DOI: https://doi.org/10.24833/0869-0049-2022-1-6-26

Research article
Received 18 December 2021
Approved 24 March 2022

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THE LEGAL STATUS OF THE PRINCIPLE OF NON-INTERVENTION

INTRODUCTION. *The United Nations framework reflects the need for a paradigm shift in order to assure that the unilateral use of sovereign powers will no longer be a threat for the humankind like until 1945. Thus, the new world order highly contributed to the crystallisation of certain principles and since then States have been taking advantage of the UN system to consolidate and develop the principle of non-intervention. This paper seeks to identify and critically explore the evolution of intervention in the United Nations bodies since 1945 and subject the findings to the criteria adopted by the ILC in its 2019 draft conclusions on peremptory norms of general international law (jus cogens) in order to determine if intervention has reached the status of jus cogens norm.*

MATERIALS AND METHODS. *This work begins with the identification of the elements comprising the principle of non-intervention from the Charter of the United Nations followed by the description of the criteria established by the ILC to recognise the existence of a peremptory norm of general international law. Subsequently, will be developed an examination of the present State practice, the rulings of the ICJ more relevant for the matter in hand and this will be followed by a comprehensive analysis to the resolutions adopted by the UNSC and the UNGA which are decisive to determine in the end that the prohibition of non-intervention is a peremptory norm of international general law. This study is developed within the framework of international law and is based on open sources, as well as legal doctrine and normative elements.*

RESEARCH RESULTS. *The result of the research brings the notion that the beginning of a new era after the end of World War II came as a result of the global awareness of the dangers of unilateralism and absolute sovereignty for humankind. The principle of non-intervention is accepted as part of customary international law and the activities taken in the framework of the UN over the last almost eight decades show how States wanted to shape the scope of this principle.*

DISCUSSION AND CONCLUSIONS. *Considering all the efforts invested by States in the attempts to reach a notion of non-intervention supported by the majority of the humankind, such principle is not only recognised as having a customary nature, but it also entails concrete rights and duties for States. In the end, the singular importance given to the principle of non-intervention leads to the conclusion that from it derives a prohibition of intervention corresponding to a jus cogens norm.*

KEYWORDS: *intervention, interference, principle of non-intervention, jus cogens, customary international law, United Nations, sovereign equality*

FOR CITATION: Guerreiro A. The Legal Status of the Principle of Non-Intervention. – *Moscow Journal of International Law.* 2022. No. 1. P. 6–26. DOI: https://doi.org/10.24833/0869-0049-2022-1-6-26

The author declares the absence of conflict of interest.

ВОПРОСЫ ТЕОРИИ МЕЖДУНАРОДНОГО ПРАВА

DOI: https://doi.org/10.24833/0869-0049-2022-1-6-26

Исследовательская статья
Поступила в редакцию: 18.12.2021
Принята к публикации: 24.03.2022

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ПРАВОВОЙ СТАТУС ПРИНЦИПА НЕВМЕШАТЕЛЬСТВА

ВВЕДЕНИЕ. *Создание Организации Объединенных Наций зафиксировало смену парадигмы, гарантируя, что одностороннее использование силы суверенными государствами не будет более представлять угрозу для человечества, как это было до 1945 г. Таким образом, новый мировой порядок в значительной степени способствовал выработке определенных принципов; с тех пор государства используют преимущества системы ООН для соблюдения принципа невмешательства. В настоящей статье предпринята попытка определить и критически исследовать эволюцию принципа невмешательства и проанализировать результаты на основе критериев Проектов выводов Комиссии международного права ООН 2019 г. об императивных нормах общего международного права (jus cogens), чтобы определить приобрело ли невмешательство статус нормы jus cogens.*

МАТЕРИАЛЫ И МЕТОДЫ. *Исследование начинается с определения элементов, составляющих принцип невмешательства в Уставе Организации Объединенных Наций, после чего следует описание критериев, установленных Комиссией международного права ООН для признания существования императивной нормы общего международного права. Далее проводится анализ существующей практики государств, постановлений Международного Суда, актуальных для рассматриваемого вопроса, а также комплексный анализ резолюций СБ ООН и ГА ООН, которые имеют решающее значение для классификации принципа невмешательства как императивной нормы общего международного права. Данное исследование основано на открытых источниках, международно- правовой доктрине и нормативных элементах.*

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. *Результаты исследования указывают на начало новой эры после окончания Второй мировой войны в результате глобального осознания человечеством угроз, связанных с унилатерализмом и абсолютным суверенитетом. Принцип невмешательства принят как часть обычного международного права. Деятельность в рамках ООН в последние почти восемь десятилетий, показывает, как государства формировали сферу действия этого принципа.*

ОБСУЖДЕНИЕ И ВЫВОДЫ. *Учитывая все усилия, приложенные государствами в попытках закрепить принцип невмешательства, при поддержке большинством человечества, такой принцип не только признается имеющим обычно-правовой характер, но и влечет за собой конкретные права и обязанности для государств. В конце концов, исключительное значение, придаваемое принципу невмешательства, приводит нас к выводу, что из него вытекает запрещение вмешательства, соответствующее норме jus cogens.*

КЛЮЧЕВЫЕ СЛОВА: *вмешательство, принцип невмешательства, jus cogens, обычное международное право, Организация Объединенных Наций, суверенное равенство*

ДЛЯ ЦИТИРОВАНИЯ: Геррейро А. 2022. Правовой статус принципа невмешательства. – *Московский журнал международного права.* №1. С. 6–26. DOI: https://doi.org/10.24833/0869-0049-2022-1-6-26

Автор заявляет об отсутствии конфликта интересов.

1. Introduction: Intervention in the Charter of the United Nations

Unilateral intervention corresponds to an act intentionally perpetrated by a State against another State with the aim to force the latter to act in a way that without coercion it would act differently might put in jeopardy the existence of the free will of peoples. It is of major importance to determine the legal nature of *intervention* given that legal scholars still refer to it as being prohibited [Babic 2003:50], part of a negative principle [Trindade 2020:172], a right [Ohlin 2015:214], a positive duty [Tesón, Vossen 2017:263] or a negative duty [Ruys, Ferro 2021:362].

Examining the 2019 *Draft Conclusions on peremptory norms of general international law* (jus cogens)[1] it begins by stressing that a *jus cogens* norm reflects and protects "fundamental values of the international community" and "are hierarchically superior to other rules of international law and are universally applicable" (Conclusion 3). In order to be recognised as a *jus cogens* norm, the norm in question must be "a norm of general international law and be accepted and recognised by the international community of States as a whole" (Conclusion 4) hence needing to be demonstrated that the norm is widely accepted and stems from State practice (Conclusion 8).

