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## The Prohibition on Intervention Under International Law and Cyber Operations

*Ori Pomson*

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## I. INTRODUCTION

Attempts to influence the affairs of other States have occurred since time immemorial. The Parliament of England in 1533 accused the Pope of “abusing and beguiling [King Henry VIII’s] subjects . . . in great derogation of [Henry’s] imperial crown and authority royal.”<sup>1</sup> More recently, during the Cold War, Soviet bloc and developing States strongly objected to western radio broadcasts into their territories without their prior consent, on grounds that they should be able “to develop and maintain their own social, political, economic and cultural systems.”<sup>2</sup>

Yet, cyber technologies have made way for such meddling to occur in novel and unique ways—particularly in light of how they enable reaching otherwise inaccessible places and audiences, while allowing a large degree of anonymity.<sup>3</sup> Indeed, over the past decade or so, States have purportedly—and at times successfully—resorted to cyber operations for the purposes of:

(1) Spreading disinformation to impact the results of foreign elections, such as in the leadup to the Brexit Referendum and the 2020 U.S. presidential elections;<sup>4</sup>

(2) Leaking and doxing information to embarrass—and potentially compromise—foreign political figures, for example the leaking of Democratic National Committee emails in 2016;<sup>5</sup>

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1. Act Concerning Peter’s Pence and Dispensations 1533, 25 Hen. 8 c. 21.

2. Jamie Frederic Metz, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AMERICAN JOURNAL OF INTERNATIONAL LAW 628, 642 (1997).

3. See, e.g., Travis Sharp, *Theorizing Cyber Coercion: The 2014 North Korean Operation Against Sony*, 40 JOURNAL OF STRATEGIC STUDIES 898, 919–20 (2017); W. Lance Bennett & Steven Livingston, *A Brief History of the Disinformation Age: Information Wars and the Decline of Institutional Authority*, in THE DISINFORMATION AGE: POLITICS, TECHNOLOGY, AND DISRUPTIVE COMMUNICATION IN THE UNITED STATES 3, 11 (W. Lance Bennett & Steven Livingston eds., 2020).

4. Amy Mackinnon, *4 Key Takeaways from the British Report on Russian Interference*, FOREIGN POLICY (July 21, 2020, 5:36 PM), <https://foreignpolicy.com/2020/07/21/britain-report-russian-interference-brexite>; National Intelligence Council, *Foreign Threats to the 2020 US Federal Elections*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE (Mar. 10, 2021), <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf>.

5. ROBERT S. MULLER, SPECIAL COUNSEL, DEPARTMENT OF JUSTICE, 1 REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 36 (Mar. 2019), <https://www.justice.gov/archives/sco/file/1373816/download>.

(3) Paralyzing infrastructure in a State with which it has hostile relations, as occurred to government and other key websites in the 2007 Estonia distributed denial of service incident;<sup>6</sup>

(4) Causing physical destruction to facilities in other States, such as occurred in Iranian nuclear facilities in the 2010 Stuxnet incident.<sup>7</sup>

Unsurprisingly, scholars have turned to the international legal rule which is *prima facie* most relevant in addressing such meddling; namely, the prohibition on intervention. Indeed, at its most abstract level, it is defined in the Declaration on Friendly Relations—United Nations General Assembly Resolution 2625 (XXV)—as follows: “No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>8</sup>

Save a few skeptical voices,<sup>9</sup> there appears to be quite a wide-ranging consensus in scholarship on the scope of the prohibition on intervention. According to this scholarship, an act constitutes prohibited intervention if it *coerces* a State in regard to its *internal or external affairs*. A State’s internal or external affairs—also termed domestic jurisdiction or *domaine réservé*<sup>10</sup>—are matters which “are not, in principle, regulated by international law.”<sup>11</sup> In regard to the element of coercion, scholarship—particularly on the subject of cyber operations—appears to generally follow the opinion of Maziar Jamnejad and Sir Michael Wood, who, in a heavily cited article, opined that for an act to amount to coercion, it must “to some degree ‘subordinate the

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6. Stephen Herzog, *Revisiting the Estonian Cyber Attacks: Digital Threats and Multinational Responses*, 4 JOURNAL OF STRATEGIC SECURITY 49, 50–51 (2011).

7. William J. Broad, John Markoff & David E. Sanger, *Israel Tests Called Crucial in Iran Nuclear Setback*, N.Y. TIMES, Jan. 16, 2011, at A1.

8. G.A. Res. 2625 (XXV), annex, princ. 3, ¶ 1 (Oct. 24, 1970). *Cf.* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 205 (June 27) [hereinafter *Nicaragua*]. *See also* Hilary Charlesworth, “Operation Just Cause,” 15 LEGAL SERVICE BULLETIN 64, 65 (1990).

9. *See* Niki Aloupi, *The Right to Non-intervention and Non-interference*, 4 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 566, 576–77 (2015); Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention?*, 16 CHINESE JOURNAL OF INTERNATIONAL LAW 175, 181–83 (2017).

10. *Cf.* Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 419, 554 (1972).

11. *See* Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 23–24 (Feb. 7).

sovereign will' of another state.”<sup>12</sup> Thus, to cite but one example of such scholarship, for the authors of the Tallinn Manual, the element of “coercion” is defined as “an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way.”<sup>13</sup> Such tests lead to conclusions that the respective cyber incidents mentioned above can plausibly constitute violations of the prohibition on intervention.<sup>14</sup>

References to the jurisprudence of international courts, as well as to resolutions of the United Nations General Assembly and other inter-governmental fora, are quite common in such scholarship for the purpose of defining the scope of the prohibition on intervention. Yet, it appears that very little attention has been given to the actual pronouncements of States that gave rise to the crystallization of the customary prohibition on intervention. As will be explained,<sup>15</sup> this lack of inductive research can give rise to serious shortcomings in comprehending the scope of the prohibition on intervention.

The essence of this article’s argument is that under the *lex lata* the prohibition on intervention only applies to acts amounting to a use of force or constituting support for the violent overthrow of a foreign regime. This argument is supported by the fact that the Western European and Other States Group (WEOG)<sup>16</sup> generally refrained from recognizing a prohibition applying to a broader range of acts. However, a customary rule prohibiting a State

12. Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 345, 381 (2009). The use of quotation marks appears to relate less to the direct quotation from another source and more to the use of a generic concept.

13. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 317 (Michael N. Schmitt gen. ed., 2017). See also FRANÇOIS DELERUE, CYBER OPERATIONS AND INTERNATIONAL LAW 259 (2020); Gary Corn, *Covert Deception, Strategic Fraud, and the Rule of Prohibited Intervention* 12 (Hoover Institution Aegis Series Paper No. 2005, Sept. 18, 2020), [https://www.hoover.org/sites/default/files/research/docs/corn\\_webready.pdf](https://www.hoover.org/sites/default/files/research/docs/corn_webready.pdf); Dire Tladi, *The Duty Not to Intervene in Matters within Domestic Jurisdiction*, in THE UN FRIENDLY RELATIONS DECLARATION AT 50, at 89, 92 (Jorge E. Viñuales ed., 2020).

14. See, e.g., Russell Buchan, *Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions?*, 17 JOURNAL OF CONFLICT AND SECURITY LAW 211, 226 (2012); HARRIET MOYNIHAN, THE APPLICATION OF INTERNATIONAL LAW TO STATE CYBERATTACKS: SOVEREIGNTY AND NON-INTERVENTION 42 (2019).

15. See *infra* Section II(A).

16. WEOG is one of the UN’s regional groups, in which western European States, as well as Australia, Canada, New Zealand, and—more recently—Israel, are members, with the United States—albeit technically not a member—also being involved in its activities. At

from preventing the holding of an election in another State, or manipulating the vote tally thereof, may be close to crystallizing, as signalled by recent shifts in the positions of WEOG States that have been more receptive to a broader conception of prohibited intervention.

For reasons of space, the present article will not expand upon the definition of a State's "internal and external affairs"—which an intervention must be in relation to for it to be prohibited—as the issue is generally less controversial; particularly since international jurisprudence on the issue has been quite clear.<sup>17</sup> Similarly, it will not analyze the overlap—and lack thereof—between the prohibition on intervention and the obligation to respect another State's (territorial) sovereignty.<sup>18</sup> It suffices to note that whereas territorial sovereignty provides for exclusive competence to exercise the functions of a State within a territorial unit<sup>19</sup>—perhaps on condition that States generally have the capacity to exercise the activity exclusively in the territorial unit<sup>20</sup>—the prohibition on intervention is not limited *ratione loci* but prohibits an act amounting to "intervention" in internal or external affairs.<sup>21</sup>

Finally, the article will not analyze the scope of various provisions in particular treaties referring to "intervention" unless they are incidentally relevant to the article's analysis. Readers should note that there are opinions that consider Article 2(7) of the UN Charter—prohibiting the UN from "interven[ing] in matters which are essentially within the domestic jurisdiction

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least during the Cold War, a European State's membership in WEOG generally reflected it being a liberal democracy. See Stefan Talmon, *Participation of UN Member States in the Work of the Organization: A Multicultural Alternative to Present-Day Regionalism?*, in MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOUR OF EDWARD MCWHINNEY 239, 256 (Sienho Yee & Jacques-Yvan Morin eds., 2009); see generally Regional Groups of Member States, UNITED NATIONS, <https://www.un.org/dgacm/en/content/regional-groups> (last visited Mar. 4, 2022).

17. See *infra* note 138 and accompanying text.

18. Cf. Daniel Bethlehem, *The End of Geography: The Changing Nature of the International System and the Challenge to International Law*, 25 EUROPEAN JOURNAL OF INTERNATIONAL LAW 9, 14 (2014).

19. Michael Akehurst, *Jurisdiction in International Law*, 46 BRITISH YEAR BOOK OF INTERNATIONAL LAW 145, 146–150 (1972).

20. Walther Schoenborn, *La nature juridique du territoire*, 30 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 81, 156–57 (1929); Rolando Quadri, *Droit international cosmique*, 98 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 505, 557–58 (1959). See also Georges Abi-Saab, *Cours général de droit international public*, 207 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9, 69–70 (1987).

21. Cf. Aloupi, *supra* note 9, at 571–72.

of any state,”<sup>22</sup>—as incorporating an inter-State prohibition on intervention.<sup>23</sup> However, the International Court of Justice’s (ICJ) statement in *Nicaragua*, that the prohibition on intervention “is not, as such, spelt out in the Charter,”<sup>24</sup> would appear sound and accurate as a matter of treaty interpretation.<sup>25</sup>

The structure of the article is as follows. Part II will examine how the prohibition on intervention under customary international law was treated in its formative years—the 1960s to 1980s. This will set the stage for Part III, which will seek to dissect the ICJ’s findings regarding the prohibition on intervention in the *Nicaragua* case—the leading case on the subject. Part IV will analyze how the prohibition on intervention has been understood by States since the *Nicaragua* judgment. Part V will provide some concluding observations.

## II. THE DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW ON NON-INTERVENTION: 1960s–1980s

The idea of a prohibition on intervention in international law would appear to date back to Emer de Vattel in the eighteenth century.<sup>26</sup> Despite Vattel’s far-reaching articulation of the prohibition on intervention,<sup>27</sup> the content of the prohibition has through the years been subject to radically diverse descriptions.<sup>28</sup> Indeed, as Sir Robert Jennings wrote, “[t]here is probably no branch of international law which is so calculated to encourage the skeptic as that mass of contradictory precedents, dogmatic assertions, and vague

22. U.N. Charter art. 2, ¶ 7.

23. See, e.g., N. Ouchakov, *La compétence interne des États et la non-intervention dans le droit international contemporain*, 141 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 1, 37 (1974).

24. *Nicaragua*, *supra* note 8, ¶ 202.

25. See, e.g., Gilbert Guillaume, *Article 2, Paragraphe*, in LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 141, 149–50 (Jean-Pierre Cot & Alain Pellet eds., 2d ed. 1991); Benedetto Conforti, *Le principe de non-intervention*, in DROIT INTERNATIONAL: BILAN ET PERSPECTIVES 489, 498–99 (Mohammed Bedjaoui ed., 1991).

26. Sidney Floss, *Non-ingérence et égalité des états: des principes indépendants des concepts de souveraineté*, 47 REVUE BELGE DE DROIT INTERNATIONAL 454, 476 (2014).

