcement measures' by the Security Council are exempt from the prohibition.

6.2. Articles 3 and 19 of the Charter of the Organization of American States

The principles of the OAS are set out in Article 3 of its Charter.[68] They include a right of states to choose their political, economic, and social systems without interference, and a duty to refrain from intervening in the affairs of other states. Chapter IV of the Charter ('Fundamental Rights and Duties of States') includes several rights and duties that are part of the non-intervention principle, such as respecting the rights of other states and a right to develop cultural, political, and economic life freely. Article 19 expressly rejects the right to interfere in the affairs of states, even by non-forcible means.

6.3. Title 1 of the Treaty on European Union

The Treaty on European Union[69] provides a mechanism for the European Union to intervene in the affairs of member states. Article 1a states that it is founded on 'the values of respect for human dignity, freedom, democracy, equality and the rule of law'. Article 7 states that the Union may determine that the Article 1a principles have been breached, call member states to answer questions, and ultimately suspend rights, including the right to vote in the Council.[70]

6.4. Article 4 of the Constitutive Act of the African Union

Article 4 of the Constitutive Act of the African Union of 11 July 2000 (as amended by the Protocol on Amendment of the Constitutive Act of 3 February/11 July 2003) sets out the principles in accordance with which the African Union shall function. They include:

> (f) prohibition of the use of force or threat to use force among Member States of the Union;
> (g) non-interference by any Member State in the internal affairs of another;
> (h) the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;

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68 The OAS Charter was preceded in the region by the Montevideo Convention of 1933 and its Additional Protocol of 1936. Judge Schwebel in *Nicaragua* refers to 'the comprehensive and categorical injunctions of the OAS Charter against intervention, and the much narrower but significant rules of non-intervention in customary international law' (Nicaragua, *supra* note 4, Dissenting Opinion, para. 242).

69 O.J. C 191, 29 July 1992 (as it would be amended if the Treaty of Lisbon (O.J. C 306 17 December 2007) enters into force).

70 Sanctions were imposed on Austria in 2000 by all other EU member states following the formation of a coalition between the People's Party and Jörg Haider's Freedom Party. Although the action was announced by the Council Presidency, and included all member states, formally the sanctions were unilateral measures by fourteen states and not an act of the EU. See M. Happold, 'Fourteen against One: The EU Member States' Response to Freedom Party Participation in the Austrian Government', (2000) 49 ICLQ 953; F. Schorkopf, *Die Maßnahmen der XIV EU-Mitgliedstaaten gegen Österreich – Möglichkeiten und Grenzen einer 'streitbaren Demokratie' auf europäischer Ebene* (2002).

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(j) the right of Member States to request intervention from the Union in order to restore peace and security.

This has to be read with Article 4 of the Protocol relating to the Establishment of the Peace and Security Council of the African Union of 9 July 2002, which provides that 'non interference by any Member State in the internal affairs of another' will be a principle of the Union.[71]

There is no provision corresponding to Article 2(7) of the Charter of the United Nations. On the contrary, while Article 4(g) of the Constitutive Act (as amended) contains a standard non-interference provision, like that in the OAS Charter, Article 4(h) states that the African Union has a right to intervene in respect of certain 'grave circumstances', although this may imply that it cannot intervene absent those 'grave circumstances'.[72]

6.5. Other regional organizations

The constituent instruments of a number of regional and sub-regional organizations refer to the principle of non-intervention. These include the following.

Under the Charter of the Association of Southeast Asian Nations (ASEAN),[73] ASEAN and its member states must act in accordance with the Principles set out in Article 2(2). These include '(e) non-interference in the internal affairs of ASEAN Member States' and '(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion'.

The Pact of the League of Arab States[74] contains provisions prohibiting intervention between members and elaborate procedures for making decisions binding on member states.

The new Charter of the Organization of the Islamic Conference[75] makes non-interference a principle of the organization, and member states undertake not to interfere in the internal affairs of other member states.

6.6. Vienna Convention on Diplomatic Relations, Article 41(1)

There are two separate, but not always clearly distinguished, rules relevant to allegedly interventionary activities of diplomats. There is the specific rule set out in Article 41 of the Vienna Convention on Diplomatic Relations – the duty placed on a diplomatic agent (and others enjoying privileges and immunities) 'not to interfere in the internal affairs' of the receiving state. And there is the principle of non-intervention. As an organ of the sending state, what a diplomatic agent does

71 Art. 4(f).

72 It is unclear what the procedural requirements would be if the Union sought to invoke Art. 4(h). S. M. Makinda and F. W. Okumu, *The African Union: Challenges of Globalization, Security and Governance* (2007), *passim* and appendix 1, 122. See also B. Kioko, 'The Right of Intervention under the African Union's Constitutive Act: From Non-interference to Non-intervention', (2003) 85 *International Review of the Red Cross* 807. The texts of the AU treaties are set out in Makinda and Okumu.

73 Charter of the Association of Southeast Asian Nations, done in Singapore on 20 November 2007, entered into force 15 December 2008. See D. Seah, 'ASEAN Charter', (2009) 58 ILCQ 197.

74 70 UNTS 237, Art. 8.

75 Adopted March 2008, Dakar, Senegal.

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in an official capacity (whether on instructions or not) may fall foul of general international law.

Article 41(1) of the Vienna Convention on Diplomatic Relations provides that, without prejudice to their privileges and immunities, all persons enjoying privileges and immunities 'have a duty not to interfere in the internal affairs of [the receiving] State'.[76] On this point, as on much else, the Convention reflects customary international law. The 1928 Havana Convention regarding Diplomatic Officers contained a similar principle,[77] although the Harvard draft of 1932 had nothing on the matter. But neither the text of the Vienna Convention nor the *travaux préparatoires* shed much light on the specific content of the duty not to interfere.