Although the Charter of the United Nations does not correspond to the "Constitution of the international community" [Fassbender 2009:1] but rather to the constitutive act of a *sui generis* international organisation [Guerreiro 2021:37] one must recognise that the principles enshrined in the Charter reflect the principles recognised by the "Peoples of the United Nations" as a condition for achieving the end of international peace and security.

The first of these principles is set out in article 2(1) and recognises the principle of sovereign equality, one of the four principles that reflect the Kantian thought[2]. It follows from the *Rapporteur's Report of the United Nations Conference on International Organization* that the understanding given to the notion of sovereign equality is based in four elements: that states are juridically equal; that each State enjoys the right inherent in full sovereignty; that the personality of the State is respected, as well as its territorial integrity and political independence; and that the State should, under international order, comply faithfully with its international duties and obligations[3].

A second principle enshrined in the United Nations Charter that unveils the presence and the meaning of non-intervention as a principle of international law can be found in article 2(3), more particularly the *principle of peaceful settlement of international disputes.* In light of the text approved, Member States discourage the use of force by recognising the duty of all States to refrain from resorting to methods that could pose a threat to peace and security.

Here, we do not follow authors who understand the expression "shall" as "not capable of binding States to refrain from intervention as it is not a compulsory provision"[4]. Firstly, not only the understanding present in the approval of the final text of the Charter indicates that such principle is binding, but also the weakening of the binding force of such principle would turn it into an ideal (abstract and inspirational) rather than a principle (objective and mandatory)[5]. Lastly, because "shall" expresses a command, while "should" demonstrates a wish, in a context where the former has the consequence of creating a legal obligation for Member States [Öberg 2005:880-881].

If, in addition, the *prohibition of use of force,* consecrated in article 2(4), and the inherent right to self-defence, envisaged in article 51 of the UN Charter, are regarded as important as the aforementioned provisions, then the principle of non-intervention emerges as a general rule applied to all possible forms of manifestation [The Charter...2013:209].

Furthermore, it should also be pointed out that there is no consensus about article 2(7) of the UN Charter as a fourth rule evidencing non-intervention as a customary principle of international law. Among

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[1] International Law Commission: Report of the International Law Commission, Seventy-first session (29 April-7 June and 8 July-9 August 2019). New York: United Nations. 2019. P. 141-208.

[2] Besides the principles of sovereign equality, non-intervention and peaceful settlement of international disputes pointed out by L. Peters, we also add the principle of fulfilment in good faith the obligations arising from treaties. See [Peters 2015:47-58].

[3] United Nations Conference on International Organization. – *Documents of the United Nations Conference on International Organization: San Francisco, 1945*. Vol. VI. London; New York: United Nations Information Organizations. 1945. P. 457.

[4] Kunig P. Intervention, Prohibition of. – *Max Planck Encyclopedia of Public International Law.* 2008. URL: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434?rskey=F5tAGg&result=2&prd=MPIL (accessed 10.12.2021).

[5] Ibid. P. 458-459.

scholars, there are some arguing in favour of the idea that the principle of non-intervention derives from article 2(7) [Brownlie 1990:553; Scott, Andrade 2019:203] and those who contend that this rule is *lex specialis* applicable exclusively to UN bodies [The Charter...2013:284; Tladi 2020:87].

In our view, both approaches are not incompatible but rather complementary. Primarily, because the ICJ already noted that "it was never intended that the Charter should embody a written confirmation of every essential principle of international law in force"[6]. Therefore, it is safe to say that the principle of non-intervention is an implied principle which may derive from a plurality of rules set out in the Charter, meaning that the more rules reflecting the presence of the principle of non-intervention, the more could be evidenced its existence and legal status.

Finally, because by expressly recognising that the UN can only intervene in matters that are not essentially within the domestic jurisdiction of States and mentioning the Organisation, such rule tacitly excludes the possibility of unilateral intervention by States. For this reason, Member States recognise that what is not tolerated to the Organisation cannot be tolerated to any Member on its own, prevailing the Latin saying *a minori ad maius.*

2. The criteria set by the ILC to identify a jus cogens norm

2.1. Rulings of the ICJ

Although the present work intends to focus on the evidence emerged from the State practice in both the UNGA and the UNSC, subsidiary sources can provide important elements to complement the primary evidence (Conclusion 9). Thus, having in mind that the decisions of the ICJ are binding (in contentious cases) and also contribute to the clarification of international law, it should be admitted that States avoid recourse to the ICJ due to the possibility of an unfavourable outcome.

This means that three notorious cases stand out as examples of contentious cases on which the Court has ruled on non-intervention: *case concerning Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda).*

In the first case, the ICJ rejected the United Kingdom's arguments, according to which there was a "new and special application of the theory of intervention", given that "the alleged right of intervention" is no more than "the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses"[7]. Therefore, because "respect for territorial sovereignty is an essential foundation of international relations" and "the nature of things" would reserve it "for the most powerful States", such theory cannot "find a place in international law"[8].

In the second case, the ICJ reaffirmed the obligation to comply with the territorial integrity of every State and acknowledged non-intervention as a principle that is part of customary international law and also as a corollary of the principle of sovereign equality of States. Non-intervention consists, according to the ICJ, on the prohibition to interfere "on matters in which each State is permitted [...] to decide freely", namely in "the choice of a political, economic, social and cultural system, and the formulation of foreign policy"[9]. In the end, the ICJ asserted that a Government is legitimised to invite another State to intervene but a State cannot provide support to the opposition of a State with the aim to overthrow the Government [Papastravidis 2017:219].

The last and more recent decision underlined that under international law a State is prohibited "from intervening, directly or indirectly, with or without armed force, in support of the internal opposition in another State"[10], hence reaffirming that the scope of the prohibition of non-intervention goes beyond

[6] International Court of Justice: Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America). Judgment of 27 June 1986 (hereinafter referred as "Nicaragua v USA"). Para. 202. URL: https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (accessed 10.12.2021).

[7] International Court of Justice: Case concerning Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania). Judgment of 9 April 1949. P. 34-35. URL: https://www.icj-cij.org/public/files/case-related/1/001-19490409-JUD-01-00-EN.pdf (accessed 10.12.2021).

[8] Ibidem.

[9] Nicaragua v USA. Para. 205.

[10] International Court of Justice: Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda). Judgment of 19 December 2005 (hereinafter reffered as "DR Congo v Uganda"). Para. 164. URL: https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-00-EN.pdf (accessed 10.12.2021).

the threat or use of force. This way, the absence of any formal protest by States on acts of interference from third States that collide with specific provisions set out in resolutions adopted by UNGA or UNSC on non-intervention cannot be automatically understood as a form of State practice tacitly recognising the lawfulness of such conduct like some scholars defend [Henderson 2019:393] as there is no legal basis for replacing traditional norms and principles by "some non-universal rules, which are not only uncodified but also created on a unilateral basis without consensus intrinsic to international law" [Vylegzhanin et al. 2021:43]. After all, it is not because something is not expressly prohibited in the law that it can be seen as permissible [Schmitt 1999:901][11].