27. EMER DE VATTEL, THE LAW OF NATIONS 289 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., 1758).

28. Cf. 1 PAUL FAUCHILLE, TRAITÉ DE DROIT INTERNATIONAL PUBLIC 540 (1922); Arrigo Cavaglieri, *Règles générales du droit de la paix*, 26 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 311, 572 (1929).

principles which are collected under the common head of ‘intervention.’”<sup>29</sup> In any event, it is doubtful—and, in fact, was doubted<sup>30</sup>—that prohibition on intervention was part and parcel of customary international law prior to the 1960s, due to the varied practice of States.<sup>31</sup> While inroads were made in codifying a prohibition in treaties governing the relations of States in the Americas in the first half of the twentieth century,<sup>32</sup> there was little authority for the proposition that such provisions reflected customary international law.<sup>33</sup>

Nevertheless, a number of significant discussions and resolutions concerning non-intervention occurred and were adopted in international fora—and particularly in the UN General Assembly—during the 1960s–1980s. It appears that reliance on such resolutions for authoritative pronouncements on the scope of the prohibition on intervention is only surpassed by the *Nicaragua* judgment.<sup>34</sup> However, unlike the *Nicaragua* judgment, which is ultimately a “subsidiary means for the determination of rules of law,”<sup>35</sup> the practice of States in regards to these resolutions could potentially provide the material sources necessary to identify the scope of a customary prohibition on intervention. Thus analysis of those resolutions and practices is essential.

The most significant of these resolutions for present purposes were: Resolution 2131 (XX) (1965)—Declaration on the Inadmissibility of Interven-

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29. R. Y. Jennings, *The Caroline and McLeod Cases*, 31 AMERICAN JOURNAL OF INTERNATIONAL LAW 82, 82 (1938). See also P. H. Winfield, *The History of Intervention in International Law*, 3 BRITISH YEAR BOOK OF INTERNATIONAL LAW 130 (1922).

30. Philip Marshall Brown, *International Responsibility in Haiti and Santo Domingo*, 16 AMERICAN JOURNAL OF INTERNATIONAL LAW 433, 436 (1922).

31. D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 44–45 (1958); Philip Kunig, *Intervention, Prohibition of*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 14–18, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=ujjY0z&result=1&prd=MPII> (last updated Apr. 2008).

32. Montevideo Convention on the Rights and Duties of States art. 8, Dec. 26, 1933, 165 L.N.T.S. 19; Additional Protocol relative to Non-intervention, Dec. 23, 1936, 188 L.N.T.S. 31; Charter of the Organization of American States art. 15, Apr. 30, 1948, 119 U.N.T.S. 3 (due to amendments, today it is art. 19) [hereinafter OAS Charter].

33. See *Nicaragua*, *supra* note 8, ¶ 6 (Ago, J., separate opinion), ¶ 242 (Schwebel, J., dissenting).

34. See, e.g., Jamnejad & Wood, *supra* note 12, at 352–55; MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 63–64 (2014); DELERUE, *supra* note 13, at 235–36.

35. Statute of the International Court of Justice art. 38, ¶ 1(d), June 26, 1945, 59 Stat. 1055.

tion in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty;<sup>36</sup> Resolution 2625 (XXV) (1970)—Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations;<sup>37</sup> Resolution 31/91 (1976)—Non-interference in the Internal Affairs of States;<sup>38</sup> and Resolution 36/103 (1981)—Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.<sup>39</sup> In addition to these resolutions, attention should be given to the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe,<sup>40</sup> which includes significant statements on the subject of non-intervention.

The UN General Assembly resolutions and the circumstances of their adoption will be analyzed, followed by analysis regarding the Helsinki Final Act. However, before proceeding to these analyses, it is apt to provide some background on the identification of customary international law on the basis of resolutions adopted in international fora—particularly in the General Assembly—as well as more generally on the basis of pronouncements by States.

*A. The Identification of Customary International Law from Resolutions and Statements*

As the ICJ stated in the *Nuclear Weapons* advisory opinion, “General Assembly resolutions, even if they are not binding, may sometimes have normative value.”<sup>41</sup> As a general proposition, this does not appear to be controversial anymore.<sup>42</sup>

Yet, prudence is necessary before ascertaining acceptance as law on the basis of a resolution passed in an inter-governmental forum, like the UN General Assembly. To begin, “substantial numbers of negative votes and

36. G.A. Res. 2131 (XX) (Dec. 21, 1965).

37. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

38. G.A. Res. 31/91 (Dec. 14, 1976).

39. G.A. Res. 36/103 (Dec. 9, 1981).

40. Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, reprinted in 14 INTERNATIONAL LEGAL MATERIALS 1292 (1975) [hereinafter Helsinki Final Act].

41. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 70 (July 8) [hereinafter Nuclear Weapons Advisory Opinion].

42. See also Int'l Law Comm'n, Draft Conclusions on Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10, 147–48 (2018).

abstention” are likely to undermine a resolution’s legal significance.<sup>43</sup> Moreover, regardless of such abstentions and negative votes, it is important to recall the ICJ’s reminder elsewhere that “some resolutions contain a large number of different propositions; a State’s vote on such resolutions cannot by itself be taken as indicative of the position of that State on each and every proposition within that resolution.”<sup>44</sup> As the ICJ made apparent on a number of occasions, statements made in meetings and discussions in the lead up to the adoption of a resolution, as well as explanations of votes, are more likely to be indicative of *opinio juris*.<sup>45</sup>

It is one thing for a State to pronounce on a certain matter; it is another thing to interpret such a pronouncement. Surprisingly, this issue—unlike the question of whether rules of customary international law are interpretable themselves<sup>46</sup>—has received very little attention in academic literature. Yet, it is an indispensable issue for the purposes of this article, where the meaning of statements of acceptance as law, or lack thereof, is crucial for identifying the scope of the prohibition on intervention.

If the subjective element of customary international law is acceptance as law by States,<sup>47</sup> it follows that it is a unilateral juridical act (*acte juridique*).<sup>48</sup> That is, “the French term ‘acte’ is ordinarily used to denote the exercise of a

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43. Cf. Nuclear Weapons Advisory Opinion, *supra* note 41, ¶ 71.

44. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), Jurisdiction and Admissibility, Judgment, 2016 I.C.J. 255, ¶ 53 (Oct. 5).

45. *Nicaragua*, *supra* note 8, ¶ 188; Nuclear Weapons Advisory Opinion, *supra* note 41, ¶ 70. See also Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 160 (Feb. 25); Prosper Weil, *Le droit international en quête de son identité*, 237 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 11, 175–76 (1992); Peter Tomka, *Custom and the International Court of Justice*, 12 LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 195, 210–11 (2013); Yoram Dinstein, *The Interaction between Customary International Law and Treaties*, 322 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 243, 306–9 (2006).

46. See, e.g., Robert Y. Jennings, *The Progressive Development of International Law and its Codification*, 24 BRITISH YEAR BOOK OF INTERNATIONAL LAW 301, 305 (1947); Panos Merkouris, *Interpreting the Customary Rules on Interpretation*, 19 INTERNATIONAL COMMUNITY LAW REVIEW 126, 137–38 (2017).

47. Statute of the International Court of Justice, *supra* note 35, art. 38, ¶ 1(b); Legal Consequences of the Separation of the Chagos Archipelago, *supra* note 45, ¶ 142.

48. Cf. Carlo Santulli, *Rapport général: contribution au colloque de Poitiers sur l’interprétation en droit international*, 115 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 297, 302 (2011).

power, i.e. a manifestation of will intended to produce the legal consequences determined by this will.”<sup>49</sup> The juridical act in this instance is unilateral in the sense that one State’s acceptance as law is not determined by—or necessarily in coordination with—any other State.<sup>50</sup> Unilateral juridical acts—and accordingly acceptance as law—must be interpreted above all by reference to the intention of their respective authors.<sup>51</sup>

An issue that is of relevance to the statements of acceptance as law relating to non-intervention is the treatment of silence and ambiguity. The proposition that State silence can be taken as acquiescence in an *opinio juris* is well known.<sup>52</sup> Yet, a State’s decision to remain silent or maintain ambiguity may result from various circumstances and considerations. In addition to instances where States simply lack the bureaucratic capacity to put a (detailed) statement together, a State may also find itself unable to agree internally on a particular position.<sup>53</sup> Indeed, the costs of coordination of a position may render the pronouncement of acceptance as law prohibitive from a cost-benefit perspective. Additionally, sometimes it may be politically sensitive for a State to pronounce its entire position on a matter and so a State will remain silent or ambiguous on that matter.<sup>54</sup> Moreover, a State will often seek to avoid prejudicing future legal positions and thus avoid taking a

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49. Roberto Ago (Special Rapporteur), *Second Report on State Responsibility*, [1970] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 186.

50. Cf. EVA KASSOTI, *THE JURIDICAL NATURE OF UNILATERAL ACTS OF STATES IN INTERNATIONAL LAW* 2–3 (2015).

51. *Fisheries Jurisdiction (Spain v. Can.)*, Jurisdiction of the Court, Judgment, 1998 I.C.J. 432, ¶ 48 (Dec. 4); *Unilateral Acts of States*, [2006] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, at pt. 2, 159, 165.

52. I. C. MacGibbon, *Customary International Law and Acquiescence*, 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 115, 130 (1957); Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 39 (1975).

53. Cf. Daniel Bethlehem, *The Secret Life of International Law*, 1 CAMBRIDGE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 23, 32–33 (2012).

54. *Id.* at 32.

stance.<sup>55</sup> It follows that one must account for these other potential explanations for a State's silence and ambiguity before considering that these reflect an *opinio juris* of sorts relating to a certain proposition.<sup>56</sup>

Another important and, as will be seen, highly relevant aspect to consider in the identification of customary international law is that while universal participation in State practice and acceptance as law is unnecessary for a customary rule to develop,<sup>57</sup> practice and *opinio juris* must be exhibited by a general number of States.<sup>58</sup> Moreover, the States participating in such practice and *opinio juris* must be representative.<sup>59</sup> As the International Law Commission (ILC) explained, such representativeness “needs to be assessed in light of all the circumstances, including the various interests at stake and/or the various geographical regions.”<sup>60</sup> It follows that the absence of one of the major blocs of States participating in—or at least acquiescing to—a practice accepted as law on a matter which directly concerns the international community as a whole would have the effect of preventing a potential customary rule on the matter from crystallizing.

### B. *The General Assembly Resolutions*

The adoption of Resolution 2131 (XX) and the provisions relating to non-intervention in Resolution 2625 (XXV) are closely connected, and hence their general background and adoption will be explained together. Later, the discussion leading up to the adoption of Resolution 2625 (XXV) will be

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55. See Danae Azaria, “Codification by Interpretation”: *The International Law Commission as an Interpreter of International Law*, 31 EUROPEAN JOURNAL OF INTERNATIONAL LAW 171, 191 (2020). See also Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEXAS INTERNATIONAL LAW JOURNAL 189, 211 (2015); Jessica Gladstone, *The Legal Adviser and International Disputes: Preparing to Commence or Defend Litigation or Arbitration*, in THE ROLE OF LEGAL ADVISERS IN INTERNATIONAL LAW 34, 41 (Andraž Zidar & Jean-Pierre Gauci eds., 2016); Sir Michael Wood, *Legal Advisers*, in *id.* at 59, 66.

56. Cf. Draft Conclusions on Identification of Customary International Law, *supra* note 42, at 142.

57. See Akehurst, *supra* note 52, at 17.

58. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 111 (Oct. 12).

59. North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, ¶ 73 (Feb. 20).

60. Draft Conclusions on Identification of Customary International Law, *supra* note 42, at 136. Cf. Dinstein, *supra* note 45, at 287–88.

scrutinized in greater detail. Finally, attention will move to the adoption of Resolutions 31/91 (1976) and 36/103 (1981).