Some members of the ILC considered that the non-interference provision in Article 41 was intended to cover the actions of members of diplomatic missions in their personal capacity, rather than official acts carried out on instructions from their government, in respect of which the non-intervention principle under general international law applied.[78] Fitzmaurice, for example, 'agreed . . . on the undesirability of introducing the concept of intervention. . . . the provision was to cover personal acts of meddling by diplomatic agents. . . . The case of Lord Sackville . . . was a case of mere interference, with no suggestion of dictatorial intervention.'[79] However, that view was not shared by all members. Notably, a proposed express limitation of Article 41 to acts done by diplomats 'outside their functions' was removed.[80]

What diplomats do in their official capacity may of course amount to a violation by the sending state of its obligations under the principle of non-intervention under general international law. Despite the debates over the original intention behind Article 41(1) of the Vienna Convention, it is not on its face limited to acts done in a personal capacity, and the lawfulness of official acts may well be raised with reference to the provision. In any event, it is not always easy to distinguish between official and personal acts.

The commentary to Article 40 of the ILC's Draft Articles on Diplomatic Intercourse and Immunities (which became Article 41 of the Convention), after giving the example that 'they must not take part in political campaigns', states the obvious:

> The making of representations for the purpose of protecting the interests of the diplomatic agent's country or of its nationals does not constitute interference in the internal affairs of the receiving State within the meaning of this provision.[81]

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76 500 UNTS 95. See E. Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* (2008), at 464–8. See, to the same effect, Art. 55 of the 1963 Vienna Convention on Consular Relations; Art. 47 of the 1969 Convention on Special Missions; and Art. 77 of the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

77 1935 LNTS 261 (No. 3581). Art. 12 of the Havana Convention read, 'Foreign diplomatic officers may not participate in the domestic or foreign policies of the State in which they exercise their functions.'

78 1957 YILC, I, 143–50.

79 1957 YILC, I, 147, para 22. In 1888, Sir Lionel Sackville-West, the British minister in Washington, received a letter from an American citizen of British birth asking which candidate to support in the presidential election. Sir Lionel replied that the election of Mr Cleveland would be satisfactory to Great Britain. His recall was swiftly demanded by the US government and his sudden departure became something of a *cause célèbre*.

80 1957 YILC, I, at 80; P. Kim, 'The Duty of Non-interference and Its Impact on the Diplomatic Message under the Vienna Convention on Diplomatic Relations', Ph.D. thesis, University College London, 2007, 81 ff.

81 1958 YILC, II, 104.

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There is no suggestion that participation in domestic politics must in any way be 'coercive' or 'dictatorial' or seek the replacement of the government. It could even be on the side of the government. Actions which would be perfectly lawful if carried out by a private individual may violate the diplomat's duty not to interfere in internal affairs.

From time to time foreign diplomats take part, or appear to take part, in political demonstrations. It is perhaps not always easy to distinguish between observing a rally and taking part in it.

Beyond that, it is difficult to be prescriptive. As the Dutch government put it,

> There are no international guidelines for the application of Article 41, paragraph 1, and we doubt whether it would be at all possible to develop such guidelines, given the fact that views on what should, or should not, be regarded as inadmissible interference in the internal affairs of a receiving State vary from place to place and from time to time.[82]

State practice does not shed great light. The application of the duty of non-interference probably relies on the instinctive good sense and understanding of the diplomat, balanced against the fact that the receiving state does not have to give reasons for declaring a diplomat *persona non grata*.[83]

6.7. International Convention on Broadcasting, 1936

The International Convention Concerning the Use of Broadcasting in the Cause of Peace, adopted under the auspices of the League of Nations on 23 September 1936, is still in force between certain states (although in the 1980s, following accession by the USSR, it was denounced by Australia, France, the Netherlands, and the United Kingdom).[84] Under its Article 1,

> The High Contracting Parties mutually undertake to prohibit and, if occasion arises, to stop without delay the broadcasting within their respective territories of any transmission which to the detriment of good international understanding is of such a character as to incite the population of any territory to acts incompatible with the internal order or the security of a territory of a High Contracting Party.

6.8. Other treaties

There are many other treaties which refer to the non-intervention principle, often by way of a saving clause. For example, Article 3 of Additional Protocol II to the Geneva Conventions is entitled 'Non-intervention', and provides *inter alia* that

> Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

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82 Cited in Denza, *supra* note 76.

83 One way of analysing the actions of President de Gaulle described at the beginning of this article could be to regard the rule in Art. 41 of the Vienna Convention as equally applicable, as a matter of customary international law, to visiting heads of state, heads of government, foreign ministers, and other high representatives of the state. On this approach, it is clear that de Gaulle's statement violated the duty not to interfere in the internal affairs of Canada, even though it may well not have been regarded as 'coercive'.

84 *Multilateral Treaties deposited with the Secretary-General, Part II*, 1.

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This provision is repeated in Article 1(5) of the Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1996 Amended Protocol II) to the 1980 UN Weapons Convention,[85] and in Article 22(5) of the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict.[86] The eighth paragraph of the preamble to the Rome Statute of the International Criminal Court[87] emphasizes that 'nothing in this Statute shall be taken as authorizing any State Party to intervene . . . in the internal affairs of any State'.

There are many bilateral instruments incorporating language on non-intervention. A prominent example is the Algiers Declaration ending the Tehran hostages crisis, in which the United States pledged 'that it is and from now on will be the policy of the United States not to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs'.[88] More routinely, treaties on friendship and co-operation often incorporate a positive statement of the non-intervention principle, though again without spelling out its specific content.[89]

7. Possible applications of the non-intervention principle in general international law

In *Nicaragua* the International Court considered only those aspects of the principle that appeared relevant to the dispute before it.[90] But it also issued the warning that '[t]he Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.'[91] Outside the area of the use of force (section 5 above), it is often unclear what is, and what is not, prohibited under customary international law. Much depends upon context, and even on the state of relations between the states concerned.

State practice in the field is often hard to assess. Statements made by those negotiating the General Assembly declarations, and statements by officials objecting to 'intervention' by other states, suggest that they consider the principle to be important, but shed little light on its content.

The discussion below looks at some commonly discussed situations and considers the extent to which the non-intervention principle lies behind the applicable rules

85 1342 UNTS 7.
86 (1999) 38 ILM 769.
87 2187 UNTS 90.
88 'Official Documents, Settlement of the Iran Hostages Crisis, Declaration of the Government of the Democratic and Popular Republic of Algeria', (1981) 75 AJIL 418.
89 See, e.g., Art. II of the Basic Treaty of Friendship and Cooperation between Australia and Japan 1976; first preambular paragraph of the Treaty of Friendship and Cooperation between the Federative Republic of Brazil and the Republic of Peru 1979; and the preamble to the Treaty of Friendship, Partnership and Co-operation between the Italian Republic and the Republic of Iraq 2007.
90 *Nicaragua*, *supra* note 4, para. 205.
91 Ibid., para. 263.