2.2. State practice

2.2.1. National Constitutions

Before focusing on the activity of the UN bodies, it should be emphasized that legislative acts and others of a similar nature can be a form of evidence of acceptance and recognition that a norm of general international law is a peremptory norm. Consequently, it is of utmost importance to note that 81 out of the 193 UN Member States' Constitutions make direct[12] or indirect[13] reference to the principle of non-intervention and a significant number of the remaining 112 do not foresee any provision on the core principles on which the State should rely its foreign relations. This means that it cannot be stated that a majority of the UN Member States do not recognise the principle of non-intervention in their domestic legislation.

2.2.2. Treaty-based rules

In addition to the UN Charter, several other treaties celebrated by States at continental or regional level reflect the principle of non-intervention and express its unique value. Hence, the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe underscores non-intervention in internal affairs as one of the 10 principles guiding relations between participating States and declared as such by all signatory parties[14]. Even though the wording adopted in English, German, Russian and Latin languages suggests that the notion of intervention for the purposes of the Final Act is limited to the use of force[15], doubts still remain whether the intention of all 35 States envisaged not only hard power but also soft power.

Another important instrument is the Constitutive Act of the African Union, which enshrines the principle of "non-interference by any Member State in the internal affairs of another"[16] and clearly separates "interference" from "intervention" when the Union should address "grave circumstances" in a Member State[17] and also because the Constitutive Act sets out a principle of "prohibition of the use of force or threat to use force among Member States of the Union"[18]. Although with a different approach, the Charter of the Organization of American States (OAS) follows the same intention to cover "intervention" and "in-

[11] One must also remember "what the Charter prohibits to a single state does not become permissible to several states acting together" [Henkin 1999:826].

[12] Namely Afghanistan (article 8), Algeria (33), Angola (12(1)(f)), Bangladesh (25), Belarus (18), Bolivia (255), Brazil (4(IV)), Burundi (260), Cambodia (53), Cape Verde (10(1)), Chad (preamble), China (preamble), Comoros (11), Costa Rica (19), Cuba (16), Dominican Republic (3), Ecuador (416(3)), Eritrea (13), Eswatini (236(1)(b)), Ethiopia (86), Guinea Bissau (18), Guyana (37), Honduras (15), Iran (154), Iraq (8), Kazakhstan (8), Korean DPR (17), Lao PDR (12), Libya (15), Maldives (115(d)), Mexico (89(X)), Mozambique (17), Nicaragua (1 and 5), North Macedonia (Amendment 2), Oman (10), Portugal (7), Qatar (7), South Sudan (43(g)), Suriname (7(3)), Thailand (66), Timor-Leste (8(1)), Turkmenistan (9), Uzbekistan (17), Venezuela (preamble), Viet Nam (12) and Yemen (4).

[13] Whether through the indirect reference to non-intervention or by mentioning of the principles or rules of customary or general international law, Armenia (article 9), Austria (9), Azerbaijan (10), Benin (preamble), Bulgaria (24), Cameroon (preamble), Central African Republic (preamble), Colombia (9), DR Congo (preamble), Czechia (1(1)), Djibouti (preamble), Equatorial Guinea (14), Estonia (3), Ghana (73), Guatemala (149), India (51), Ireland (29), Latvia (preamble), Lebanon (preamble), Lithuania (135), Malawi (211(3)), Malta (56(2)), Moldova (preamble), Mongolia (10), Namibia (96), Nepal (51(m)), Nigeria (preamble), Papua New Guinea (3), Philippines (2(5)), Romania (10), Sao Tome and Principe (12), Serbia (16), Sierra Leone (10), Uganda (28) and Ukraine (18).

[14] Article 1(a)(VI).

[15] Aside from the expressions in English (*intervention*), German (*einmischung*) and Russian (*вмешательство*), there were no differences between the words chosen in four Latin languages' versions: *interventja* (Romanian), *intervention* (French), *intervención* (Spanish), *intervento* (Italian).

[16] Article 4(g).

[17] Article 4(h).

[18] Article 4(f).

terference" as part of a single prohibition and as a principle aimed at protecting the sovereign right of each State to choose its political, economic and social systems and also its cultural elements without external interference[19].

Other examples of regional organisations following the same steps as the African Union and the OAS include the Charter of the Association of Southeast Asian Nations (ASEAN) and the Charter of the Organisation of the Islamic Conference (OIC), both expressly enshrine non-interference in the internal affairs as a principle and address it separately from the use of force[20]. The Charter of the South Asian Association for Regional Cooperation goes in the same sense by making direct reference to the principles of non-interference in the internal affairs of other States and of non-use of force[21].

Not expressly enshrining non-intervention as a principle but still highlighting the importance of sovereignty, independence and protection against external interference, the Pact of the League of Arab States brings a different approach to non-intervention but still recognising its importance[22]. Although the European Union (EU) is a project of both economic and partially political integration, meaning that Member States must hand over sovereignty to a larger extent than any country participating on any other international organisation, the Treaty on European Union still foresees mechanisms that the organisation shall respect in order to interfere in the internal affairs of any Member State when the EU is not directly authorised to do so either by the Treaty on the European Union or by the Treaty on the Functioning of the European Union[23].

In addition to these continental and regional treaties, there are several others dedicated to specific subjects (diplomacy, weapons, humanitarian law or criminal law) which provide rules protecting the right of each State to its the exclusive exercise of jurisdiction within its soil and also to take sovereign decisions without external interference [Jamnejad, Wood 2009:366-367]. Having in mind all the cases mentioned, there are few doubts as regards non-intervention as a principle which prohibits the use of both hard and soft power means to force States to make decisions, to act or to not act in a way such State does not intend to.

2.2.3. United Nations Security Council

The issue of intervention in the internal affairs of States soon stirred up much interest within the UN bodies, having been debated in the Security Council since the beginning of its activities on matters as the "Indonesian Question"[24], the debate of the Ukrainian complaint against Greece[25] and during the discussion of the "Czechoslovakian Question"[26]. Several years after this start, the UNSC took a more objective stance on the issue of non-intervention as a principle inferred from the abovementioned principles laid down in the Charter, which should not be confused with the principle of non-intervention by UN bodies.

One case that reflects the sensitivity of the principle of non-intervention in the activity of the UNSC was given during the voting of the Draft Resolution S/5187 (1962) proposed by the USSR. According to its preamble, the Draft Resolution's ambition was to lead to the recognition of "the right of every state to strengthen its defences" and to the inadmissibility of "interference by some States in the internal affairs of other sovereign and independent countries".