1. The Adoption of Resolutions 2131 (XX) and 2625 (XXV)

Despite being adopted five years after the adoption of Resolution 2131 (XX), the work on Resolution 2625 (XXV) began first. Resolution 2625 (XXV) was the product of the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States (the “Special Committee”). The Special Committee, established by the General Assembly, was tasked with drawing up a report with conclusions and recommendations on four principles of international law “for the purpose of the progressive development and codification of the four principles so as to secure their more effective application.”<sup>61</sup> One of the four principles was “[t]he duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the [UN] Charter.”<sup>62</sup> The Special Committee was ultimately composed of twenty-six States,<sup>63</sup> of diverse regions and ideologies, and their representatives were recommended by the General Assembly to be “jurists”<sup>64</sup>—something States generally adhered to, some even appointing their most senior foreign ministry legal advisers.<sup>65</sup> The Special Committee first met in 1964 and held meetings for around a month, ultimately unable to reach consensus on formulating the principles it was tasked with.<sup>66</sup>

In 1965, the General Assembly decided to reconstitute the Special Committee, with its membership slightly expanded, and tasked it to address further principles, in addition to those already tasked.<sup>67</sup> The reconstituted Special Committee (re)started meetings in 1966 and eventually succeeded in reaching consensus on the formulation of the principles it was tasked with.<sup>68</sup>

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61. G.A. Res. 1966 (XVIII), ¶ 1 (Dec. 16, 1963).

62. G.A. Res. 1815 (XVII), ¶ 3(c) (Dec. 18, 1962).

63. Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, U.N. Doc. A/5746, ¶ 3 (Nov. 16, 1964).

64. G.A. Res. 1966 (XVIII), ¶ 2 (Dec. 16, 1963).

65. Edward McWhinney, *The “New” Countries and the “New” International Law: The United Nations’ Special Conference on Friendly Relations and Co-operation among States*, 60 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 4–5 (1966).

66. Report of the Special Committee, *supra* note 63, at 67, 104, 141, 163.

67. G.A. Res. 2103 (XX) (Dec. 20, 1965).

68. Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, U.N. Doc. A/8018, at 70 (1970).

However, between the end of the Special Committee's meetings in 1964 and their resumption in 1966, Resolution 2131 (XX)—the Declaration on the Inadmissibility of Intervention—was negotiated and drafted in the General Assembly First Committee (Disarmament and International Security).<sup>69</sup> It was subsequently adopted in plenary of the General Assembly by 109 votes in favor, none against, and one State—the United Kingdom—abstaining.<sup>70</sup> The first two operative paragraphs of Resolution 2131 (XX) read as follows:

1. No State 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 condemned.

2. 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 or to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.<sup>71</sup>

The Special Committee, and subsequently the General Assembly, would take up this formulation nearly word for word as the elaboration of the principle of non-intervention in Resolution 2625 (XXV),<sup>72</sup> which was adopted in the General Assembly by consensus.<sup>73</sup>

Considering that the ICJ in *Nicaragua* relied, inter alia, on Resolution 2625 (XXV) to discern the *existence* of a prohibition on intervention as part and parcel of customary international law,<sup>74</sup> some—including the Tallinn

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69. Report of the First Committee on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, U.N. Doc. A/6220 (Dec. 21, 1965).

70. U.N. GAOR, 20th Sess., 1408th plen. mtg., U.N. Doc. A/PV.1408, ¶ 90 (Dec. 21, 1965).

71. G.A. Res. 2131 (XX), ¶¶ 1–2 (Dec. 21, 1965).

72. See G.A. Res. 2625 (XXV) (Oct. 24, 1970). Cf. Arangio-Ruiz, *supra* note 10, at 560–61.

73. U.N. GAOR, 25th Sess., 1883d plen. mtg., U.N. Doc. A/PV.1883, ¶ 8 (Oct. 24, 1970).

74. *Nicaragua*, *supra* note 8, ¶¶ 202–3.

Manual<sup>75</sup>—have relied on the elaboration of that prohibition in the Resolution to determine the actual *scope* of the customary prohibition.<sup>76</sup> However, unlike its analysis on the prohibition on the use of force,<sup>77</sup> the Court did not examine the elaborating text in Resolution 2625 (XXV) to determine the scope of the customary prohibition on intervention. Actually, the discussions regarding non-intervention in the Special Committee are far more revealing as to what States considered to be the proper scope of the principle of non-intervention.

## 2. The Debates Preceding the Adoption of Resolution 2625 (XXV)

The discussions in the 1964 meetings of the Special Committee were in many respects a matter of the various representatives laying out their States' respective positions.<sup>78</sup> Emblematic of Soviet-bloc States was the Czechoslovak representative's statement that "any external pressure exercised against the right of a State freely to choose a particular social system or political regime should [] be unconditionally prohibited."<sup>79</sup> African States expressed support for similar positions.<sup>80</sup> Latin American States supported a formulation similar to that in the Charter of the Organization of American States,<sup>81</sup> which prohibits "any . . . form of interference or attempted threat against the per-

75. TALLINN MANUAL 2.0, *supra* note 13, at 317, 317 n.774.

76. *See, e.g.*, Eric David, *Portée et limite du principe de non-intervention*, 23 REVUE BELGE DE DROIT INTERNATIONAL 350, 351 (1990); Alexander Orakhelashvili, *Sanctions and Fundamental Rights of States: The Case of EU Sanctions Against Iran and Syria*, in ECONOMIC SANCTIONS AND INTERNATIONAL LAW 13, 19–20 (Matthew Happold & Paul Eden eds., 2016).

77. *See Nicaragua*, *supra* note 8, ¶ 191.

78. *See* McWhinney, *supra* note 65, at 21–25. *See also* Luke T. Lee, *The Mexico City Conference of the United Nations Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, 14 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 1296, 1304–6 (1965).

79. Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, Summary Record, U.N. Doc. A/AC.119/SR.25, at 5 (Oct. 23, 1964). *See also id.* at 10 (Pol.); Summary Record, U.N. Doc. A/AC.119/SR.28, at 14–15 (U.S.S.R.) (Oct. 23, 1964).

80. U.N. Doc. A/AC.119/SR.28, *supra* note 79, at 19 (Nigeria); Summary Record, U.N. Doc. A/AC.119/SR.29, at 6 (Ghana) (Oct. 23, 1964).

81. *See* U.N. Doc. A/AC.119/SR.28, *supra* note 79, at 7 (Arg.); Summary Record, U.N. Doc. A/AC.119/SR.32, at 4 (Guat.), 23 (Mex.) (Oct. 26, 1964). *See also* U.N. Doc. A/AC.119/SR.28, *supra* note 79, at 14–15 (U.S.S.R.); U.N. Doc. A/AC.119/SR.29, *supra* note 80, at 15 (India). *Cf.* Summary Record, U.N. Doc. A/AC.119/SR.31, at 9 (Can.) (Oct. 26, 1964); U.N. Doc. A/AC.119/SR.32, *supra*, at 15 (Venez.).

sonality of the State or against its political, economic, and cultural elements.”<sup>82</sup> Conversely, WEOG States downplayed the significance of non-intervention,<sup>83</sup> some even considering that it would be inappropriate at the present stage to formulate the content of such a principle.<sup>84</sup> Thus, the United Kingdom representative stated that “[t]he prohibition of the use or threat of force had absorbed much of the classic conception of intervention, which had always been regarded as connoting forcible or dictatorial interference,” whereas “[i]t was only when taken beyond its classic conception that the word ‘intervention’ began to raise real difficulties.”<sup>85</sup>

When the Special Committee reconvened in 1966, with Resolution 2131 (XX) having already been adopted, much of the discussion concerned the status of that resolution. The majority of States in the Special Committee considered Resolution 2131 (XX) controlling for its work, leaving the Special Committee unable to revisit the content of that resolution,<sup>86</sup> though some were open to the possibility of adding to it. WEOG States were opposed, and considered Resolution 2131 (XX)—a product of the First Committee—merely an expression of political will, and hence posited that the Special Committee should not consider itself bound by the resolution’s formulations.<sup>87</sup> Ultimately, by majority decision—the only WEOG State not voting

82. OAS Charter, *supra* note 32, art. 15 (art. 19 following amendments).

83. Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, Summary Record, U.N. Doc. A/AC.119/SR.30, at 14–15 (Neth.) (Oct. 26, 1964).

84. U.N. Doc. A/AC.119/SR.28, *supra* note 79, at 10 (Fr.). *See also* U.N. Doc. A/AC.119/SR.30, *supra* note 83, at 15–16 (Leb.).

85. Summary Record, U.N. Doc. A/AC.119/SR.26, at 5–6 (Oct. 23, 1964). *See also* U.N. Doc. A/AC.119/SR.32, *supra* note 81, at 13 (Austl.). *Cf. id.* at 28 (U.S.).

86. 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, Summary Record, U.N. Doc. A/AC.125/SR.8, ¶ 30 (Utd. Arab Rep.) (July 25, 1966); *id.* U.N. Doc. A/AC.125/SR.10, ¶¶ 10 (Venez.), 18 (Kenya), 22 (Syria), 25 (Chile) (July 25, 1966); *id.* U.N. Doc. A/AC.125/SR.11, ¶¶ 4 (Mex.), 23 (Alg.) (July 25, 1966); *id.* U.N. Doc. A/AC.125/SR.14, ¶¶ 20 (Czechos.), 30 (Yug.), 44 (U.S.S.R.) (July 25, 1966); *id.* U.N. Doc. A/AC.125/SR.15, ¶¶ 12 (India), 33 (Nigeria) (Mar. 17, 1966); *id.* U.N. Doc. A/AC.125/SR.16, ¶¶ 3 (Cameroon), 19 (Rom.), 35 (Arg.), 38 (Guat.) (Jul. 25, 1966); 1967 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, Summary Record, U.N. Doc. A/AC.125/SR.72, at 13 (Ghana), 20 (Pol.) (Dec. 4, 1967). *Cf.* U.N. Doc. A/AC.125/SR.15, *supra*, ¶ 20 (Leb.).

87. U.N. Doc. A/AC.125/SR.8, *supra* note 86, ¶ 16 (Can.); U.N. Doc. A/AC.125/SR.11, *supra* note 86, ¶¶ 19 (Austl.), 36 (U.S.); 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States,

against was Sweden, which abstained—the Special Committee decided that it would not reconsider the formulation of the principle of non-intervention enshrined in Resolution 2131 (XX),<sup>88</sup> and the discussion on that subject mostly ended there.<sup>89</sup>

At least one State supportive of the formulation on non-intervention in Resolution 2131 (XX) did appear to note that it involved progressive development of international law.<sup>90</sup> Others were adamant that Resolution 2131 (XX)—at least in the years following its adoption—reflected international law, whether as customary international law or even as a general principle of law.<sup>91</sup>

For their part, WEOG States' representatives generally did not go further than recognizing that the use of force and “subversive activities directed toward the violent overthrow of the regime of another State” would amount to intervention,<sup>92</sup> and this is very much reflected in the draft text Australia, Canada, France, Italy, the United Kingdom, and the United States proposed

Summary Record, U.N. Doc. A/AC.125/SR.12, ¶ 4 (Fr.) (July 25, 1966); U.N. Doc. A/AC.125/SR.14, *supra* note 86, ¶ 19 (It.); U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶ 50 (U.K.); 1966 Special Committee, Summary Record, U.N. Doc. A/AC.125/SR.18, ¶ 5 (Jap.) (July 25, 1966); 1967 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, Summary Record, U.N. Doc. A/AC.125/SR.73, at 7 (Neth.) (Dec. 4, 1967). *See also* U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶ 29 (Swed.)

88. 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States, Summary Record, U.N. Doc. A/AC.125/SR.17, ¶ 39 (Jul. 26, 1966).

89. *See also* Piet-Hein Houben, *Principles of International Law Concerning Friendly Relations and Co-operation Among States*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 703, 716–18 (1967). *Cf.* Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AMERICAN JOURNAL OF INTERNATIONAL LAW 713, 729 (1971).

90. 1970 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, Summary Record, U.N. Doc. A/AC.125/SR.114, at 33 (Arg.) (May 1, 1970).

91. U.N. Doc. A/AC.125/SR.8, *supra* note 86, ¶ 30 (Utd. Arab Rep.); U.N. Doc. A/AC.125/SR.10, *supra* note 86, ¶¶ 7 (Yug.), 18 (Kenya); U.N. Doc. A/AC.125/SR.17, *supra* note 88, ¶ 5 (Chile); 1967 Special Committee, Summary Record, U.N. Doc. A/AC.125/SR.71, 7 (Czechos.) (Dec. 4, 1967); U.N. Doc. A/AC.125/SR.72, *supra* note 86, at 9 (Mex.), 13 (Ghana); U.N. Doc. A/AC.125/SR.73, *supra* note 87, at 6 (Venez.). *See also* U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶ 37 (Guat.).