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of customary international law. Some clearly involve breaches of the principle; some do not. Then there are the doubtful cases.[92]

7.1. Political interference (including funding)

'Political interference' covers diverse situations where one state becomes involved in the internal political processes of another. This type of intervention encompasses acts of greatly differing intensity and coerciveness.[93]

The most coercive form of political interference is 'regime change', which is a clear violation of the non-intervention principle. In the context of non-forcible intervention, regime change will be chiefly achieved through support and funding for insurrectionary opposition groups. *Nicaragua* was at its heart a case about the United States funding and supporting a political opposition to a foreign government. The *ratio decidendi* of *Nicaragua* seems to depend on the intention of the Nicaraguan Contras to overthrow the Sandinista National Liberation Front (FSLN) government.[94] Although an intention to overthrow the government is not a requirement for foreign party funding to be illegal (such a requirement would allow too much), the judgment is clear that it is not legitimate for a state to intervene in order to overthrow a 'bad regime'.[95]

Where the funding is for non-insurrectionary political parties, the law is less clear. It has been suggested that a rule prohibiting the funding of political parties abroad would be uncertain in scope in the light of prevailing state practice.[96] Support for foreign political parties is becoming increasingly overt and states do not seek to justify their actions. However, the tendency to fund parties through non-state actors may suggest that states continue to have doubts about the legality of such acts.[97] This is also reflected in the increase in domestic legislation prohibiting foreign-sourced funding.[98] The key test remains coercion. Funding a political party where the domestic law of the recipient party prohibits it will usually contravene the principle of non-intervention, as will funding a party with coercive goals. Even absent those factors, the level of support might be of such a magnitude as to be coercive.

Analysis of political interference is complicated by state-to-state funding intended to prop up a particular ruling faction within the state. Such support is

92 The situations considered below are not exhaustive of circumstances which could give rise to a claim that the prohibition against intervention has been breached. They are a sample of situations with which writers have been preoccupied.

93 Q. Wright, 'Subversive Intervention', (1960) 54 AJIL 521; W. Williams Jr, 'Non-military Strategies and Competition for Power: The Need for Expanded Regulation of Coercion', (1976) 70 *American Society of International Law Proceedings* 165; E. O'Malley, 'Destabilization Policy: Lessons from Reagan on International Law, Revolutions and Dealing with Pariah Nations', (2002–3) 43 *Virginia Journal of International Law* 319.

94 *Nicaragua, supra* note 4, para. 241.

95 For assertions to the contrary see United States, *National Security Strategy 2002*.

96 See Damrosch, *supra* note 23.

97 Particularly active in funding foreign political parties are the 'foundations' funded by German political parties, the US-funded National Endowment for Democracy, and the UK Foreign and Commonwealth Office-funded Westminster Foundation for Democracy.

98 E.g., United States, Bipartisan Campaign Finance Reform Act 2002, s. 303; France, Loi Organique no 88–226; Philippines, Election Code 1978; Taiwan, Public Officials Election and Recall Law 1980; Chile, Constitution, Art. 19(15); United Kingdom, Political Parties, Elections and Referendums Act 2000, s.54.

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often far more effective than funding the party directly, in part because of the greater sums involved.[99] This raises the question of the consent justification for intervention.[100] The will of the state would only be subordinated in these situations if the state were seen as synonymous with the people and not the government of the day; however, that is not the position under current international law.[101] Given the consent of the government, such funding will not be prohibited as intervention.

The provision of support or funding to a party on the eve of an election is a more intrusive act, more likely to result in a change in government, than that given at other times. Practice is extensive, presumably because the pre-election form of political support will be most effective. States are particularly concerned about this form of intervention, and nine General Assembly resolutions condemning interference in electoral processes were adopted between 1989 and 2001.[102]

It is increasingly common for third states (often through international organizations such as the OSCE) to take a close interest in, and be free with their comments on, the conduct of the elections. This is often at the invitation of the state concerned. Indeed, that state's co-operation is important, as was evident from the problems with observing the Russian presidential elections in March 2008, which led the OSCE to cancel its mission. But state practice confirms that even without such consent, comment on the fairness (or otherwise) of elections is not contrary to international law.[103]

7.2. Economic coercion

Economic measures can be directed against states or their leaders to force a change in policy.[104] In so far as economic sanctions are adopted by the UN Security Council under Chapter VII of the Charter, they raise no issue under the non-intervention principle. Individual states and regional organizations sometimes have recourse to economic measures instead of taking forcible measures, as – not being contrary to Article 2(4) of the Charter – they may be easier to justify politically and legally.[105] While such measures may contravene treaty obligations, it is unclear how far the

99 Examples typical of state practice include the US funding to the Philippines under the Marcos regime, or the refusal of the EU and the United States to provide assistance to the Palestinian Authority while under Hamas control.

100 See section 8.2, *infra*.

101 There has been a recent shift away from such a characterization; see *World Duty Free v. Republic of Kenya* (ICSID Case No. ARB/00/7), Award, 4 October 2006.

102 See *supra* note 20.

103 K. D. Asante, 'Election Monitoring's Impact on the Law: Can It Be Reconciled with Sovereignty and Nonintervention?', (1993–4) 26 *New York University Journal of International Law and Politics* 235.

104 See D. W. Bowett, 'International Law and Economic Coercion', (1975–6) 16 *Virginia Journal of International Law* 245; I. Shihata, 'Arab Oil Policies and the New International Economic Order', (1975–6) 16 *Virginia Journal of International Law* 261; J. Paust and A. Blaustein, 'The Arab Oil Weapons – A Threat to International Peace', (1974) 68 AJIL 410; *Les moyens de pression économiques et le droit international (Actes du Colloque de la S. B. D. I.)* (1985); R. Porotsky, 'Economic Coercion and the General Assembly', (1995) 28 *Vanderbilt Journal of Transnational Law* 901.