With this as a starting point, in spite of the difficulties in the UNSC concerning the adoption of draft resolutions, initiatives like Resolution 387 (1976) of 31 March 1976 were approved, hence underlining "the principle that 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". Before, the UNSC has adopted Resolution 330 (1973) of 21 March 1973 with 12 votes in favour and three abstentions, which called on States to take "appropriate measures to impede the activities of those enterprises which deliberately attempt to coerce Latin American countries" and requested States "to refrain from using or encouraging the use

[19] Articles 3(e) and 19.
[20] Article 2(2)(c), (e) and (f) of the ASEAN Charter and preamble and articles 1(3) and (4) and 2(4) and (5) of the OIC Charter.
[21] Preamble and article II(1).
[22] Articles 1, 2, 3, 5 and 6.
[23] Article 7.
[24] UN Security Council: 15th meeting. February 10, 1946. URL: https://digitallibrary.un.org/record/636636/files/S_PV-15-EN.pdf (accessed 10.12.2021).
[25] UN Security Council: 61st meeting. September 5, 1946. URL: https://digitallibrary.un.org/record/637470/files/S_PV-61-EN.pdf (accessed 10.12.2021).
[26] UN Security Council: 268th meeting. March 17, 1948. URL: https://digitallibrary.un.org/record/635394/files/S_PV-268-EN.pdf (accessed 10.12.2021).

of any type of coercive measures against States of the region".

A few months later, in connection with the Cuban intervention in Chile, several States voiced their commitment to the principle of non-intervention[27]. Afterwards, the UNSC adopted by consensus Resolution 405 (1977) of 14 April 1977 in which its Members condemned "all forms of external interference in the internal affairs of Member States" and, in 1979, draft resolution S/13027 was only hampered by the veto of the USSR, even though it provided that "the parties concerned should adhere strictly to the principle of non-interference in the internal affairs of States, so as to create an atmosphere conducive to the stability of the region".

In the 1980s, the USSR military presence in Afghanistan inspired several States to submit the draft resolution S/13729 (1980) for adoption. Despite the rejection of the initiative[28], a strong majority of the UNSC Member States affirmed their firm position during the meetings with regard to the principle of non-intervention as well as to the right of the Afghan people to self-determination[29]. Just two years later, the UNSC adopted by unanimity Resolution 514 (1982) of 12 July 1982 which reiterated the need to comply with the "principles of the Charter of the United Nations, including respect for sovereignty, independence, territorial integrity and non-interference in the internal affairs of States".

Almost simultaneously, the situation in Central America has led the UNSC to take a firm line against the attempts from a group of States to intervene in Nicaragua. Once again, the UNSC insisted on the need to enforce the principles of self-determination, non-intervention and territorial integrity, hence adopting Resolution 530 (1983) of 19 May 1983, which reaffirmed "the right of Nicaragua and of all the other countries in the area to live in peace and security, free from outside interference"[30].

In the same sense, Resolutions 562 (1985) of 10 May 1985 and 637 (1989) of 27 July 1989 reasserted the right of all the peoples to live free from all foreign intervention, subversion, direct or indirect coercion, limitation or threats, classifying it as an "inalienable right". During the debate, several members of the UNSC brought up the need to eliminate "any interference in internal affairs and any destabilizing action against the Governments of the region" and highlighted decisions taken within the Movement of Non-Aligned Countries like the principle of non-intervention as a basic element on which peace and cooperation should rest[31].

2.2.4. United Nations General Assembly

The history of the United Nations since 1945 demonstrates that the structure and functioning of the UNGA, where all members have the right to speak and each Member equals one vote, tends to reflect more faithfully the respect for the principles enshrined in the Charter, particularly concerning sovereign equality and non-intervention, avoiding that a small number of States may decide on behalf of all other members. Debates in the Security Council concerning activities carried out by States in other States have always been shrouded in controversy given the likelihood that a position could be taken by political motivations and not necessarily by legal reasons.

In this framework, the activities carried out by armed groups and the dangers they present to the identity and independence of a State have been a priority for the international community at least since the end of World War I [Brownlie 1958:713-714]. Therefore, it was no surprise that during the debate on formal aspects of the UN Charter, countries like Bolivia and the Philippines proposed the addition of a definition of aggression followed by an exact definition of the elements which constitute such acts among which were "the intervention of a state in the internal or external policy of another" and "to interfere with the internal affairs of another nation by establishing agencies in that nation to conduct propaganda subversive of the institutions of that nation"[32].

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[27] UN Security Council: 1741st meeting. September 17, 1973. URL: https://digitallibrary.un.org/record/579245/files/S_PV-1741-EN.pdf (accessed 10.12.2021).

[28] 13 votes in favour and 2 against, including the USSR veto.

[29] UN Security Council: 2185th meeting. January 5, 1980. URL: https://digitallibrary.un.org/record/117779/files/S_PV-2185-EN.pdf (accessed 10.12.2021).

[30] In the same way, UNGA Resolution 38/10 of 11 November 1983 reiterated "the right of all countries of the region to live in peace and to decide their own future, free from outside interference or intervention". This draft resolution was adopted by consensus.

[31] UN Security Council: 2580th meeting. May 10, 1985. URL: https://digitallibrary.un.org/record/144417/files/S_PV-2580-EN.pdf (accessed 10.12.2021).

[32] United Nations Conference on International Organization. – *Documents of the United Nations Conference on International Organization: San Francisco, 1945*. Vol. III. London/New York: United Nations Information Organizations. 1945. P. 538, 577.

Despite the rejection of these two proposals, one of the first decisions taken by the UNGA was the creation of the ILC in 1947. Thereupon and after being instructed through Resolution 178 (II) of 21 November 1947, ILC adopted the *Draft Declaration on Rights and Duties of States* in 1949. The final result is remarkable, bringing to light fourteen articles based on the principles consecrated by the "new international order under the Charter of the United Nations" and declared by "most of the other States of the world"[33].

Looking at the Draft Declaration, protection against intervention is considered to be a right of each State deriving from the rights to independence and to exercise freely its sovereign powers[34]. Non-intervention, in turn, is consecrated as duty of States[35] and a corollary of the right of each State to equality. Thus, it is a duty of States to "refrain from fomenting civil strife in the territory of another State" as well as "to ensure that conditions prevailing in its territory do not menace international peace and order"[36].

Although the lack of commentaries and proposals from Member States and jurists from all nations led the UNGA to postpone the voting on the Declaration[37], it should be highlighted the result achieved with the adoption of the Draft Declaration by the ILC. Indeed, just as the Draft articles on Responsibility of States for Internationally Wrongful Acts, which are accepted by international courts as expressing binding interpretations on responsibility of States [Crawford 2002:59], the *Draft Declaration on Rights and Duties of States* also reflects a common understanding from highly qualified publicists representing different regions and cultures.