92. U.N. Doc. A/AC.125/SR.10, *supra* note 86, ¶ 15 (U.K.); U.N. Doc. A/AC.125/SR.14, *supra* note 86, ¶ 19 (It.); U.N. Doc. A/AC.125/SR.15, *supra* note 86, ¶ 26 (Can.); U.N. Doc. A/AC.125/SR.73, *supra* note 87, at 8 (Neth.).

for elaborating the principle of non-intervention. While their draft proclaimed that “[n]o State shall take action of such design and effect as to impair or destroy the political independence or territorial integrity of another State,”<sup>93</sup> this was immediately followed by a paragraph which stated:

Accordingly, no State shall instigate, foment, organize or otherwise encourage subversive activities directed toward the *violent overthrow of the regime of another State*, whether by invasion, armed attack, infiltration of personnel, terrorism, clandestine supply of arms, the fomenting of civil strife, or other forcible means. In particular, States shall not employ *such means* to impose or attempt to impose upon another State a specific form of government or mode of social organization.<sup>94</sup>

Otherwise, WEOG States emphasised “the generally recognized freedom of States to seek to influence the policies and actions of other States,”<sup>95</sup> unless elsewhere prohibited, underscoring that merely pressuring other States is not prohibited intervention.<sup>96</sup> The exception to these WEOG States is Sweden, which considered that “giving financial support to a political party in another State” constitutes intervention.<sup>97</sup> Though WEOG States entertained the possibility of broadening the scope of their proposed elaboration of the principle of non-intervention—seemingly as a compromise offer to the other States grounded in their insistence of following Resolution 2131 (XX)<sup>98</sup>—they stopped short of recognizing such a broadening as *lex lata*.<sup>99</sup>

Now, one may point out that WEOG States did not go as far as positively reaffirming a freedom to influence the political systems of other States,

93. Report of the 1966 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, U.N. Doc. A/6230, ¶ 279 (June 27, 1966).

94. *Id.* (emphases added).

95. *Id.*

96. 1966 Special Committee, Summary Record, U.N. Doc. A/AC.125/SR.13, ¶ 3 (Austl.) (Jul. 25, 1966); U.N. Doc. A/AC.125/SR.12, *supra* note 87, ¶ 5 (Fr.); U.N. Doc. A/AC.125/SR.15, *supra* note 86, ¶ 29 (Can.); U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶¶ 14 (It.), 56 (U.S.).

97. U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶ 31. Sweden appears to have been relatively receptive to a broader conception of intervention also in the years following the adoption of Resolution 2625 (XXV). See U.N. GAOR, 29th Sess., Sixth Comm., 1472th mtg., Summary Record, U.N. Doc. A/C.6/SR.1472, ¶ 7 (Oct. 9, 1974).

98. *Cf.* Rosenstock, *supra* note 89, at 727–28.

99. *Cf.* U.N. Doc. A/AC.125/SR.72, *supra* note 86, at 6 (U.S.); U.N. Doc. A/AC.125/SR.73, *supra* note 87, at 22 (U.K.). See also U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶ 43 (It.).

as opposed to merely their “policies and actions.”<sup>100</sup> However, it seems problematic to infer from this omission recognition on the part of WEOG States that such influencing is unlawful. Indeed, it appears to have been diplomatically prohibitive for these States to go as far as to (openly) contend that States have the freedom to influence other States’ political systems. On a number of occasions in the Special Committee, non-WEOG States had accused WEOG States of engaging in such activities;<sup>101</sup> thus, to reaffirm a freedom to act in such a matter would be, for WEOG States, to proverbially poke non-WEOG States in the eye—if not revealing their hand—while simultaneously seeking to reach a consensus over formulae they were positing. Hence, it seems unwarranted to attribute to WEOG States a position broader than that they positively recognized.

Additionally, one may ask why WEOG States were willing to join in the consensus adopting the Friendly Relations Declaration when its formulation of the prohibition on intervention significantly diverged from their preferred formulation. Yet, the formulation of the prohibition on intervention in Resolution 2625 (XXV) should be placed in the Resolution’s broader context. The principle of non-intervention is one of seven principles elaborated in the Declaration.<sup>102</sup> Were the WEOG States to refrain from joining the consensus, it would have undermined the project of adopting Resolution 2625 (XXV) as a whole, with the WEOG States’ stubbornness at serious risk of being blamed for such failure.<sup>103</sup> Additionally, while the formulation of the prohibition on intervention went against the positions of WEOG States, the formulation of other principles did not appear to significantly diverge from their positions.<sup>104</sup> Refusing to join in the consensus would have meant abandoning acceptable formulations achieved elsewhere in the document.

As a side note, it does not appear that WEOG States came around to embrace the formulation of the prohibition on intervention in Resolution

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100. Report of the 1966 Special Committee, *supra* note 93, ¶ 279.

101. *See, e.g.*, U.N. Doc. A/AC.119/SR.31, *supra* note 81, at 4–5 (Burma); U.N. Doc. A/AC.125/SR.71, *supra* note 91, at 5 (Czechos.), 10–11 (U.S.S.R.). *See also* 1968 Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States, Summary Record, U.N. Doc. A/AC.125/SR.91, at 104 (Cameroon) (Sept. 23, 1968).

102. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

103. Nicholas Greenwood Onuf, *The Principle of Nonintervention, the United Nations, and the International System*, 25 INTERNATIONAL ORGANIZATION 209, 221–22 (1971).

104. *See, e.g.*, Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 1, 89 (1978). *See generally* Rosenstock, *supra* note 89.

2625 (XXV) in the years following the Resolution's adoption. Rather, at times, when discussion of non-intervention occurred, they appear to have simply ignored its detailed formulation in the Friendly Relations Declaration, instead recalling the purported elusive or narrow definition of the concept of intervention.<sup>105</sup> Otherwise, WEOG States adopted what could be considered a revisionist interpretation of the provision on non-intervention. Thus, in 1987, the United States opined that, “[w]here the Declaration spoke of ‘coercion’, [it] understood that term to mean ‘unlawful force’ within the meaning of the Charter.”<sup>106</sup>

Returning to the Special Committee discussions, it is important to note that the use of the term “coerce” in defining the prohibition on intervention was not itself a serious issue in the discussion in the Special Committee. Actually, both non-WEOG and WEOG States appear to have understood the use of this term as not prejudicing their respective understandings of the prohibition on intervention.<sup>107</sup> The question of the scope of the prohibition does not appear to have centered on a definition of sorts for the term “coerce.” Moreover, for those taking the text of Resolution 2625 (XXV) at face value,<sup>108</sup> there seems to be little which compels the conclusion that “coercion” is a necessary element of the prohibition on intervention.<sup>109</sup>

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105. U.N. GAOR, 34th Sess., Sixth Comm., 61st mtg., Summary Record, U.N. Doc. A/C.6/34/SR.61, ¶ 28 (Neth.) (Dec. 6, 1979); U.N. GAOR, 36th Sess., Sixth Comm., 10th mtg., Summary Record, U.N. Doc. A/C.6/36/SR.10, ¶ 16 (Neth.) (Oct. 2, 1981); U.N. GAOR, 40th Sess., Sixth Comm., 31st mtg., Summary Record, U.N. Doc. A/C.6/40/SR.31, ¶ 23 (Austl.) (Nov. 7, 1985). *See also* U.N. GAOR, 27th Sess., Sixth Comm., 1348th mtg., Summary Record, U.N. Doc. A/C.6/SR.1348, ¶ 21 (Port.) (Nov. 2, 1972); U.N. GAOR, 35th Sess., Sixth Comm., Summary Record, U.N. Doc. A/C.6/35/SR.11, ¶ 9 (Can.) (Oct. 6, 1980); *see infra* notes 186–187 and accompanying text.

106. U.N. GAOR, 42d Sess., Sixth Comm., 19th mtg., Summary Record, U.N. Doc. A/C.6/42/SR.19, ¶ 22 (Oct. 12, 1987). *See also* U.N. GAOR, 27th Sess., Sixth Comm., 1368th mtg., Summary Record, U.N. Doc. A/C.6/SR.1368, ¶ 35 (Austl.) (Nov. 21, 1972).

107. U.N. Doc. A/AC.119/SR.28, *supra* note 79, at 10 (Fr.); U.N. Doc. A/AC.125/SR.12, *supra* note 87, ¶ 5 (Fr.); U.N. Doc. A/AC.125/SR.16, *supra* note 86, ¶¶ 10 (Neth.), 51 (U.K.); U.N. Doc. A/AC.125/SR.71, *supra* note 91, at 6 (Czechos.). *See also* U.N. GAOR, 25th Sess., Sixth Comm., 1180th mtg., Summary Record, U.N. Doc. A/C.6/SR.1180, ¶ 14 (Ceylon) (Sept. 24, 1970). *See also* U.N. Doc. A/AC.125/SR.13, *supra* note 96, ¶ 4 (Austl.).

108. *See supra* notes 71–73 and accompanying text.

109. *Cf.* Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 89 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 9–10 (1989); ANTÔNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 71–72 (3d ed. 2020). *Contra* Tladi, *supra* note 13, at 92.

In summing up the discussions, it is clear that a majority of States did accept as law the formulation of the principle of non-intervention which featured in both Resolutions 2131 (XX) and 2625 (XXV). However, it is also apparent that a bloc of States had clear reservations on the subject and refrained from recognizing forms of prohibited intervention other than essentially two categories of acts. Giving regard to the demands of representativeness of the interests at stake in assessing whether State practice and *opinio juris* are sufficiently general for the crystallization of a customary rule, it is very difficult to view the formulation of the prohibition on intervention in Resolutions 2131 (XX) and 2625 (XXV) as reflecting customary international law—at least at the time of their adoption.<sup>110</sup> At the same time, there was consensus that the use of force against another State, as well as support for “subversive activities directed toward the violent overthrow of the regime of another State,”<sup>111</sup> would amount to an unlawful intervention when done in relation to that State’s domestic jurisdiction.

Before proceeding, this author concedes that the suggested conclusion that the formulation of the prohibition on intervention enshrined in Resolution 2625 (XXV) does not reflect customary international law—at least at the time of its adoption—will likely be surprising, considering that the Resolution as a whole is at times considered the “Forgotten Constitution” of international law.<sup>112</sup> Yet, one should also not lose sight of what Robert Rosenstock, who represented the United States in the Special Committee, observed in regards to the vote on the adoption of the terms of Resolution 2131 (XX); namely, “[t]he irony of adopting a resolution speaking of ‘the universal legal conviction’ by a divided vote.”<sup>113</sup> Whereas for the purposes of formally adopting a resolution the divided vote may constitute mere irony, the existence of customary international law, though not conditional on universality, is dependent on representativeness, the lack of which is reflected in the divided vote.

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110. Cf. Derek W. Bowett, *International Law and Economic Coercion*, 16 VIRGINIA JOURNAL OF INTERNATIONAL LAW 245, 246 (1976).

111. Cf. Report of the 1966 Special Committee, *supra* note 93, ¶ 279.

112. See Jorge Viñuales, *The Forgotten Constitution: The UN Friendly Relations Declaration at 50*, EJIL:TALK! (Apr. 23, 2021), <https://www.ejiltalk.org/the-forgotten-constitution-the-un-friendly-relations-declaration-at-50>.

113. Rosenstock, *supra* note 89, at 728.

### 3. Resolutions 31/91 (1976) and 36/103 (1981)

As noted, there were two other significant General Assembly resolutions on non-intervention: Resolutions 31/91 and 36/103. However, the legal significance of these resolutions can be disposed of quite briefly; hence they will be considered together. Resolution 31/91 (1976) includes a few vague and broad statements on the prohibition on intervention, *inter alia* “reaffirm[ing] the inalienable sovereign right of every state to State to determine freely, and without any form of foreign interference, its political, social and economic system and its relations with other states.”<sup>114</sup> Yet, it was adopted without much involvement of WEOG States,<sup>115</sup> many of which abstained in the vote on its adoption.<sup>116</sup>

Resolution 36/103 contains a very detailed list of activities relating to intervention, which it declares States must refrain from.<sup>117</sup> However, this resolution received no votes in favor from WEOG States, with most of these voting against the resolution.<sup>118</sup> Hence, Resolution 36/103, too, is of little value for discerning the scope of the customary prohibition on intervention.