105 Though see *supra* note 12.

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prohibition on intervention extends to unilateral economic measures.[106] General Assembly resolutions refer to economic intervention as a matter of course. Some are dedicated exclusively to economic intervention. The Friendly Relations Declaration (in the second paragraph of its section on the non-intervention principle) states that

> 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 the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.

Except in the context of certain General Assembly resolutions, which cannot be regarded as reflecting the law,[107] any prohibition of economic intervention is narrowly construed. In *Nicaragua*, the ICJ said that

> The Court's attention has been drawn in particular to the cessation of economic aid in April 1981; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981; and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.
> ... the Court ... is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.[108]

The actions of the United States at issue in *Nicaragua* and found not to breach the principle of non-intervention are the most common, and potentially most severe, economic actions that can be employed against a state.

In 1973 Arab states reduced their oil output by between 5 per cent and 25 per cent in order to force Israel to change certain policies relating to Palestine and to force other states to change their diplomatic stance towards Israel. If the ICJ in *Nicaragua* is correct and a total trade embargo is not economic intervention, then it seems that a 5 per cent to 25 per cent reduction in exports of a single resource would not be intervention either.

The answer appears to lie, as ever, in the requirement of coercion. The debate between proponents and opponents of applying the principle of non-intervention to economic measures is really a debate about the impact of these measures on the target state. It is clear from the multitude of instruments relating to intervention that the principle is to apply to acts other than the use of armed force, and there is no reason to exclude economic measures. The problem is rather in making the

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106 In 1993 a United Nations panel of experts assembled to look into ways of eliminating economic coercion found insufficient consensus in international law to allow any instrument to be formed: Note by the Secretary-General prepared pursuant to G.A. Res. 46/210, UN Doc. A/48/535 (1993).

107 A 1973 General Assembly resolution on 'Permanent sovereignty over natural resources' deplored 'acts of States which use force, armed aggression, economic coercion or any other illegal or improper means in resolving disputes' and emphasized 'the duty of all States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the territorial integrity of any State and the exercise of its national jurisdiction': UN Doc. A/Res/3171 (XXVIII). The 1974 Charter of Economic Rights and Duties of States and the 1981 Declaration deal with the issue at some length. The 1981 Declaration even included a duty on states to prevent the use of 'transnational and multinational corporations under its jurisdiction and control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations'. The more expansive elements of these resolutions do not reflect customary international law.

108 *Nicaragua*, *supra* note 4, paras. 244, 245.

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argument that a state's sovereign will can be overborne through the imposition of economic measures. What the ICJ appears to be saying in *Nicaragua* is that the particular acts at issue in the case did not amount to intervention, which is not to say that they could not in another scenario. States that are dependent on aid from one state or conduct their trade almost exclusively with that state may find it easier to argue that the imposition of economic measures against them was coercive and thus illegal.

As we have seen, the principle of non-intervention has two elements; the first is coercion and the second is an intention to change the policy of the target state. With regard to the second requirement, it is helpful to consider the position of the Organization of the Petroleum Exporting Countries (OPEC). OPEC controls much of the global supply of oil and maintains prices. Nearly every decision made by it might be considered as intervention, because it will have an effect on the global economy, and potentially in dramatic ways. However, its decisions cannot be said to breach the non-intervention principle in so far as OPEC does not act as a political body. Its aims do not extend beyond market regulation and price stabilization. Its actions are not therefore accompanied by an intention to change the policy of affected states.[109]

The distinction between withdrawal of benefits, which are less likely to contravene the non-intervention principle, and more direct action such as embargoes, was glossed over in *Nicaragua*. It is arguable that benefits are simply a question of state generosity, and the factors for allocating aid are extra-legal and ought not to be regulated. However, the purpose of the non-intervention principle is to prevent the 'subordination of sovereign will'. The reliance of many vulnerable states on aid makes its withdrawal in practice one of the most effective methods of pressure.

Since 1992 the UN General Assembly has adopted annually a resolution on the US 'economic, commercial and financial embargo' against Cuba, in which it reaffirms 'among other principles the sovereign equality of States, non-intervention and non-interference in their internal affairs and freedom of international trade and navigation, which are also enshrined in many international legal instruments'.[110] In 2007, many speakers in the debate (including the EU) condemned the extraterritorial aspect of the embargo, but not – at least not on legal grounds – the embargo as such. The United States maintains that the decision to trade with other countries is a bilateral matter, and points out that from time to time various UN member states have taken similar measures.

It ought to be emphasized that economic intervention is, like all other forms of intervention, a matter of state-to-state behaviour. The only situation in which the actions of a private company could fall foul of the non-intervention principle is where the attribution test in state responsibility is met.[111] That test will be particularly

109 The 1973 oil embargo was organized through the Organization of Arab Petroleum Exporting Countries (OAPEC), an Arab-only organization with political as well as market-related goals.

110 See *supra* note 20.

111 Part One, Chapter II, of the ILC Articles on State Responsibility. See most importantly the test in Art. 8: 'The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.'

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difficult to apply here, because the concepts at the core of the international law of attribution, such as control, training, and funding, were formed in the context of forcible intervention. The 1981 Declaration asserts that states have a duty to control private corporations. Even if this provision reflected customary international law, which it does not, the company would not be liable directly for its actions; responsibility would lie with the state for a failure to control.

7.3. Extraterritorial enforcement jurisdiction

The exercise of enforcement jurisdiction in the territory of another state, without its consent, breaches the non-intervention principle.[112] Unlike prescriptive jurisdiction, enforcement jurisdiction is normally territorial. It is an inherent part of a state's ability to apply its laws and maintain security within its borders. Examples of prohibited extraterritorial enforcement jurisdiction include the collecting of evidence[113] and police and other investigations (even if not purporting to use powers of compulsion) conducted without the consent of the territorial state.[114] Although it is open to states to argue that their extraterritorial enforcement measures are done for benign purposes and so cannot be coercive, as was argued by the United Kingdom in *Corfu Channel*, extraterritorial enforcement measures will nearly always be considered illegal.