In the end, it is undeniable that the Draft Declaration can have a stronger influence on State practice and more impact before international courts than if a group of States attempted to bring forward the same rules in the form of convention or multilateral treaty due to the possible "decodifying effect" [Crawford 2002:58]. Thus, we cannot agree with H. Kelsen catastrophic sentence issued against the project by questioning its legal relevance and validity [Kelsen 1950:259-261]. In fact, notwithstanding the risks incurred by the UNGA with the adjournment *sine die* of the vote, the 14 articles set out in the *Draft Declaration* conveys the crystallisation of non-intervention as a principle of customary international law from which rights and duties derive[38].

The year of 1949 was a turning point in the approach of States towards the affirmation of non-intervention as a means to bring peace and security for the humankind by successively expressing willingness to accept the Draft Declaration as part of a codification initiative and lending continuity to the process in the following years. At the same time the final text of the *Draft Declaration on Rights and Duties of States* was passed by the ILC, the UNGA adopted Resolution 290 (IV) of 1 December 1949, entitled *Essentials of Peace,* in which it called upon all States "to refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State, or at fomenting civil strife and subverting the will of the people of any State"[39].

Although G. Arangio-Ruiz suggested that "majorities and unanimities behind Assembly resolutions" are generally "not decisive" [Arangio-Ruiz 1979:49-50], the size of the vote must have some kind of binding effect if such resolution is adopted as a complementary element to State practice or to other legal instruments and it is expressed in such a way that leaves no doubts of its importance for the international community. Considering the context and the fact that Resolution 290 (IV) was adopted with 53 votes out of 59 (comprising 89,83% of the total Member States), the expressive number of those that voted in favour must be understood as a clear intention of the international community to regard such rules as having a customary nature.

In the following year, the UNGA passed Resolution 380 (V) of 17 November 1950 hence reiterating its opposition towards what the Member States classed as "aggression" conducted directly "whatever the weapons used" or "by fomenting civil strife" in order to change another State's "legally established government"[40]. Like in the previous year, the draft

[33] UN General Assembly International Law Commission. Draft Declaration on Rights and Duties of States. – *Yearbook of the International Law Commission – 1949.* New York: United Nations. 1956. Preamble.
[34] Articles 1 and 2.
[35] Articles 3 and 9.
[36] Articles 4 and 7.
[37] Resolution 596 (VI) of 7 December 1951.
[38] Such rights and duties were already disseminated and set out in the Charter of the Organisation of American States (1948) and in the Pact of the League of Arab States (1945).
[39] Para. 3.
[40] Para. 1.

that became Resolution 380 (V) was adopted by a large majority: 50 out of 56 Member States (89,29%) voted in favour of it.

Fifteen years on, the UNGA adopted by unanimity[41] Resolution 2131 (XX) of 21 December 1965, entitled *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty,* under which the Member States recognised that "full observance of the principle of non-intervention of States in the internal and external affairs of other States is essential to the fulfilment of the purposes and principles of the United Nations" and that "direct intervention, subversion and all forms of indirect intervention are contrary to these principles"[42]. It is also noted that there was a significant change in respect of the different forms of intervention.

On the one hand, Member States acknowledged "every State has an inalienable right to choose its political, economic, social and cultural systems, without the interference in any form by another State"[43]. On the other hand, Resolution 2131 (XX) is emphatic by providing that no State "shall organize, assist, foment finance, incite or tolerate subversive, terrorist or armed activities" or "interfere in civil strife in another State" and also may not "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"[44].

When Resolution 380 (V) was adopted, the *principle of non-intervention* had already been incorporated in the Charter of the Organisation of African Unity, in 1963, and explored in the 1965 *Declaration on the Problem of Subversion*[45]. The States that attended the 1955 Bandung Asian-African Conference and the 1961 and 1964 Conferences of Heads of State or Government of the Non-Aligned Countries had also already endorsed it[46].

In line with the pattern in previous resolutions, Resolution 2625 (XXV) of 24 October 1970, entitled *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* was adopted without a vote. Through this instrument the UNGA codified principles of general international law including the principle of sovereign equality and revisited the idea of the ILC's 1949 *Draft Declaration* in the sense that non-intervention corresponds to a duty of States.

Simultaneously, the context of Resolution 2625 (XXV) demonstrates that Member States reiterated the condemnation of both the incitement and the recourse to intervention making use of economic and political tools or any other means able to subvert the will of the sovereign bodies of a State, hence treating these forms of pressure in the same way "as resort to force or threat of force" [Arangio-Ruiz 1979:100]. Having this in mind as well as the fact that States' representatives at the Sixth Committee recognised that Resolution 2625 (XXV) was "as important as the Charter" and "the most serious attempt yet made to produce a set of international legal principles"[47], it has to be concluded that non-intervention is more than just part of customary international law and goes beyond the use of force.

In the following decade, the UNGA took the opportunity afforded by the adoption of Resolution 31/91 (1976) of 14 December 1976 by 89,19% of the Member States present at the meeting to insist on the advocacy for the "inalienable sovereign right of every State to determine freely, and without any form of foreign interference, its political, social and economic system". Here Member States also denounced "any form of interference, overt or covert, direct or indirect" and through "subtle and sophisticated forms of economic coercion, subversion" and even "defamation with a view to destabilisation"[48].

Both the spirit and the substance of Resolution 31/91 were recalled in instruments adopted in the following years such as Resolutions 32/153 (1977) of 19 December 1977, 33/74 (1978) of 15 December 1978, 34/101 (1979) of 14 December 1979 and 35/159 (1980) of 12 December 1980, while Resolu-

[41] By 109 votes in favour and one abstention.
[42] Preamble.
[43] Para. 5.
[44] Para. 2.
[45] Resolution 27 (II) of the Assembly of Heads of State and government of the Organisation of African Unity. URL: https://archives.au.int/bitstream/handle/123456789/768/AHG%20Res%2027%20(II)%20_E.pdf?sequence=1 (accessed 10.12.2021).
[46] A significant number of States started to gather in the 1950s seeking to develop a set of principles that corresponded to actions and behaviours that would ensure the independence of the States involved in these meetings. See: [Ježić 2005:60].
[47] UN General Assembly Sixth Committee: 1178th meeting. September 23, 1970. Paras. 1, 10. URL: https://digitallibrary.un.org/record/816681/files/A_C-6_SR-1178-EN.pdf (accessed 10.12.2021).
[48] Preamble and paras. 1, 3.

tion 34/103 (1979) of 14 December 1979 declared the inadmissibility of the policy of hegemonism through any form of "domination, subjugation, interference or intervention and all forms of pressure, whether political, ideological, economic, military or cultural"[49]. All these instruments were adopted with solid majorities[50].