### C. *The Helsinki Final Act (1975)*

The Helsinki Final Act of 1975 was perhaps, *politically*, the most significant of the instruments mentioned here, as it “was a key component of the process of détente aimed at decreasing tensions and strengthening relations among States with opposing ideologies.”<sup>119</sup> Adopted during the Cold War and addressing a number of issues that were the subject of contention

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114. G.A. Res. 31/91, ¶ 1 (Dec. 14, 1976).

115. U.N. GAOR, 31st Sess., First Comm., 58th mtg., at 11–12, U.N. Doc. A/C.1/31/PV.58 (Dec. 10, 1976).

116. U.N. GAOR, 31st Sess., 98th plen. mtg., U.N. Doc. A/31/PV.98, ¶ 23 (Dec. 14, 1976).

117. G.A. Res. 36/103 (Dec. 9, 1981).

118. *See* U.N. GAOR, 36th Sess., 91st plen. mtg., U.N. Doc. A/36/PV.91, ¶ 271 (Dec. 9, 1981).

119. Michael Wood & Daniel Purisch, *Helsinki Final Act (1975)*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 22 (last updated July 2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1051?prd=EPIL>.

therein, it was signed by all European States—save Albania—as well as Canada and the United States.<sup>120</sup> Moreover, for the Soviet bloc, the most significant aspect of the Helsinki Final Act was that it included statements on non-intervention as well as on inviolability of frontiers.<sup>121</sup> It is thus of great interest that these statements on non-intervention were taken, with certain nuances, from Resolution 2625 (XXV).<sup>122</sup>

A number of scholars have referred to the formulation of non-intervention in the Helsinki Final Act in order to determine the content of this principle.<sup>123</sup> There is also some support in the *Nicaragua* judgment for this approach, where the Court observed in regards to the principle of non-intervention that “it can be inferred that the text [of the Helsinki Final Act] testifies to the existence, and the acceptance by the United States, of a customary principle which has universal application.”<sup>124</sup>

The Helsinki Final Act is not, in and of itself, a binding instrument.<sup>125</sup> This, however, does not remove the possibility that it reflects the *opinio juris* of the States which joined the Act. Yet, the instrument was primarily considered to be one of political commitment, drafted by diplomats rather than lawyers,<sup>126</sup> and involved much compromise among competing Soviet-West

120. *Helsinki Accords*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/Helsinki-Accords> (last visited Mar. 4, 2022). See also ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 32 (3d ed. 2013).

121. For the West bloc, the most significant aspect was the Act’s statements on human rights. See SARAH B. SNYDER, HUMAN RIGHTS ACTIVISM AND THE END OF THE COLD WAR: A TRANSNATIONAL HISTORY OF THE HELSINKI NETWORK 30–31 (2011).

122. Helsinki Final Act, *supra* note 40, at 1294–95. See Victor-Yves Ghébal, *L’Acte final de la Conférence sur la sécurité et la coopération en Europe et les Nations Unies*, 21 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 73, 95 (1975).

123. See, e.g., M.C.W. Pinto (ed.), *Asian-African Legal Consultative Committee Annual Survey of Activities 1996-1997*, 7 ASIAN YEARBOOK OF INTERNATIONAL LAW 345, 357–58 (1997); Natalino Ronzitti, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in COERCIVE DIPLOMACY, SANCTIONS AND INTERNATIONAL LAW 1, 6 (Natalino Ronzitti ed., 2016); Chimène Keitner, *Foreign Election Interference and International Law*, in DEFENDING DEMOCRACIES: COMBATING FOREIGN ELECTION INTERFERENCE IN A DIGITAL AGE 179, 186–187 (Jens David Ohlin & Duncan B. Hollis eds., 2020).

124. *Nicaragua*, *supra* note 8, ¶ 204.

125. See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AMERICAN JOURNAL OF INTERNATIONAL LAW 296 (1977).

126. Harold S. Russell, *The Helsinki Declaration: Brobdingnag or Lilliput?*, 70 AMERICAN JOURNAL OF INTERNATIONAL LAW 242, 248–49 (1976).

views.<sup>127</sup> Thus, “arguing that the Final Act would be a legally binding agreement on the basis of another source of international law [other than treaty law] would be futile. The intention of the parties, as expressed at the end of the Conference in Helsinki in 1975, clearly points to the fact that the Final Act has to be considered as a political, not as a legal document.”<sup>128</sup> Moreover, it has been observed that willingness to adopt ambitious statements in the Final Act was actually a result of its non-binding status;<sup>129</sup> it would hence be all the more surprising that States accepted the Final Act’s formulations as customary international law. Furthermore, the size of the Helsinki Final Act further undermines any proposition that States necessarily accepted as law each proposition provided therein.<sup>130</sup>

Thus, it may indeed be less controversial to consider, as the Court did in *Nicaragua*, recognition of the principles themselves in the Final Act an expression of *opinio juris* by the participating States—and perhaps the source of a potential catalyst for subsequent evolution of international law.<sup>131</sup> However, to consider the precise elaboration of these principles as embodying the *opinio juris* of each and every State involved would be quite far-fetched.<sup>132</sup>

In summary, it does not appear that the Helsinki Final Act leads to conclusions regarding the scope of the prohibition on intervention which diverge from those which arose from the discussions leading up to the adoption of Resolution 2625 (XXV).

To substantiate a prohibition on intervention that is (far) broader than that which derives from the analysis in this Part, scholars have in particular referred to the *Nicaragua* case.<sup>133</sup> Accordingly, the question arises: did the *Nicaragua* judgment reach a conclusion different from that which would appear to arise from State practice? It is to this issue the article now turns.

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127. José A. Cabranes, *Reflections on the Belgrade Meeting (1977–78) of the Conference on Security and Cooperation in Europe*, 4 YALE STUDIES IN WORLD PUBLIC ORDER 274, 276–77 (1978).

128. Arie Bloed, *Two Decades of the CSCE Process: From Confrontation to Co-operation*, in 1 THE CONFERENCE ON SECURITY AND CO-OPERATION IN EUROPE: ANALYSIS AND BASIC DOCUMENTS, 1972–1993, at 1, 22 (Arie Bloed ed., 1993).

129. Erika B. Schlager, *A Hard Look at Compliance with Soft Law: The Case of the OSCE*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 346, 353 (Dinah Shelton ed., 2003).

130. See *Marsh. Is. v. India*, *supra* note 44 and accompanying text.

131. Laurence Boisson de Chazournes, *Qu’est-ce que la pratique en droit international?*, in LA PRATIQUE ET LE DROIT INTERNATIONAL 13, 27–28 (2004).

132. See also J. E. S. Fawcett, *The Helsinki Act and International Law*, 13 REVUE BELGE DE DROIT INTERNATIONAL 5, 7 (1977).

133. See, e.g., Buchan, *supra* note 14, at 223; MOYNIHAN, *supra* note 14, at 27.

## III. THE NICARAGUA CASE

Beyond being “without doubt one of the most significant cases to have come before the International Court,”<sup>134</sup> *Nicaragua* is the only ICJ case to have considered the prohibition of non-intervention in detail—both on theoretical and practical levels.<sup>135</sup> It is for this reason that it has become *the* authoritative source on the prohibition on intervention in international law.<sup>136</sup>

In any attempt to understand the judgment’s findings on the prohibition on intervention, it is important to contemplate the two separate parts in the judgment which discuss non-intervention.<sup>137</sup> The first part discusses the existence of the prohibition on a general level, while laying out its main elements. The second part involves the application of the prohibition on intervention to the facts of the case. After providing an overview of these two parts of the judgment, an attempt will be made to discern the *Nicaragua* precedent.

A. *The Abstract Elaboration of Non-Intervention*

It is appropriate to quote at length the Court’s dicta on the content of the prohibition on intervention:

[T]he Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external

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134. ROSENNE’S THE WORLD COURT: WHAT IT IS AND HOW IT WORKS 93 (Terry D Gill ed., 6th ed. 2003).

135. Fernando Lusa Bordin, *The Nicaragua v. United States Case: An Overview of the Epochal Judgments*, in NICARAGUA BEFORE THE INTERNATIONAL COURT OF JUSTICE 59, 77 (Edgardo Sobenes Obregon & Benjamin Samson eds., 2018). *Cf.* Corfu Channel (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 34–35 (Apr. 9); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 164 (Dec. 19). *See also* Asylum (Colom./Peru), Judgment, 1950 I.C.J. 266, 285 (Nov. 20).

136. *See, e.g.*, Théodore Christakis & Karine Bannelier, *Volenti non fit injuria? Les effets du consentement à l’intervention militaire*, 50 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 102, 113–14 (2004); Marcelo Kohen, *The Court’s Contribution to Determining the Content of Fundamental Principles of International Law*, in ENHANCING THE RULE OF LAW THROUGH THE INTERNATIONAL COURT OF JUSTICE 139, 146 (Giorgio Gaja & Jenny Grote Stoutenburg eds., 2014).

137. *Cf.* Bordin, *supra* note 135, at 71.

affairs of other States. 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, 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 direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State. As noted above . . . , General Assembly resolution 2625 (XXV) equates assistance of this kind with the use of force by the assisting State when the acts committed in another State “involve a threat or use of force.” These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention. In view of the nature of Nicaragua’s complaints against the United States, and those expressed by the United States in regard to Nicaragua’s conduct towards El Salvador, it is primarily acts of intervention of this kind with which the Court is concerned in the present case.<sup>138</sup>

The caveat introduced at the beginning of the passage, emphasizing that “the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute,” raises the question whether the prohibition on intervention under customary international law is broader than that laid out by the Court. In this regard, Thomas Grant has opined that while the ICJ did not rule out in this passage the possibility that other forms of prohibited intervention exist in international law, it “did not however venture to say what more that might be. Nor did the Court say in terms that other means necessarily exist at all within the definition.”<sup>139</sup>

It is suggested, however, that an alternative interpretation is possible. The *Nicaragua* case is unique not only for the breadth of its substantive findings but also in that the Court’s jurisdiction on many of the key issues—

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138. *Nicaragua*, *supra* note 8, ¶ 205.

139. Thomas D. Grant, *The Yanukovich Letter: Intervention and Authority to Invite in International Law*, 2 *INDONESIAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* 281, 291 (2015).

including non-intervention—only extended to the identification and application of customary international law.<sup>140</sup> Thus, due to the jurisdictional limitations, the Court was barred from determining whether the United States violated certain instruments—particularly the Organization of American States Charter—vis-à-vis Nicaragua.<sup>141</sup> The quoted passage comes immediately after the Court referenced regional instruments to which the United States is party to, which enshrine prohibitions on intervention.<sup>142</sup> Accordingly, elaborating on the interpretation of the principle of intervention enshrined in those instruments would not be “relevant” to the resolution of the dispute over which the Court had jurisdiction. Conversely, were the Court only concerned with certain aspects of the customary prohibition on intervention, it would appear odd that, immediately following the cryptic sentence, the Court referred “[i]n this respect” to the “generally accepted formulations” of the prohibition. Moreover, as will be seen, Nicaragua’s claims of violations of the prohibition of intervention actually related to quite distinct U.S. acts—military assistance to the *contras*, humanitarian assistance to the *contras*, and economic sanctions against Nicaragua—that would necessitate quite a broad grasp of the contours of the customary prohibition on intervention.

Moving from one perplexity to another, the quoted passage lays out two elements that together form prohibited intervention: coercion in regards to *domaine réservé*. However, beyond this very broad expression of the prohibition, as regards the element of interest here, very little is elaborated regarding what amounts to coercion, other than the “particularly obvious” instance where there is resort to force.

### B. *The Application of the Prohibition to the Facts*

There were essentially three categories of activities which the Court examined through the lenses of non-intervention. The first was the direct military support of the United States to the *contras*. The Court began by making two observations: first, by supporting the *contras*, the United States sought “to coerce the Government of Nicaragua in respect of matters in which each

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140. See also James R. Crawford, *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*, MAX PLANCK ENCYCLOPEDIAS OF PUBLIC INTERNATIONAL LAW ¶¶ 13–17 (last updated Jan. 2019), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e170>.

141. See *Nicaragua*, *supra* note 8, ¶ 56.

142. *Id.* ¶ 204.