7.4. Extraterritorial prescriptive jurisdiction

The limits on a state's prescriptive jurisdiction can be viewed as a question of non-intervention. Thus when the United States sought to impose obligations on foreign companies extraterritorially in support of its own foreign-policy objectives,[115] this was seen as unlawful intervention in the affairs of the states whose companies were affected, and led to countermeasures.[116]

Although it is difficult to see how a non-discriminatory application of a state's laws by the judicial branch could be coercive, the extraterritorial exercise of jurisdiction could amount to intervention in some situations.[117] Where there is no basis at

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112 Judges Higgins, Kooijmans, and Buergenthal referred to 'legal obligations . . . [which] pertain to the non-exercise of power in the territory of another State' (*Arrest Warrant* case, *supra* note 37, at para. 79). The PCIJ in *Lotus* said that 'the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State': PCIJ, (1927) Series A, No. 10, at 18.

113 As in the *Corfu Channel* case, *supra* note 34.

114 See, e.g., the facts in the Canadian case *R v. Hape*, *supra* note 37.

115 Chiefly through the US Export Administration Act 1979 and 2001, and the Sherman Act 1890. For case law see *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547. For examples from the European Union see the *Woodpulp* case, Case 89, 104, 114, 116, 117 and 125–129/85; *A. Ahlstrom Oy v. Commission* [1988] ECR 5193, [1988] 4 CMLR 901; and *Gencor Ltd v. Commission*, Case T-102/96, [1999] ECR II-753, [1999] 4 CMLR 971. Relevant US foreign policy aims have included the control of the global competition environment, blocking construction of the Siberian pipeline, control over the uranium trade, supporting anti-communist sentiments in Poland and restricting trade with Cuba.

116 The United Kingdom, for example, enacted the Protection of Trading Interests Act 1980 to block the application of offending US legislation.

117 C. Ryngaert, *Jurisdiction in International Law* (2008). In April 2007 Rwanda lodged an application with the ICJ alleging *inter alia* that France, following an investigation into the 1994 downing of the aircraft in which President Juvenal Habyarimana was travelling, breached the principle of non-intervention by issuing arrest warrants for Rwandan President Paul Kagame on the basis of the French nationality of the pilots, and by

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all for the exercise of jurisdiction, for example over a non-national for conduct carried out overseas and not attracting universal jurisdiction, then the exercise of jurisdiction will very likely contravene the non-intervention principle. Doctrines of non-justiciability developed by national courts in both civil and criminal cases are often based – expressly or implicitly – on the principle of non-intervention.[118] And, as Sir Ian Sinclair has written, 'a court may refuse to pronounce upon the validity of a law of a foreign State applying to matters in its own territory on the ground that to do so would amount to an assertion of jurisdiction over the internal affairs of that State'.[119]

7.5. Recognition and non-recognition

Premature recognition of statehood is often seen as an unlawful intervention in the internal affairs of the territorial state.[120] The unlawfulness of premature recognition was raised with regard to Israel in 1948, although the circumstances were special.[121] In the early 1990s the recognition of the states of the former Yugoslavia on the break-up of the Socialist Federal Republic of Yugoslavia (SFRY) was the subject of the Opinions of the Badinter Commission.[122] The General Assembly has sought an advisory opinion on whether Kosovo's declaration of independence was in accordance with international law, but did not ask about recognition.[123] The recognition in August and September 2008 of the statehood of Abkhazia and South Ossetia by Russia and Nicaragua, following the conflict in Georgia, was widely condemned.[124]

A state's failure to recognize an entity that fulfils the criteria for statehood will not normally constitute intervention. International law does not generally impose an obligation to recognize. However, in certain exceptional circumstances, where non-recognition is intended to force a change of policy, there could be a breach of the non-intervention principle. The treatment of Macedonia by Greece is an interesting case. After secession from Yugoslavia, the former Yugoslav Republic of Macedonia took as its constitutional name 'Republic of Macedonia' and adopted a flag which included the Star of Vergina. Greece objected, on the grounds that the choice of name and flag implied a claim to Greek territory, lobbied states to refuse to

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requesting the UN Secretary-General to begin prosecution through the International Criminal Tribunal for Rwanda (ICJ press release, 18 April 2007). The only basis for jurisdiction would have been *forum prorogatum*. The application was not registered since France did not accept jurisdiction.

118 'In accordance with the general principles of international law, a domestic criminal justice system should avoid intervening in the affairs of other States.' *Evgeny Adamov v. Federal Office of Justice*, Federal Tribunal, Switzerland, Judgment of 22 December 2005, ATF 132 II 81, para. 3.4.3, ILDC 339 (CH 2005).

119 I. Sinclair, 'The Law of Sovereign Immunity: Recent Developments', (1980-II) 167 RCADI 113, at 198–9.

120 J. Dugard, D. Raič, 'The Role of Recognition in the Law and Practice of Secession', in M. G. Kohen (ed.), *Secession: International law Perspectives* (2006), 94–137.

121 M. G. Kohen, 'La création de l'Etat d'Israël à la lumière du droit international', in I. Buffard, J. Crawford, A. Pellet, and S. Wittich (eds.), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), 441–54.

122 Opinions 1–3, (1992) 3 EJIL 1 at 182, and opinions 4–10, (1993) 4 EJIL 1, at 74.

123 UN Doc. A/RES/63/3 of 8 October 2008. W. Benedek, 'Implications of the Independence of Kosovo for International Law', in Buffard et al., *supra* note 121, at 391–412.

124 See for background *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Interim Measures*, ICJ Order of 15 October 2008.

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recognize Macedonia, and sought to block its entry into international organizations including the UN and NATO.[125]

7.6. Broadcasting and propaganda

Broadcasting (through all means, including radio, television, and the Internet) is a common way to influence policy in other states. Broadcasts can be used to change perceptions of a state in the international community through the provision of biased news reports, or by transmitting information into another state in order to influence its population.[126]

There is some textual support for a prohibition on certain extraterritorial broadcasts. The preamble to the 1976 Declaration on Non-Interference refers to 'campaigns of vilification' and 'subversion and defamation'. The 1981 Declaration refers to 'defamatory campaign[s], vilification or hostile propaganda for the purpose of intervening or interfering in the internal affairs of other States'.[127]

Article 19(2) of the International Covenant on Civil and Political Rights provides for the right to seek, receive, and impart information and ideas regardless of frontiers. However, the right is not absolute. Article 19(3) allows limitation of the right in order to protect others and for 'the protection of national security or of public order, or of public health or morals'. Further, Article 20 prohibits propaganda for war and the advocacy of national, religious, or racial hatred.[128]

Whether a broadcast contravenes the non-intervention principle depends on all the circumstances. If it is deliberately false and intended to produce dissent or encourage insurgents, the non-intervention principle is likely to be breached. If factual and neutral, it is doubtful that the broadcast will constitute intervention, regardless of the effect it may in fact have.