Thereafter, the UNGA passed Resolutions 36/102 (1981) of 9 December 1981, which implemented the *Declaration on Strengthening of International Security,* and 36/103 (1981) of 9 December 1981, which adopted the *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States.* As it derives from the text of the former, by voting in favour, 127 out of 147 Member States (86,39%) not only considered that the principle of non-intervention shall be respected by States but also expressed willingness to "refrain from any threat or use of force, intervention, interference [...] or measures of political and economic coercion which violate the sovereignty, territorial independence and security of other States"[51].

The latter resolution, in its turn, is a clear demonstration that 120 out of 148 Member States (81,08%) insisted on the idea that "no State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States" and also recognised a set of rights and duties that emerge from the principle of non-intervention[52]. It is also important to note, on the one hand, that both resolutions not only recognise the principle of sovereign equality as a core element of a system of international relations and, on the other hand, that the principle of non-intervention comprehends not only the duty to refrain from *intervening* but also the duty to refrain from *interfering*. It seems clear from here that Member States intended to clear away possible doubts over the scope of non-intervention as also prohibiting acts of interference.

Finally, it should be highlighted that both resolutions enhance the right of States to sovereignty, to political independence and to the national identity of peoples, as well as the duty of States to refrain from the threat or use of force and from actions able to "disrupt the political, social or economic order of other States" or to "overthrow or change the political system of another State or its Government"[53].

No less important than such rights and duties are also the duties to refrain from (i) the promotion, encouragement or support of rebellious activities within other States to undermine or subvert the political order of other States; (ii) any defamatory campaign, vilification or hostile propaganda for the purpose of intervening or interfering in the internal affairs of other; (iii) the use of its external economic assistance programme or the adoption of any multilateral or unilateral economic reprisal; (iv) the exploitation and the distortion of human rights issues as a means of interference in the internal affairs of States; and (v) the dissemination of false or distorted news which can be interpreted as interference in the internal affairs of other States.

In the final stage of the Cold War, the UNGA first approved by consensus the *Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations* in the form of Resolution 42/22 (1987) of 18 November 1987, which is not contrary to the 1981 Declaration but rather complementary, dispelling doubts over an approach to non-intervention considered to be a "broad definition" [Kunig:20]. Later, the Member States asserted the *respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes* through Resolutions 44/147 (1989) of 15 December 1989, 45/151 (1990) of 18 December 1990 and 46/130 (1991) of 17 December 1991[54].

The ILC also suggested the inclusion of a crime of intervention (article 17) in the 1991 version of the *Draft Code of Crimes Against the Peace and Security of Mankind* as requested by a group of States[55]. Even though the main aim of this offence was to punish the "intervention in the internal or external affairs of a State" its scope was narrow and only addressed

[49] Para. 3.

[50] Resolution 32/153 (1977) was adopted by 89,86% of the Member States; Resolution 33/74 (1978) by 90,14%; Resolution 34/101 (1979) by 81,48%; Resolution 34/103 (1979) by 78,87%; and Resolution 35/159 (1980) by 82,76%.

[51] Paras. 14 and 3(a) respectively.

[52] Paras. 1 and 2 of the Annex.

[53] Para. II(a) of Resolution 36/103.

[54] Resolution 44/157 was adopted by 76,88% of the Member States, Resolution 45/151 by 73,51% and Resolution 46/251 by 65,81%.

[55] International Law Commission. Document A/40/10: Report of the International Law Commission on the work of its thirty-seventh session, 6 May – 26 July 1985). – *Yearbook of the International Law Commission – 1985*. Vol. II. Part II. New York: United Nations. 1986. Paras. 89-90.

the fomentation of armed "subversive or terrorist activities" as well as the organization, the assistance, the financing and the supply of arms for the purpose of such activities". After intense debate, the final 1996 version of the *Draft Code* no longer contained this provision[56].

3. Development of the principle of non-intervention after the Cold War

Between 1945 and 1991, the bodies of the UN were particularly active in asserting the prohibition of intervention. Primarily, due to the absence of a specific rule in the UN Charter, which could enable all Member States to set its scope accurately. Secondly, due to the need to regulate a vital principle in a period marked by the increasing number of independent States and thus the way how State sovereignty could be in jeopardy in case of lack of understanding over the scope of the principle of non-intervention.

With the boundaries of the principle of non-intervention well established by the above-mentioned UNGA declarations and resolutions, global manifestations on the prohibition of intervention were episodical and boiled down to very specific realities since 1992. The increasing importance of subjects like self-determination and the so-called third generation civil wars [Domestici-Met 1999:277-301] motivated the UNSC to take up a position on the interference in Bosnia-Herzegovina[57] as well as to take a firm stand against "all forms of intervention", never leaving aside specific forms of intervention *lato sensu*[58]. Having this in mind, the UNGA did not remain indifferent to the events in Bosnia-Herzegovina[59] nor did it stop to take a position on economic interference[60].

It should also be recalled the provisional adoption of a crime of intervention by the ILC in its 1991 version of the Draft Code of Crimes Against the Peace and Security of Mankind[61]. Even though such criminal offence was built in order to address "intervention in the internal or external affairs of a State" the conduct punished consisted of "fomenting [armed] subversive or terrorist activities or by organising, assisting or financing such activities, or supplying arms for the purpose of such activities, thereby [seriously] undermining the free exercise by that State of its sovereign rights"[62]. Despite the ambition of the ILC with this step, the 1996 version, which was the basis for the Rome Statute of the International Criminal Court, did not contemplate several crimes set out in the 1991 draft, including the crime of intervention, given the need to secure the broadest possible consensus regarding a list of international crimes, reason why the draft was restricted to the offences considered to be "extremely serious"[63].

In the context of information and communication technologies (ICT), the UNGA adopted Resolution 53/70 of 4 January 1999, which already alerted for the potential use of ICT for terrorist purposes and underlined the way "the dissemination and use of information technologies and means affect the interests of the entire international community". Later that year, the UNGA adopted Resolution 54/49 of 23 December 1999 with a similar text. This normative basis inspired Russia to propose the five Principles of international information security which aimed to outlaw "information weapons"[64] and was inspired by the perceived fear that the possibility of development

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[56] On the differences between the 1991 and 1996 versions of the *Draft Code* see: [Bassiouni 1993:247-267; Rayfuse 1997:43-86].

[57] See Resolutions 752 of 15 May 1992, 757 of 30 May 1922, 764 of 13 July 1992, 770 of 13 August 1992, 771 of 13 August 1992, 786 of 10 November 1992 and 787 of 16 November 1992.

[58] Resolutions 804 of 29 January 1993, 874 of 14 October 1993 and 884 of 12 November 1993. Also, regarding Iraq, see Resolution 1790 of 18 December 2007, and on the situation in DR Congo see Resolution 2360 of 21 June 2017.