State is permitted, by the principle of State sovereignty, to decide freely”;<sup>143</sup> second, “the intention of the *contras* themselves was to overthrow the present Government of Nicaragua.”<sup>144</sup> On this basis, the Court declared:

[I]n international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching.<sup>145</sup>

The Court thus concluded “that the support given by the United States, up to the end of September 1984, to the military and paramilitary activities of the *contras* in Nicaragua, by financial support, training, supply of weapons, intelligence and logistic support, constitutes a clear breach of the principle of non-intervention.”<sup>146</sup>

The second category of activities the Court considered in its application of the prohibition of non-intervention to the facts of the case was “humanitarian assistance” the United States provided to the *contras*.<sup>147</sup> While the Court considered that humanitarian assistance provided in an indiscriminate manner would not amount to intervention, this is not the case when it is provided “merely to the *contras* and their dependents.”<sup>148</sup>

The third category was economic measures the United States adopted vis-à-vis Nicaragua. These included: the cessation in 1981 of providing economic aid, allegedly worth thirty-six million U.S. dollars per year;<sup>149</sup> the blocking of loans being granted by international and regional financial institutions, resulting in a loss of two hundred to four hundred million dollars’ worth of loan assistance;<sup>150</sup> reducing in 1983 the quota of sugar imports from Nicaragua—a key Nicaraguan export industry—by ninety percent, causing

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143. *Id.* ¶ 241.

144. *Id.*

145. *Id.*

146. *Id.* ¶ 242

147. *See id.* ¶ 97.

148. *Id.* ¶ 243.

149. Oral Arguments on the Merits, 5 I.C.J. PLEADINGS 97 (Sept. 17, 1985), Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (evidence of Mr. Huper).

150. *Cf.* Memorial of Nicaragua (Merits), 4 I.C.J. PLEADINGS 9, *id.*; Oral Arguments on the Merits, 5 I.C.J. PLEADINGS 97, *id.*

an alleged impact of fifteen to eighteen million dollars;<sup>151</sup> and, finally, by Executive Order in 1985 implementing a comprehensive trade embargo in regards to Nicaragua.<sup>152</sup> The last of these measures barred “all imports into the United States of goods and services of Nicaraguan origin; [and] all exports from the United States of goods to or destined for Nicaragua, except those destined for the organized democratic resistance, and transactions relating thereto.”<sup>153</sup> It also barred “Nicaraguan air carriers from engaging in air transportation to or from points in the United States, and transactions relating thereto,”<sup>154</sup> as well as “vessels of Nicaraguan registry from entering into United States ports, and transactions relating thereto.”<sup>155</sup> It has been observed that the U.S. economic measures against Nicaragua were actually more effective for the United States in achieving its policy goals in Nicaragua than its support for the *contras*, with the measures devastating the Nicaraguan economy and purportedly being a key cause in the Sandinista’s “stunning” loss in Nicaragua’s 1990 elections.<sup>156</sup>

What was the Court’s approach on the conformity of the economic measures with the prohibition on non-intervention? Though later in its judgment finding certain economic measures as breaches in relation to the Nicaragua-U.S. Treaty of Friendship, Commerce and Navigation,<sup>157</sup> the Court stated in very brief terms that “it 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.”<sup>158</sup>

### C. The Precedent

Particularly in the context of analyses relating to cyber operations, authors have focused on the quoted passage above in Section A to discern what

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151. Oral Arguments on the Merits, 5 I.C.J. PLEADINGS 95, 97, *id.*

152. *Id.* at 220. See also *Nicaragua*, *supra* note 8, ¶¶ 123–25, *id.*; Memorial of Nicaragua (Merits), 4 I.C.J. PLEADINGS 122, *id.*

153. Exec. Order No. 12513, 3 C.F.R. 342 (1985).

154. *Id.*

155. *Id.*

156. William M. Leogrande, *Making the Economy Scream: US Economic Sanctions against Sandinista Nicaragua*, 17 *THIRD WORLD QUARTERLY* 329, 343 (1996). See also Barry H. Barlow, *The Nicaraguan-Contra Negotiations of 1988: A Test of the Reagan Doctrine*, 18 *CANADIAN JOURNAL OF LATIN AMERICAN & CARIBBEAN STUDIES* 67, 82 (1993).

157. *Nicaragua*, *supra* note 8, ¶¶ 276, 279.

158. *Id.* ¶ 245.

amounts to coercion,<sup>159</sup> leading to quite broad articulations of the prohibition on intervention.<sup>160</sup> Yet, this only tells part of the story. It is rather more revealing to analyze what the Court actually considered to amount to a violation of the prohibition on intervention.<sup>161</sup>

To begin, it is clear from the Court's last finding, on the application of the law to the economic measures adopted by the United States against Nicaragua, that coercion as an element of prohibited intervention—or at least, together with domestic jurisdiction, as a necessary element thereof—is not, as has been contended, merely “pressure applied by one state to deprive the target state of its free will in relation to the exercise of its sovereign rights.”<sup>162</sup> Indeed, this contradicts the ICJ's finding that the U.S. economic measures against Nicaragua did not amount to prohibited intervention; and despite the prohibition on economic pressure constituting a major aspect of the formulation of non-intervention in Resolution 2625 (XXV) for supportive States.<sup>163</sup> Many of the U.S. economic measures were clearly adopted in regard to matters of Nicaragua's *domaine réservé*. Thus, upon reducing Nicaragua's sugar quota, the United States stated that it sought, inter alia, to prevent funds going towards Nicaragua's militarization,<sup>164</sup> whereas the Court stated in its judgment that such militarization is not prohibited by international

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159. See *supra* note 138 and accompanying text.

160. Buchan, *supra* note 14, at 221–25; Barrie Sander, *Democracy under the Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 CHINESE JOURNAL OF INTERNATIONAL LAW 1, 20–21 (2019); Hendrick Townley & Asaf Lubin, *The International Law of Rabble Rousing*, 45 YALE JOURNAL OF INTERNATIONAL LAW ONLINE 1, 13–14 (2020); Marko Milanovic & Michael N. Schmitt, *Cyber Attacks and Cyber (Mis)information Operations During a Pandemic*, 11 JOURNAL OF NATIONAL SECURITY LAW & POLICY 247, 256 (2020). Cf. TALLINN MANUAL 2.0, *supra* note 13, at 322, 324 n.783.

161. See also Stefan Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 CHINESE JOURNAL OF INTERNATIONAL LAW 219, 247 (2013); Hannah Woolaver, *Pro-Democratic Intervention in Africa and the Arab Spring*, 22 AFRICAN JOURNAL OF INTERNATIONAL & COMPARATIVE LAW 161, 164–66 (2014).

162. MOYNIHAN, *supra* note 14, at 317.

163. Cf. U.N. Doc. A/AC.119/SR.28, *supra* note 79, at 14–15 (U.S.S.R.); U.N. Doc. A/AC.125/SR.71, *supra* note 91, at 6 (Czechos.); U.N. Doc. A/AC.125/SR.72, *supra* note 86, at 18–19 (Kenya); U.N. Doc. A/AC.125/SR.73, *supra* note 87, at 4 (Rom.); U.N. Doc. A/C.6/SR.1180, *supra* note 107, ¶ 14 (Ceylon).

164. Press Release, White House, Announcement of Revised United States Sugar Import Quotas for Nicaragua, Honduras, Costa Rica, and El Salvador, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (May 10, 1983), <https://www.reaganlibrary.gov/archives/speech/announcement-revised-united-states-sugar-import-quotas-nicaragua-honduras-costa>.

law.<sup>165</sup> Moreover, the 1985 measures were enacted due to the U.S. Congress' decision not to authorize aid to the *contras* and were intended to substitute the pressure deriving from the U.S. assistance to the *contras*.<sup>166</sup> In this regard, upon informing Congress of these measures, President Reagan tied them to "Nicaragua's continuing efforts to subvert its neighbors, its rapid and destabilizing military build-up, its close military and security ties to Cuba and the Soviet Union and its imposition of Communist totalitarian internal rule."<sup>167</sup> Yet, the Court had emphatically stated that "there is no rule of customary international law to prevent a State from choosing and conducting a foreign policy in co-ordination with that of another State,"<sup>168</sup> and that "[e]very State possesses a fundamental right to choose and implement its own political, economic and social systems."<sup>169</sup>

It appears to have been argued that economic measures do not constitute intervention because—as the Court made clear<sup>170</sup>—it is a freedom of every State to decide upon its economic relations.<sup>171</sup> However, it seems that this argument is misplaced. An international prohibition is generally needed precisely because an actor is otherwise free to act in a certain manner.<sup>172</sup> Despite the arguments made in this article, even the prohibition on intervention covers certain acts which would seemingly otherwise not be prohibited under international law; namely, assistance—not amounting to use of force—to an armed group seeking the overthrow of a foreign regime.<sup>173</sup>

Some scholars consider that economic coercion can still be sufficient for a breach of non-intervention, stating or implying that the economic pressure exerted by the United States against Nicaragua was not at the necessary

165. *Nicaragua*, *supra* note 8, ¶ 269.

166. Bernard Weinraub, *Reagan, Declaring "Threat," Forbids Nicaraguan Trade and Cuts Air and Sea Links*, N.Y. TIMES, May 2, 1985, at A1.

167. Ronald Reagan, President of the United States, Message to the Congress on Economic Sanctions Against Nicaragua, RONALD REAGAN LIBRARY & MUSEUM (May 1, 1985), <https://www.reaganlibrary.gov/archives/speech/message-congress-economic-sanctions-against-nicaragua>.

168. *Nicaragua*, *supra* note 8, ¶ 256.

169. *Id.* ¶ 258.

170. *Id.* ¶ 276.

171. *Cf.* Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, 14 BALTIC YEARBOOK OF INTERNATIONAL LAW 137, 150 (2014).

172. S.S. Lotus (Fr./Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7); Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 56 (July 22).

173. *Nicaragua*, *supra* note 8, ¶ 228.

level.<sup>174</sup> It seems, however, that the correct view to be drawn from the *Nicaragua* judgment is that the Court simply did not see so-called economic coercion as “coercion” for the purposes of the prohibition on intervention.<sup>175</sup> As noted, the U.S. measures against Nicaragua were vast and devastating—seemingly a major cause of the actual regime change which occurred only a few years later;<sup>176</sup> if such economic measures did not amount to intervention, what measures would?<sup>177</sup>

Some have otherwise argued that the Court did not actually identify or apply customary international law correctly on the question of economic measures.<sup>178</sup> Yet, what is striking is the similarity between what the Court considered to be unlawful intervention, and the forms of activities on which the Special Committee was in general agreement as being encompassed in the principle of non-intervention. That is, the consensus in the Special Committee only encompassed recourse to the use of force, as well as support of groups seeking the violent overthrow of foreign governments, when conducted in relation to a State’s domestic jurisdiction, as prohibited intervention.<sup>179</sup> The only forms of intervention actually recognized in the *Nicaragua* case were those same forms WEOG States agreed to. Indeed, the Court’s conclusion that the United States violated the prohibition on intervention was based on the narrow ground that the United States sought to coerce *Nicaragua* in regards to its domestic jurisdiction *and* that this was done

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174. Philippe Cahier, *Changements et continuité du droit international*, 195 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 9, 41 (1985); Andrew Clapham, *National Action Challenged: Sovereignty, Immunity and Universal Jurisdiction before the International Court of Justice*, in JUSTICE FOR CRIMES AGAINST HUMANITY 301, 308 (Mark Latimer & Philippe Sands eds., 2003); Jamnejad & Wood, *supra* note 12, at 369–72; Tladi, *supra* note 13, at 100–1.

175. Pierre Michel Eisemann, *L’arrêt de la C.I.J. dans l’affaire des activités militaires et paramilitaires au Nicaragua et contre celui-ci*, 32 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 153, 184 (1986); Omer Y. Elagab, *Coercive Economic Measures against Developing Countries*, 41 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 682, 693 (1992); Eyal Benvenisti & George W. Downs, *Distributive Politics and International Institutions: The Case of Drugs*, 36 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 21, 31 (2004).

176. Leogrande, *supra* note 156, at 343.

177. *Cf.* Hofer, *supra* note 9, at 181–83.

178. Homayoun Mafi, *The Dilemma of US Economic Sanctions on Iran: An Iranian Perspective*, 19 IRANIAN JOURNAL OF INTERNATIONAL AFFAIRS 99, 116–17 (2007). *Cf.* Christopher Hare & Jarrod Wong, *A Passage Through India (and Beyond) or a Case of Love Thy Neighbour?*, 8 LEIDEN JOURNAL OF INTERNATIONAL LAW 311, 324 (1995).