7.7. Diplomacy

Verzijl has written that '[t]he borderline between simple diplomatic pressure upon a foreign government and a forcible interference in its internal or external affairs is

125 *Application of the Interion Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)* case. See M. Craven, 'What's in a Name? – The Former Yugoslav Republic of Macedonia and Issues of Statehood', (1995) 16 *Australian Yearbook of International Law* 199; M. C. Wood, 'Participation of Former Yugoslav States in the United Nations and in Multilateral Treaties', (1997) 1 *Max Planck Yearbook of United Nations Law* 231; M. C. Wood, 'Macedonia', *Max Planck Encyclopedia of Public International Law, supra* note 16. See generally J.-P. Queneudec, 'Le nom et les symboles de l'Etat au regard du droit international', in F. Alabrune, E. Belliard, and E. Broussy (eds.), *L'Etat souverain dans le monde d'aujourd'hui: Mélanges en l'honneur de Jean-Pierre Puissochet* (2008).

126 For example, the use of Radio Liberty and Radio Free Europe: see O'Malley, *supra* note 93, at 319. It is important to distinguish government broadcasts from others. Argentina's reported anger (in April 2008) to references to General Peron in the American cartoon series *The Simpsons*, as a dictator married to the pop star Madonna, is difficult to base in the non-intervention principle. The same applies to the letter of complaint written by Mexico to Australia (in June 2007) after contestants on the Australian version of the television series *Big Brother* were required to wear droopy moustaches and sombreros and throw slime-filled balloons at the Mexican flag. The producers of Australian *Big Brother* issued an apology – a response more sympathetic than that from the producers of *The Simpsons*, who said that they would not be happy till they had upset every country in the world.

127 Annex, para. 2(II)(j).

128 For a detailed examination of the limitations of the right and the genesis of Art. 20, see Michael Kearney, *The Prohibition of Propaganda for War in International Law* (2007).

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entirely fluid'.[129] While it could be argued that much modern diplomacy (especially so-called 'public diplomacy') raises issues under the principle of non-intervention, states frequently issue statements criticizing conduct by other states, or commenting on foreign situations. States meet to discuss common problems and to agree on the conduct of international relations. States act so as to avoid the censure of other states, and the solutions obtained through these exchanges and discussions often have carrot and stick, or *quid pro quo*, elements. Such discussions are routine in international relations and are the first resort of states seeking to change the behaviour of other states.

The relationship between diplomatic activity and intervention was one of the most controversial aspects of the negotiations leading to the Friendly Relations Declaration. Several Western states sought an amendment relating to 'the generally recognized freedom of States to seek to influence the policies and actions of other States in accordance with international law and settled international practice'.[130] The proposal was rejected by developing countries, who saw themselves as victims of current practices and did not wish to legitimize such treatment. The United Kingdom, however, made a statement to the effect that

> In considering the scope of 'Intervention', it should be recognized that in an interdependent world, it is inevitable and desirable that States will be concerned with and will seek to influence the actions and policies of other States, and that the objective of international law is not to prevent such activity but rather to ensure that it is compatible with the sovereign equality of States and self-determination of their peoples. The United Kingdom delegation wishes to state its understanding that the concept of intervention in the 'external affairs' of States was to be construed in the light of that commentary.[131]

7.8. Action to promote and protect human rights

The relationship between the non-intervention principle and international human rights law has been controversial from the outset.[132] During the negotiation of the Friendly Relations Declaration a particular source of contention was the exclusion of a 'habitual engagement rule', which would have provided expressly that the prohibition of intervention would not extend to matters generally engaged in by states

129 Verzijl, *supra* note 1, at 236–7.

130 UN Doc. A/6230 (1966), at 148–50.

131 UN Doc. A/AC.125/SR.114 (1966).

132 See generally P. Szasz, 'The International Legal Aspects of the Human Rights Programme of the United States', (1979) 12 *Cornell International Law Journal* 161; M. Bossuyt, 'Human Rights and Non-intervention in Domestic Matters', (1985) 35 *Review of the International Commission of Jurist* 2; A. Rosen, 'Canada's Use of Economic Sanctions for Political and Human Rights Purposes', (1993) 51 *University of Toronto Faculty Law Review* 1; D. McGoldrick, 'The Principle of Non-intervention: Human Rights', in Lowe and Warbrick, *supra* note 23, at 85; G. Arangio-Ruiz, 'Human Rights and Non-intervention in the Helsinki Final Act', (1977-IV) 157 RCADI 195; G. Arangio-Ruiz, 'Droits de l'homme et non-intervention: Helsinki, Belgrade, Madrid', (1980) 35 *La Communità Internazionale* 453; A. Bloed and P. van Dijk, 'The Conference on Security and Cooperation in Europe, Human Rights and Non-Intervention', (1983) 5 *Liverpool Law Review* 117; Damrosch, *supra* note 23; A. Rosen, 'Canada's Use of Economic Sanctions for Political and Human Rights Purposes', (1993) 51 *University of Toronto Faculty Law Review* 1; Redmond, *supra* note 39, O'Malley, *supra* note 93; D. Tuerk, 'Reflections on Human Rights: Sovereignty of States and the Principle of Non-intervention', in M. Bergsmo, *Human Rights and Criminal Justice for the Downtrodden: Essays in Honour of Asbjorn Eide* (2003), 753; K. Zemanek, 'Human Rights Protection vs. Non-intervention', in L. C. Vorah, *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (2003), 935.

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on the basis that they must be permissible and lawful.[133] In particular, developed countries argued that actions to induce a state to comply with its human rights obligations were not contrary to the prohibition on intervention, whereas developing countries were again concerned not to legitimize practices that they felt were contrary to their independent status.