[59] Resolution 46/242 of 25 August 1992.

[60] Adopting, each year, since 1992, resolutions on the "economic, commercial and financial embargo imposed by the United States of America against Cuba".

[61] International Law Commission. Document: Report of the International Law Commission on the work of its forty-third session, 29 April – 19 July 1991. – *Yearbook of the International Law Commission – 1991*. Vol. II. Part II. New York: United Nations. 1994. P. 96.

[62] Article 17(2).

[63] International Law Commission: Report of the International Law Commission: Documents of the forty-seventh session. – *Yearbook of the International Law Commission – 1995*. Vol. II. Part I. New York; Geneva: United Nations. 2006. P. 35.

[64] UN General Assembly: Developments in the field of information and telecommunications in the context of international security. July 10, 2000. P. 3. URL: https://digitallibrary.un.org/record/421270/files/A_55_140-EN.pdf (accessed 10.12.2021).

of ICT for military purposes by one State in such a manner that it could be able to pose a threat to the international community[65].

Equally important is the Russian contribution to the 1999 Report of the Secretary-General in which are recognised as threats, among others, the adoption of "doctrines providing for the possibility of waging information wars" as well as the "manipulation of information flows, disinformation and concealment of information with a view to undermining a society's psychological and spiritual environment and eroding traditional cultural, moral, ethical and aesthetic values"[66].

After the adoption of UNGA Resolutions 55/63 of 4 December 2000 and 56/121 of 19 December 2001, 2004 marked the year when the UN started to encourage Member States to adopt a comprehensive instrument on cyber security and cyber defence, which led to the 2010, 2013, 2015 and 2021 substantive reports agreed by the Groups of Governmental Experts dedicated to the study of threats posed by the use of ICTs in the context of international security[67]. All these reports have in common the idea that in the context of the use of ICTs States are bound to the principles of sovereign equality refrain from the threat or use of force and non-intervention in the internal affairs of other States[68].

In view of this, the UNGA noted in Resolution 73/27 of 11 December 2018 that States could be held responsible for cyber activities launched or originated from their territory. This instrument is in line with the international code of conduct for information security submitted jointly by China, Russia, Tajikistan and Uzbekistan before the UN[69], which is open for accession by any Member State and aims to promote a commitment of the signatories with the respect for sovereignty, territorial integrity and political independence of all countries in the context of ICT.

The complexity of the continuous introduction and development of new technological tools to ease the access to public bodies' web and data servers may engender new dynamics between States as well as between States and non-state actors. Here, general elections in sovereign States should be seen as a very sensitive issue given that with elections to sovereign bodies of a State third parties can indirectly influence the sovereign will of a people on the basis of their own interests. In this sense the UNGA has already been stating its position over the last decades by expressing concern with ICT in the context of international security[70]. Some of the most recent Resolutions adopted by the UNGA were unanimously approved or were passed without a vote, they call upon States to follow the reports of the Group of Governmental Experts and do not create or attempt to create any new rule of, but rather declare international law already consolidated, bringing more light to the interpretation of rules already in force in the international order [Zimmermann 2014].

One last sensitive issue that has focused the attention of the international community over the last decade relates to the political and security situation in Eastern Europe since 2013. The first topic of discussion concerns the respect for Crimea's self-determination, on which UNGA Resolution 28/262 of 27 March 2014 was a very important starting point. This instrument, which was adopted by the UN Member States with 100 votes in favour, affirmed the "unity and territorial integrity of Ukraine" and considered that the referendum held in Crimea had "no validity". The fact that this resolution was adopted with the votes of 51,81% of the Member States as well as that the UNSC was barely used as a first resource body

[65] UN Institute for Disarmament Research: The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century. November 29, 2017. P. 15. URL: https://unidir.org/sites/default/files/publication/pdfs/the-united-nations-cyberspace-and-international-peace-and-security-en-691.pdf (accessed 10.12.2021).

[66] UN General Assembly: Report of the Secretary-General: Developments in the field of information and telecommunications in the context of international security. August 10, 1999. Para. 13. URL: https://digitallibrary.un.org/record/286090/files/A_54_213-EN.pdf (accessed 10.12.2021).

[67] The activity of the Groups of Governmental Experts can be fully accessed at the web site of UN Office for Disarmamen Affairs. URL: https://www.un.org/disarmament/ict-security/(accessed 10.12.2021).

[68] UN General Assembly: Note by the Secretary-General: Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security. July 14, 2021. Para. 70. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/075/86/PDF/N2107586.pdf?OpenElement (accessed 10.12.2021).

[69] UN General Assembly: Letter dated 12 September 2011 from the Permanent Representatives of China, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General. September 11, 2011. URL: https://digitallibrary.un.org/record/710973/files/A_66_359-EN.pdf (accessed 10.12.2021).

[70] More recently through Resolutions 70/237 of 23 December 2015, 71/28 of 5 December of 2016, 72/196 of 19 December 2017, 73/27 of 5 December 2018, 74/29 of 12 December 2019, 76/19 of 6 December 2021 and 76/277 of 24 December 2021.

to address a situation with a likely impact to international security are two determinant elements that tend to weaken the value of Resolution 28/262, thus having no declarative effect on the way the rights to self-determination and to third party self-defence are interpreted and accepted under international law.

In addition, it should be highlighted that subsequent resolutions have been adopted by the UNGA, but the tendency of support for the content of each resolution has been decreasing initiative after initiative. Accordingly, Resolutions 71/205 of 19 December 2016 and 72/190 of 19 December 2017 were adopted with 70 votes in favour (corresponding to 36,27% of Member States), both followed by three resolutions stressing "that the presence of Russian troops in Crimea is contrary to the national sovereignty, political independence and territorial integrity of Ukraine", all of them with low support[71].

It was therefore no surprise that a new resolution in the same sense, Resolution 76/70 of 9 December 2021, followed the same declining trend[72] in the sense that Crimea's self-determination and all subsequent events may be a case of unlawful intervention. In the end, not only does not exist a minimally consistent support from the international community but the positions in favour of the recognition of a violation of international law[73] are so scarce that are only able to bind the States in favour of such a stance in a way that they recognise several conducts as unlawful also for themselves regardless of the place and context where they can take place.

Although a group of Member States that each year vote in favour of these resolutions try to establish a pattern, the current support for the abovementioned interpretation is far from reaching the notion of "very large majority" as proposed by the ILC (Conclusion 7). In fact, it is still far from reaching a simple majority, which the ILC considered as "not sufficient"[74].