179. *See infra* Section V(B)(2).

through the assistance to an armed group seeking to overthrow the Nicaraguan regime.<sup>180</sup> However, the Court's conclusions in *Nicaragua* cannot be taken as a positive affirmation that these are the sole forms of prohibited intervention, since at no point in the judgment did the Court rule out other forms of prohibited intervention.

Therefore, to answer the question with which Part II of this article ended, it does not appear the *Nicaragua* judgment reached a conclusion which contradicts the proposition that for an act to constitute a violation of the prohibition on intervention it must amount to a use of force or constitute assistance to the violent overthrow of a foreign regime.

#### IV. STATE PRACTICE SINCE *NICARAGUA* UNTIL PRESENT DAY

From the *Nicaragua* decision until recent years, there does not appear to have been much detailed discussion among States on the prohibition on intervention. One exception, however, relates to the work of the ILC on a draft code of crimes against the peace and security of mankind—a forerunner to the Rome Statute of the International Criminal Court<sup>181</sup>—where a draft provision criminalizing at least certain forms of intervention was initially proposed.<sup>182</sup>

The initial inclusion of this provision in the draft code spurred discussion on the subject in the UN General Assembly Sixth Committee, though substantial parts of this discussion—and the reason no provision on intervention was ultimately included in the draft<sup>183</sup>—related to the defining of inter-

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180. *Nicaragua*, *supra* note 8, ¶ 241.

181. See CASSESE'S INTERNATIONAL CRIMINAL LAW 261–62 (Antonio Cassese & Paola Gaeta eds., 3d ed. 2013).

182. Doudou Thiam, Special Rapporteur, Sixth Report on the Draft Code of Crimes against the Peace and Security of Mankind, [1988] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, at pt. 1, 197, 199–200.

183. Doudou Thiam, Special Rapporteur, Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, [1995] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, at pt. 1, 33, 35. See also Draft Code of Crimes against the Peace and Security of Mankind, [1995] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, at pt. 2, 15, 22–23.

vention as a *criminal* act, including whether its lack of clarity rendered it inappropriate for such an instrument.<sup>184</sup> In any event, for States which addressed the substance of the prohibition, similar position-taking took place this time round as had occurred over twenty years earlier in the Special Committee. Certain non-WEOG States emphasised that intervention could take various forms, such as economic and political coercion.<sup>185</sup> Conversely, of the WEOG States which addressed substantive aspects of the prohibition, they appear to have maintained their ambiguity on the matter,<sup>186</sup> while some emphasized that influencing other States is a normal aspect of international relations.<sup>187</sup>

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184. U.N. GAOR, 43d Sess., Sixth Comm., 33d mtg., U.N. Doc. A/C.6/43/SR.33, ¶¶ 18 (Can.), 24 (It.) (Nov. 8, 1988); U.N. GAOR, 43d Sess., Sixth Comm., 34th mtg., U.N. Doc. A/C.6/43/SR.34, ¶¶ 37 (China), 70 (Ger. Dem. Rep.) (Nov. 9, 1988); U.N. GAOR, 44th Sess., Sixth Comm., 28th mtg., U.N. Doc. A/C.6/44/SR.28, ¶¶ 25 (Austria), 42 (Fed. Rep. Ger.), 82 (Switz.) (Oct. 31, 1989); U.N. GAOR, 44th Sess., Sixth Comm., 29th mtg., U.N. Doc. A/C.6/44/SR.29, ¶ 48 (Neth.) (Nov. 1, 1989); Draft Code of Crimes against the Peace and Security of Mankind: Comments and Observations Received from Governments, [1993] 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, at pt. 2, 59, 101 (U.K.), 103 (U.S.); U.N. GAOR, 50th Sess., Sixth Comm., 13th mtg., U.N. Doc. A/C.6/50/SR.13, ¶¶ 19 (Cyprus), 31 (Fr.), 39 (Braz.) (Oct. 23, 1995); U.N. GAOR, 50th Sess., Sixth Comm., 19th mtg., U.N. Doc. A/C.6/50/SR.19, ¶¶ 29 (Cameroon), 31 (Iraq) (Oct. 20, 1995); U.N. GAOR, 50th Sess., Sixth Comm., 21st mtg., U.N. Doc. A/C.6/50/SR.21, ¶ 30 (Egypt) (Oct. 25, 1995); U.N. GAOR, 50th Sess., Sixth Comm., 22d mtg., U.N. Doc. A/C.6/50/SR.22, ¶¶ 2 (Bahr.), 10 (Jam.) (Oct. 26, 1995). *See also* U.N. GAOR, 45th Sess., Sixth Comm., 36th mtg., U.N. Doc. A/C.6/45/SR.36, ¶ 16 (Isr.) (Nov. 9, 1990); U.N. Doc. A/C.6/50/SR.13, *supra*, ¶ 79 (Guat.).

185. U.N. GAOR, 43d Sess., Sixth Comm., 32d mtg., U.N. Doc. A/C.6/43/SR.32, ¶ 69 (Pol.) (Nov. 8, 1988); U.N. Doc. A/C.6/43/SR.33, *supra* note 184, ¶ 36 (Kenya); U.N. GAOR, 43d Sess., Sixth Comm., 36th mtg., U.N. Doc. A/C.6/43/SR.36, ¶ 78 (Tunis.) (Nov. 10, 1988); U.N. GAOR, 43d Sess., Sixth Comm., 39th mtg., U.N. Doc. A/C.6/43/SR.39, ¶ 112 (Bah.) (Nov. 11, 1988); U.N. Doc. A/C.6/44/SR.28, *supra* note 184, ¶ 2 (Czechos.); A/C.6/44/SR.29, *supra* note 184, ¶¶ 9 (Trin. & Tobago), 43 (Bulg.), 94 (Rom.); Comments and Observations Received from Governments, *supra* note 184, at 70 (Belr.), 82 (Ecuador), 92 (Para.); U.N. GAOR, 50th Sess., Sixth Comm., 16th mtg., U.N. Doc. A/C.6/50/SR.16, ¶ 27 (Iran) (Oct. 17, 1995). *See also* U.N. Doc. A/C.6/43/SR.34, *supra* note 184, ¶ 49 (Venez.); U.N. Doc. A/C.6/44/SR.28, *supra* note 184, ¶ 32 (China); U.N. GAOR, 44th Sess., Sixth Comm., 30th mtg., U.N. Doc. A/C.6/44/SR.30, ¶ 19 (Viet.) (Nov. 1, 1989). *But see* U.N. Doc. A/C.6/43/SR.32, *supra*, ¶¶ 24–25 (Eth.).

186. U.N. Doc. A/C.6/43/SR.33, *supra* note 184, ¶ 24 (It.); Comments and Observations Received from Governments, *supra* note 184, at 64 (Austl.). *Cf. id.* at 71 (Belg.).

187. U.N. Doc. A/C.6/43/SR.33, *supra* note 184, ¶ 18 (Can.); U.N. Doc. A/C.6/44/SR.29, *supra* note 184, ¶ 48 (Neth.).

Nevertheless, in light of the ever-growing threat and occurrences of malicious cyber operations over the past decade and following the burst of academic literature on the prohibition on intervention applied to such operations, there has in recent years been a flurry of government statements, primarily on the part of WEOG States, on this issue. Have these positions validated the opinions laid out in academic literature? To answer this question, and to more generally consider whether the customary prohibition on intervention has developed in most recent years, the stated positions of these States will be thematically laid out, followed by an analysis.

#### A. Pronounced Positions of States

##### 1. “Coercion”

A common theme to most of the State pronouncements is that they appear to adopt, even if paraphrased in different ways, the statement in the *Nicaragua* case that intervention involves coercion in relation to a State’s *domaine réservé*.<sup>188</sup> However, only some of these States have gone as far as to spell out what is meant by “coercion.”

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188. Brian J. Egan, U.S. State Department Legal Advisor, Remarks on International Law and Stability in Cyberspace, Address at Berkeley Law School (Nov. 10, 2016), in U.S. DEP’T STATE ONLINE ARCHIVES, <https://2009-2017.state.gov/s/1/releases/remarks/264303.htm>; Netherlands Minister of Foreign Affairs, Letter of 5 July 2019 to the Parliament on the International Legal Order in Cyberspace, Appendix: International Law in Cyberspace 3, GOVERNMENT OF THE NETHERLANDS, <https://www.government.nl/documents/parliamentary-documents/2019/09/26/letter-to-the-parliament-on-the-international-legal-order-in-cyberspace> (last visited Feb. 18, 2022) [hereinafter Netherlands Position]; Ministry of Foreign Affairs of Finland, International Law and Cyberspace: Finland’s National Positions 3, MINISTRY OF FOREIGN AFFAIRS FINLAND, [https://um.fi/documents/35732/0/KyberkannatPDF\\_EN.pdf/12b4bbde-623b-9f86-b254-07d5af3c6d85?t=1603097522727](https://um.fi/documents/35732/0/KyberkannatPDF_EN.pdf/12b4bbde-623b-9f86-b254-07d5af3c6d85?t=1603097522727) (last visited Mar. 4, 2022) (published by Finland on Oct. 15, 2020) [hereinafter Finland Position]; New Zealand Foreign Affairs and Trade, The Application of International Law to State Activity in Cyberspace, at ¶ 9, DEPARTMENT OF THE PRIME MINISTER & CABINET (Dec. 1, 2020), <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf> [hereinafter N.Z. Position]; Roy Schöndorf, *Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations*, 97 INTERNATIONAL LAW STUDIES 395, 403 (2021) [hereinafter Israel Position]; Commonwealth of Australia, Department of Foreign Affairs and Trade, Australia’s International Cyber and Critical Tech Engagement Strategy 98 (2021), <https://www.internationalcybertech.gov.au/sites/default/files/2021-04/210>

The Netherlands, Switzerland, Estonia, Norway, and Romania considered coercion to connote compelling a State to act in an involuntary manner.<sup>189</sup> However, the Netherlands underlined that “[t]he precise definition of coercion . . . has not yet fully crystallised in international law,”<sup>190</sup> whereas Romania considered that this is an assessment to be made “on a case-by-case basis.”<sup>191</sup> Additionally, Australia—and similarly New Zealand—stated that “[c]oercive means are those that effectively deprive the State of the ability to control, decide upon or govern matters of an inherently sovereign nature.”<sup>192</sup>

Germany went into the greatest detail to date regarding the element of “coercion.” While adding caveats regarding activities such as “pointed commentary and sharp criticism,” it stated that “[c]oercion implies that a State’s

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45%20DFAT%20Cyber%20Affairs%20Strategy%20Internals\_Acc\_update\_1\_0.pdf [hereinafter Australia Position]; Federal Government of Germany, On the Application of International Law in Cyberspace, Position Paper, at 4–5, (Mar. 2021), <https://www.auswaertigesamt.de/blob/2446304/32e7b2498e10b74fb17204c54665bdf0/on-the-application-of-international-law-in-cyberspace-data.pdf> [hereinafter Germany Position]; Switzerland Federal Department of Foreign Affairs, Switzerland’s Position Paper on the Application of International Law in Cyberspace 3, [https://www.eda.admin.ch/dam/eda/en/documents/ausenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021\\_EN.pdf](https://www.eda.admin.ch/dam/eda/en/documents/ausenpolitik/voelkerrecht/20210527-Schweiz-Annex-UN-GGE-Cybersecurity-2019-2021_EN.pdf) (last visited Mar. 4, 2022) [hereinafter Switzerland Position]; U.K. Foreign, Commonwealth & Development Office, Application of International Law to States’ Conduct in Cyberspace: United Kingdom Statement, at ¶ 8 (June 3, 2021), <https://www.gov.uk/government/publications/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement/application-of-international-law-to-states-conduct-in-cyberspace-uk-statement> [hereinafter U.K. Position (2021)]; Ministry of Foreign Affairs of Japan, Basic Position of the Government of Japan on International Law Applicable to Cyber Operations 2, MINISTRY FOREIGN AFFAIRS OF JAPAN (May 28, 2021), <https://www.mofa.go.jp/files/100200935.pdf>; Official Compendium of Voluntary National Contributions on the Subject of How International Law Applies to the Use of Information and Communications Technologies, U.N. Doc. A/76/136, at 19 (Braz.), 25 (Est.), 68 (Nor.), 77 (Rom.), 82 (Sing.) (July 13, 2021); Government of Italy, Italian Position Paper on “International Law and Cyberspace,” (2021), [https://www.esteri.it/mae/resource/doc/2021/11/italian\\_position\\_paper\\_on\\_international\\_law\\_and\\_cyberspace.pdf](https://www.esteri.it/mae/resource/doc/2021/11/italian_position_paper_on_international_law_and_cyberspace.pdf). Cf. DROIT INTERNATIONAL APPLIQUE AUX OPERATIONS DANS LE CYBERESPACE 7 (2009).