In recent years some Western politicians have seemed to assume that the external imposition of a political system, or even regime change, is acceptable in certain (ill-defined) circumstances.[134] This is not a view that many lawyers would share. In the United Kingdom, for example, the Attorney General advised categorically against any such right before the invasion of Iraq in 2003.[135] At the other end of the spectrum, what should be (and largely is) uncontested is that states and international organizations are entitled to criticize the human rights situation in other countries.[136] Between lies a range of non-forcible acts, such as unilateral sanctions or broadcasts, which aim to persuade or force a state better to comply with international human rights standards. In its 1989 resolution on 'The Protection of Human Rights and the Principle of Non-intervention in the Internal Affairs of States', the Institute of International Law stated,

> Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations in case of violation of the obligations assumed by the members of the Organizations [*sic*], States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any other State which has violated the obligation set forth in Article 1,[137] provided such measures are permitted under international law and do not involve the use of armed force in violation of the Charter of the United Nations. These measures cannot be considered an unlawful interference in the internal affairs of States.[138]

The scope of a human rights 'exception' to the principle of non-intervention is unclear. At the very least it should apply in those circumstances in which the General

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133 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, 21 UN GAOR Annex III (Agenda Item 87) 93, UN Doc. A/6230 (1966).

134 For example, the 1998 US Iraq Liberation Act, which called on the United States 'to support efforts to remove the regime headed by Saddam Hussein from power in Iraq and to promote the emergence of a democratic government to replace that regime.'

135 Lord Goldsmith's advice to the Prime Minister, 7 March 2003, para. 4. See 'Attorney General's Advice on the Iraq War: Resolution 1441', (2005) 54 ICLQ 767. This was in the context of the use of force.

136 In 1991, the states participating in the Conference on Security and Co-operation in Europe (CSCE) 'categorically and irrevocably [declared] that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.' Document of the Conference on the Human Dimension of the CSCE (Moscow, 3 October 1991).

137 Art. 1 read,

> Human rights are a direct expression of the dignity of the human person. The obligation of States to ensure their observance derives from the recognition of this dignity as proclaimed in the Charter of the United Nations and in the Universal Declaration of Human Rights.
> This international obligation, as expressed by the International Court of Justice, is *erga omnes*; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.

138 The French text is authoritative: see *Yearbook of the Institute of International Law, Session of Santiago de Compostela*, 1989.

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Assembly has proclaimed a responsibility to protect ('genocide, war crimes, ethnic cleansing and crimes against humanity'),[139] but this may be overly restrictive. On the other hand, if the exception extends even to minor breaches of human rights, it would allow a coach and horses to be driven through the non-intervention principle.

Lack of clarity about the principle of non-intervention does not make it any easier to resolve these difficulties. However, certain concepts could be applied to the relationship between human rights and intervention to make it workable. In particular, applying the concepts of the margin of appreciation and proportionality would prevent states using minor human rights breaches to justify major interventions.

The arguments relating to intervention to protect human rights, and in particular human rights guaranteeing political participation, must be read in the context of the Friendly Relations Declaration and *Nicaragua*. The Friendly Relations Declaration states that there is no right to intervene 'for any reason whatever'. Even more clearly, in *Nicaragua* the Court emphasized that there is no customary norm allowing

> a general right for States to intervene, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.[140]

The judgment in *Nicaragua* dates from 1986. Since then, as evidenced for example by the 'responsibility to protect', the international consensus regarding human rights and intervention is shifting. Yet it is difficult to argue that the 'fundamental modification' to which the ICJ in *Nicaragua* referred has occurred.

8. Circumstances precluding wrongfulness in cases of intervention

There are three principal circumstances precluding the wrongfulness of conduct that might otherwise amount to unlawful intervention:[141] Security Council authorization, consent, and countermeasures.[142]

8.1. Authorization under Chapter VII of the UN Charter

Acting under Chapter VII of the Charter, the Security Council, after determining the existence of a threat to the peace, breach of the peace, or act of aggression, may decide how international peace and security should be restored and impose

139 World Summit Outcome, A/RES/60/1, paras. 138–9; approved by the Security Council in UN Doc. S/RES/1674.
140 *Nicaragua*, *supra* note 4, at paras. 206, 207.
141 See Articles 20 and 22 of the ILC Articles on State Responsibility (2001). For a criticism of the ILC understanding of consent as a circumstance precluding wrongfulness, see T. Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?', in *Droit du pouvoir, pouvoir du droit, Liber Amicorum Jean Salmon* (2007), 223–70.
142 It is occasionally suggested that 'intervention' by bodies such as the European Union, 'coalitions of the willing', or the 'international community' are somehow legal when the same acts by individual states would not be. More 'legitimate' perhaps, but they cannot be 'more legal'. It cannot be legal for several states to do together what none of them can do alone.

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non-forcible and forcible measures. Article 2(7) does not apply to enforcement measures under Chapter VII. By virtue of Article 103, obligations thus imposed by the Council take priority over any other obligations that a state may have.[143] It follows that the Security Council may authorize states to take measures that would otherwise amount to an unlawful intervention. To take one example among many, in 1997 the Security Council imposed sanctions against members of the military junta in Sierra Leone because it determined that the situation in Sierra Leone, resulting from the junta's failure to allow the restoration of the democratically elected government and a return to constitutional order, was a threat to international peace and security in the region.[144] In the absence of serious human rights violations by the new government, such sanctions would almost certainly contravene the principle of non-intervention if employed by a state without Security Council authorization.

8.2. Consent

Intervention (even military intervention) with the consent of the government of a state is not precluded. Difficult questions will, however, arise. 'Intervention by invitation' is notoriously open to abuse.[145]

It is sometimes suggested that intervention in a civil war on the side of the government and at its request is unlawful,[146] but there is little support for this view in practice. Intervention on the side of those opposing the government, on the other hand, is clearly prohibited. Whether there is an exception to the principle of non-intervention in the case of assistance to peoples seeking to exercise the right of self-determination was once much discussed: Article 7 of the 1974 Definition of Aggression refers to the right of peoples forcibly deprived of the right of self-determination 'to seek and receive support, in accordance with the Charter and in conformity with the [Friendly Relations] Declaration'.

Consent works in much the same way for non-forcible intervention. The essence of the principle of non-intervention is the 'subordination of sovereign will'. Action taken with a state's consent is an expression, not a subordination, of its will.