189. Netherlands Position, *supra* note 188, at 3; Switzerland Position, *supra* note 188, at 3; U.N. Doc. A/76/136, *supra* note 188, at 25 (Est.), 69 (Nor.), 77 (Rom.).

190. Netherlands Position, *supra* note 188, at 3.

191. A/76/136, *supra* note 188, at 77.

192. Australia Position, *supra* note 188, at 98; N.Z. Position, *supra* note 188, ¶ 9.

internal processes regarding aspects pertaining to its *domaine réservé* are significantly influenced or thwarted and that its will is manifestly bent by the foreign State's conduct."<sup>193</sup>

## 2. Examples of Intervention

Most of the States which have pronounced on the prohibition on intervention have also mentioned examples of acts which in their opinion would amount to prohibited intervention. One example, which was first mentioned by the United States, and has since been pronounced in an identical or similar manner by the United Kingdom, Finland, New Zealand, Israel, Australia, Germany, and Norway, is that “a cyber operation by a State that interferes with another country’s ability to hold an election or that manipulates another country’s election results would be a clear violation of the rule of non-intervention.”<sup>194</sup>

Other examples brought by States diverge somewhat more, with each receiving support from four States at most. Moreover, in these areas, States have generally used language indicating that reference would need to be made to the circumstances in which the cyber operation was conducted in order to reach a conclusion that the prohibition on intervention was breached. These include: use of force;<sup>195</sup> supporting armed activities by non-State actors against another State;<sup>196</sup> “undermin[ing] the stability of another State’s financial system”;<sup>197</sup> certain forms of financial pressure;<sup>198</sup> certain dis-

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193. Germany Position, *supra* note 188, at 5 (emphasis omitted).

194. Egan, *supra* note 188. See Jeremy Wright, U.K. Attorney General, Cyber and International Law in the 21st Century, GOV.UK (May 23, 2018), <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century> [hereinafter U.K. Position (2018)]; U.K. Position (2021), *supra* note 188, ¶ 9; Finland Position, *supra* note 188, at 3; N.Z. Position, *supra* note 188, ¶ 10; Israel Position, *supra* note 188, at 403; Australia Position, *supra* note 188, at 98; Germany Position, *supra* note 188, at 5; U.N. Doc. A/76/136, *supra* note 188, at 69 (Nor.). Cf. *id.* at 77 (Rom.), 83 (Sing.).

195. Netherlands Position, *supra* note 188, at 3; Finland Position, *supra* note 188, at 3; Israel Position, *supra* note 188, at 403; Germany Position, *supra* note 188, at 5.

196. Finland Position, *supra* note 188, at 3; Israel Position, *supra* note 188, at 403.

197. U.K. Position (2021), *supra* note 188, ¶ 9.

198. Finland Position, *supra* note 188, at 3; Switzerland Position, *supra* note 188, at 3.

information campaigns relating to “public health efforts during a pandemic”;<sup>199</sup> “target[ing] the essential medical services of another State”;<sup>200</sup> undermining ability to protect the health of the population;<sup>201</sup> “intervention in the fundamental operation of Parliament”;<sup>202</sup> causing significant damage to, or loss of functionality of, critical infrastructure;<sup>203</sup> and various activities in relation to elections.<sup>204</sup>

### B. *Analysis of States’ Pronouncements and Implications*

Perhaps the most striking aspect of the pronouncements, at least when viewed from a historical perspective, is that they reflect a shift in the manner WEOG States have been prepared to address the prohibition on intervention.<sup>205</sup> While in the past generally refraining from recognizing forms of intervention not amounting to use of force or assistance to an armed group seeking the overthrow of a foreign regime,<sup>206</sup> WEOG States have now clearly gone beyond their restrained approach.

Nevertheless, it is important not to exaggerate the scale of the shift. Indeed, it is difficult to identify a far-ranging consensus among the positions pronounced by these States. Clearly, there is near unanimity in that intervention involves “coercion” in relation to a State’s *domaine réservé*. Yet, reminiscent of the ambiguities in the *Nicaragua* case, that simply shifts the focus from what constitutes “intervention” to what constitutes “coercion,” without adding much substance as to the scope of the prohibition.

Undoubtedly, one may be tempted to embark on an effort to interpret the term coercion, as found in State pronouncements. Yet, as argued above,<sup>207</sup> if the pronouncement of *opinio juris* is a (juridical) act of acceptance as law, emphasis should be placed on the intention of the States expressing

199. N.Z. Position, *supra* note 188, ¶ 10.

200. U.K. Position (2021), *supra* note 188, ¶ 9. *See also* Australia Position, *supra* note 188, at 98.

201. U.N. Doc. A/76/136, *supra* note 188, at 140 (U.S.).

202. U.K. Position (2018), *supra* note 194; Australia Position, *supra* note 188, at 98.

203. N.Z. Position, *supra* note 188, ¶ 10; U.N. Doc. A/76/136, *supra* note 188, at 69 (Nor.), 83 (Sing.).

204. Germany Position, *supra* note 188, at 5; U.N. Doc. A/76/136, *supra* note 188, at 69 (Nor.).

205. Note that Brazil, Estonia, Japan, Romania, and Singapore, the statements of which were referenced, are not WEOG States.

206. *See supra* Section II(B)(2).

207. *See, particularly, supra* notes 48–55 and accompanying text.

*opinio juris*. If a significant portion of WEOG States avoid defining “coercion,” their ambiguity cannot simply be overcome through interpreting their pronouncements—at least in the absence of further indications of what they mean. States maintain ambiguity for various reasons. In the cyber context, for example, since technologies and their related challenges are constantly evolving, it is understandable that a State may seek to avoid prejudicing its future positions, which could occur through the pronouncement of a detailed legal position.<sup>208</sup> Moreover, different government bodies often have different interests<sup>209</sup>—some defence ministries seek greater leeway in extra-territorial cyber operations, while some interior security bodies seek greater protection from external threats<sup>210</sup>—and thus are unable to agree on a position.<sup>211</sup> In such and other circumstances, it is convenient for a State to avoid taking a detailed position by using a vague term like “coercion”—particularly as it was used in a vague manner by no less than the ICJ in its *Nicaragua* judgment—in its expression of *opinio juris*. Yet, to consider that such a State intended a particular meaning to be given to the term would be inconsistent with the State’s intention in using the ambiguous term. Hence, in light of these very plausible explanations for ambiguity, it is difficult to contend that States, which have employed the term “coercion” without much further detail, have accepted positions on what amounts to a prohibited intervention beyond those instances they expressly recognized. In this light, given that States have not reached a consensus regarding the meaning of “coercion,” then the use of the term “coercion” is of little legal significance, and focus should rather be placed on actual forms of intervention recognized as prohibited.

Now, there is perhaps a nascent consensus growing among WEOG States regarding a prohibition on hampering a State’s ability to hold an election or manipulating election results. Moreover, it would appear that this particularized prohibition is contained within the more sweeping *opinio juris* of non-WEOG States relating to the prohibition on intervention, outlined above in Part II.

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208. Cf. Schmitt & Watts, *supra* note 55, at 211.

209. See, e.g., Jean-Pierre Cabestan, *China’s Foreign- and Security-policy Decision-making Processes under Hu Jintao*, 38 JOURNAL OF CURRENT CHINESE AFFAIRS 63, 88 (2009); Daniel A. Farber & Anne Joseph O’Connell, *Agencies as Adversaries*, 105 CALIFORNIA LAW REVIEW 1375, 1383 (2017).

210. See also Alexander Claver, *Governance of Cyber Warfare in the Netherlands: An Exploratory Investigation*, 20 INTERNATIONAL JOURNAL OF INTELLIGENCE, SECURITY, & PUBLIC AFFAIRS 155, 165 (2018).

211. See also Schmitt & Watts, *supra* note 55, at 211.

It is possible to question whether the passage of time since the 1960s permits the reliance on the *opinio juris* pronounced then for the identification of customary international law now; although the position of these States has in certain respects been confirmed in the context of the discussions in the Sixth Committee on the ILC's draft code of crimes against the peace and security of mankind.<sup>212</sup> Interestingly, the question whether a State's acceptance as law can lapse over time appears to have received very little—if any—attention in academic literature.<sup>213</sup> Yet, if the rare jurisprudence of the successive international courts analyzing specific manifestations of State practice and *opinio juris* provides any indication, it appears that acceptance as law dating back decades—even more than half a century—is relevant in the identification of customary international law,<sup>214</sup> unless the pronouncing State has expressly changed its position.<sup>215</sup> In this light, it would seem that there is representativeness of the different geographical regions and interests concerned in the *opinio juris* relating to a prohibition on hampering a State's ability to hold an election or manipulating election results.

## V. CONCLUSIONS

If the reader is persuaded by the arguments made in the present article, it follows that under customary international law the prohibition on intervention only applies to acts amounting to a use of force or constituting support for the violent overthrow of a foreign regime. At the same time, the practice on the subject of intervention is evolving and we may be witnessing the beginnings of a crystallization of a prohibition on hampering another State's ability to hold an election or the manipulation of election results. It is manifestly important to continue to monitor State practice, as WEOG States have been generally more receptive to a broader prohibition on intervention than that they have previously been willing to recognize.

What are the consequences of the arguments made in this article for the legality of cyber operations conducted to influence the policies of other

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212. *See supra* note 185.

213. This is different from the question regarding the effects of the passage of time—often accompanied by changes in trends of practice and acceptance as law—on a customary rule which had previously crystallized. *See, e.g.*, HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 95–96 (2d ed. 2019).

214. *S.S. Lotus*, *supra* note 172, at 26–30; *Jurisdictional Immunities of the State* (Ger. v. It.: Greece Intervening), Judgment, 2012 I.C.J. 99, ¶ 72 (Feb. 3).

215. *S.S. Lotus*, *supra* note 172, at 29–30.

States? It would appear that the vast majority of cyber operations, including those alluded to in the Introduction, *cannot* constitute a violation of the prohibition on intervention. The one exception would be those cyber operations which are expected to cause physical destruction and/or death, such as the Stuxnet incident, as these would likely amount to use of force.<sup>216</sup> Additionally, an act like the provision of zero days to an insurrection movement would also likely constitute prohibited intervention, as it would amount to assistance to an armed group seeking to overthrow a foreign regime. Finally, it appears that sooner or later a cyber operation that shuts down polling stations in a national election held in another State would constitute prohibited intervention, as such an operation would hamper that State's ability to hold elections.

Undoubtedly, the present article's conclusions are likely to be seen as too narrow by certain scholars. Indeed, a plethora of cyber operations employed to influence other States' policies would not be subject to the prohibition on intervention. Yet, being loyal to doctrinal analysis compels this article's conclusions.<sup>217</sup> Finally, one should not lose sight of the fact that there are other rules of potential applicability to cyber operations, some of which have been alluded to throughout this article.

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216. OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE* 137 (2d ed. 2014); Claus Kreß, *The State Conduct Element*, in 1 *THE CRIME OF AGGRESSION: A COMMENTARY* 412, 425 (Claus Kreß & Stefan Barriga eds., 2017); CHRISTIAN HENDERSON, *THE USE OF FORCE AND INTERNATIONAL LAW* 59 (2018); ROBERT KOLB, *INTERNATIONAL LAW ON THE MAINTENANCE OF PEACE: JUS CONTRA BELLUM* 336 (2018). *See also* Ricardo J. Alfaro, *Memorandum*, [1951] 2 *YEARBOOK OF THE INTERNATIONAL LAW COMMISSION* 33, 37–38; IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 362 (1963).

217. *Cf.* Alain Pellet, *Le droit international à la lumière de la pratique*, 414 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE* 9, 178–79 (2021).