A state can consent to an act by consenting to the mechanism which produces that act. For example, when a state consents to a dispute resolution procedure, it also consents to decisions properly produced by that procedure. The same applies with regard to mechanisms of regional organizations such as the European Union and African Union that permit action against member states engaging in grave human rights violations.[147]

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143 Although Art. 103 refers to 'obligations under any international agreement', it is widely accepted that the principle applies equally to obligations under customary international law.

144 UN Doc. S/RES/1132.

145 L. Doswald-Beck, 'The Legal Validity of Intervention by Request of the Government', (1985) 56 *British Yearbook of International Law* 189. Particularly controversial was the use of force in Hungary in 1956, in Czechoslovakia in 1968, in Grenada in 1983, and in Panama and Afghanistan in 1989. See G. Nolte, 'Secession and External Intervention', in M. G. Kohen (ed.), *Secession: International Law Perspectives* (2006).

146 Institut de Droit International, Resolution on The Principle of Non-Intervention in Civil Wars, Session of Wiesbaden, 1975. But see Hafner, *supra* note 1.

147 See sections 6.3 and 6.4 *supra*.

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The difficulties highlighted above with regard to consent to armed force are even greater in the more subtle context of non-forcible action. Consent, to be valid, has to be given by a legitimate authority and not under coercion. Yet to establish that consent was not freely given may be difficult. Would a statement by a strong state to a weak state that a certain course of action would be 'unfavourably looked upon' constitute a threat of intervention? It almost certainly would not. The most useful touchstone for consent is, again, coerciveness. If the consent was extracted by coercive means or under circumstances such that the sovereign will of the consenting state was subordinated, it can be argued that the non-intervention principle has been violated. A state's consent given because a subsequent benefit is expected, or because of concerns about a cooling of relations, is not invalid.

8.3. Countermeasures

Until *Nicaragua* the concept of countermeasures was not commonly applied to intervention. In that case the Court made clear the place of justifiable self-help in the area of non-intervention by applying the language of 'proportional countermeasures':

> The United States admits that it is giving its support to the *contras* in Nicaragua, but justifies this by claiming that that State is adopting similar conduct by itself assisting the armed opposition in El Salvador, and to a lesser extent in Honduras and Costa Rica, and has committed trans-border attacks on those two States. The United States raises this justification as one of self-defence: having rejected it on those terms, the Court has nevertheless to consider whether it may be valid as action by way of counter-measures in response to intervention. The Court has however to find that the applicable law does not warrant such a justification.
>
> On the legal level, the Court cannot regard response to an intervention by Nicaragua as such a justification. While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot, as the Court has already observed . . ., produce any entitlement to take collective counter-measures involving the use of force. The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[148]

The Court was clear that the response by a victim state to a non-forcible intervention must itself be non-forcible. In any event, the prohibition on armed reprisals is well established.[149] As for the question of the non-forcible measures that can be taken, the answer lies in the law of state responsibility.

Since their adoption by the ILC, the Articles on State Responsibility have become the starting point for any consideration of questions of state responsibility and many of their provisions are taken to reflect customary international law.[150] Article 49 contains the basic rule regarding countermeasures:

148 *Nicaragua*, *supra* note 4, at paras. 248, 249.
149 *Naulilaa Arbitration* 1928, 2 RIAA 1011.
150 S. Olleson, *The Impact of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts* (2008).

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(1) An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two.
(2) Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
(3) Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

The issue of proportionality is dealt with separately at Article 51:

> Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Taking Articles 49 and 51 together, it appears that the Court's reference in *Nicaragua* to 'proportionate countermeasures' is no more than an orthodox statement of the self-help remedies available to Nicaragua in the face of an internationally wrongful act by the United States.[151]

It is, however, normally assumed that the Court's reference to 'proportionate countermeasures' allowed action beyond the mere suspension of legal obligations. It may in fact be desirable to allow some retaliatory coercion short of force in international law in order to reduce the instances in which states resort to force to resolve conflicts.[152] A state can surely intervene in the affairs of a state in relation to which it is a victim of intervention in order to stop the original intervention.

9. Conclusions

It is hoped that the present article will encourage further research into the important, although obscure, subject of non-intervention. Despite the uncertainties surrounding the principle, and the difficulty of assessing state practice in the field, it is possible to suggest the following tentative conclusions.

The principle of non-intervention remains well established in contemporary international law. It is part of customary international law, and the International Court of Justice has so affirmed on a number of occasions, including very recently.

Despite its frequent affirmation, the principle is uncertain in scope. It underlies and encompasses a series of more specific rules. It is not itself a *jus cogens* norm. Nor does its violation give rise to criminal responsibility.

Non-intervention is a broad principle that includes the prohibition of the use of force, set forth in Article 2(4) of the Charter and in customary international law. But the principle also requires that a state not intervene in the internal or external affairs of other states in coercive ways not involving the use of force, which may include, for example, unilateral economic measures.

The core of what is prohibited is 'coercive interference' in matters which international law leaves to the discretion of states, such as their political, economic, and

151 See also *Air Services Agreement of 27 March 1946 (United States v. France)*, 18 RIAA 417, at 444; and *Gabčikovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep. 7, at 56.
152 See Damrosch, *supra* note 23; and R. Sadurska, 'Threats of Force', (1988) 82 AJIL 239.

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legal systems, and their choice of government and foreign policies. The requirement of coercion is a crucial limit in the principle of non-intervention. Without it, any act which had an effect on another state could fall within the prohibition. The requirement of coerciveness not only removes minor international friction from the scope of the principle, but means that it only applies to those acts that to some degree 'subordinate the sovereign will' of another state.

The principle of non-intervention is an 'essentially relative concept', liable to change as international law changes. In particular, it has been profoundly affected by the development of international human rights law and globalization, and arguably also by widespread acceptance of the importance for international relations of such principles as democracy, good governance, and the rule of law.

Despite the political rhetoric from both opponents and proponents of the principle of non-intervention, behind it lies an extensive body of law that has been reflected in many judicial decisions, treaties, and UN resolutions. In the coming years, as in the past, some will invoke it to try and evade their responsibilities to the international community and to their nationals; others will belittle it in order to justify interventionist foreign-policy goals. The cynical political uses to which the principle will be put should not detract from the fact that it may be a positive tool for the regulation of diplomacy, international relations, and our growing interdependence. Regardless, it will continue to be fundamental to the way many states see the world.

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