Therefore, it is necessary to evaluate with caution the meaning of UNGA Resolution ES-11/1 of 2 March 2022, which declared the Russian military intervention in Ukraine started in 24 February 2022 as a case of "aggression by the Russian Federation against Ukraine". Indeed, even though this resolution was adopted with a landslide majority[75], this position must be seen as an isolated act with a degree of support still away from the support expressed in most of the UNGA resolutions and declarations on the scope of the prohibition of intervention. Also, the ICJ has not used (yet) expressions like "war" or "aggression" in the Order of 16 March 2022 on Provisional measures on the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*[76].

4. The scope of the principle of non-intervention

The study carried out until the present point has shown that the principle of non-intervention unequivocally comprises the sovereign and inalienable right of all States to freely determine their political, economic, cultural and social systems, to develop their international relations and to exercise permanent sovereignty over their natural resources in accordance with the will of the people, without intervention, interference, subversion, coercion or threat of any kind. Hence, every State has the duty not to act, alone or together with other States, direct or indirectly, with the use or threat of use of force (intervention) or through other means (interference) in the internal or external affairs of other States without the latters' consent or without the authorisation of the UNSC to do so. Otherwise, the Intervener State will breach international law, in particular, the sovereign, political independence, territorial integrity,

[71] Resolutions 73/194 of 17 December 2018, 74/17 of 9 December 2019 and 75/29 of 7 December 2020 were adopted, respectively, with 66, 63 and 63 votes in favour (34,2% and 32,64% of UN Member States).

[72] 62 votes in favour corresponding to 32,12% of Member States, less than a third of the universe of possible voters.

[73] In a similar sense, see the decision of the United States Court of Appeals for the Sixth Circuit in *Buell v. Mitchell*. The Court considered that a position of "thirty-two-percent of countries" was not enough to consider that the prohibition of the death penalty was a norm with *jus cogens* status. United States Court of Appeals, Sixth Circuit: Buell v. Mitchell. Decision of 4 December 2001. Para. 373. URL: https://casetext.com/case/buell-v-mitchell (accessed 10.12.2021).

[74] International Law Commission: Report of the International Law Commission, Seventy-first session (29 April-7 June and 8 July-9 August 2019). New York: United Nations. 2019. P. 168.

[75] 141 votes in favour corresponding to 73,06% of Member States.

[76] International Court of Justice: Case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). Order of 16 March 2022. URL: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed 10.12.2021).

national unity and security of third States as sacred values of each state.

Therefore, aside from generating simultaneously a duty for all States and a right that protects each of them individually, the principle of non-intervention also entails: the right of all peoples to determine freely and without external interference, their political, economic and social systems and to pursue their cultural development and identity; the duty of all States to refrain, on their international relations, from the use of force against the territorial integrity or the political independence of any State; the obligation of all States to refrain from organising, assisting, fomenting, financing, inciting, tolerating or participating in paramilitary, terrorist or subversive acts in other States; the prohibition to use or encourage the use of measures of economic and political coercion or other types of measures in order to obtain advantage of any kind or the subordination of the targeted State – which sees unilateral coercive measures as instruments of unlawful interference due to the inexistence of a hierarchical link between the sanctioning State and the State concerned[77].

The principle of non-intervention generates a prohibition of intervention with *obligatio erga omnes* status, to which every State is bound to comply. Such norm is part of international customary law and is linked to two other principles, each of them corresponding to different constitutive elements of the sovereign State. On the one hand, the principle of territorial integrity and inviolability, which prohibits the use of force against one State and attributes to the latter the exclusive right to conduct operational and security actions within its territory. On the other hand, the principle of non-intervention derives from the principle of political independence and free exercise of sovereignty, therefore prohibiting any external act able to pose a threat to the autonomy of a State and that corresponds to an unlawful interference in the internal affairs of the latter [Aloupi 2015:571-575].

In this framework, the intervention and interference in the internal affairs of States is unlawful when seven elements are observed: (i) one State or a plurality of States in a coordinated manner (ii) intervene or interfere (iii) wrongful[78] and unilaterally (iv) without the consent of the targeted State or lacking authorisation from the UNSC (v) in the sovereign decisions that shall exclusively be taken by a State in the (vi) political, economic, cultural and social domains (vii) freely.

5. Exceptions to the prohibition of intervention

Having in mind the international legal framework presently in force, it can be observed that international law is rigid and intolerant towards the admissibility of lawful acts of unilateral intervention. The principle of non-intervention confirms a set of fundamental rights and imposes duties on States, which practically preclude the recognition of exceptions to the general principle. Notwithstanding, over the last two centuries, it has been evident a growing recognition that intervention may be lawful when the intervener faces a threat to its existence as a State.

5.1. Inherent right to self-defence

The first recognised exception to the prohibition of intervention derives from the inherent right to self-defence. As mentioned above, article 2(4) of the UN Charter reflects the efforts of codification of the prohibition use or threat of use of force. Although it affirms the recognition of the inherent right to self-defence, Article 51 of the UN Charter cannot, however, be admitted as a norm regulating the use of force in international relations in a complete manner. In fact, Article 51 is limited to the existence of a customary right pre-existing the UN, which cannot be averted by any norm written in the Charter.

The first right of a State consists of the right to its independence, which is an absolute right that is part of the right of States to their existence. Thus, having in mind that the right to the preservation of its own existence constitutes a necessary condition to the exercise of any other right as well as that any risk to its independence and territorial integrity undermines State sovereignty, to every State is recognised the customary right to self-defence.

Even though article 51 of the UN Charter expressly refers to self-defence in the event of an armed attack and until the UNSC has taken measures necessary to maintain international peace and security, the

[77] When a State is targeted with unilateral coercive measures from another State, counter-measures are lawful, given that they are adopted as an answer to a previous measure from another State.

[78] Considering that a wrongful act of a State consists of an action or omission, which is attributable to the State under international law and constitutes a breach of an international obligation of the State (Article 2 of ILC's 2001 Draft articles on Responsibility of States for Internationally Wrongful Acts).

admissibility and the conditions under which States can invoke self-defence remain a controversial issue. Here, controversy affects not only an armed attack already committed but also an imminent one, the latter under the so-called anticipatory self-defence [Wilmshurst 2005:4] or anticipatory use of force [Dinstein 2012:194-196].

Although both concepts are recognised as lawful under international law because they are considered to be a last resort solution to avoid armed attacks likely to happen in the future [Baptista 2003:132], regardless if they are imminent or non-imminent [Ruys 2010:252], they shall always be seen with caution because they entail risks in case they are invoked in a broad sense [Morais 2006:603, 608].

However, one must not forget that the notion of 'armed attack' may take different forms. As the ICJ recognised on the *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* to conclude "that the established rules of humanitarian law applicable in armed conflict" does not apply to nuclear weapons "would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future"[79].

The fact that the ICJ highlights "any use of force, regardless of the weapons employed"[80] makes it plausible to accept that the notion of 'armed attack' may comprise not only conventional weapons but also other means able to result "in a considerable loss of life and/or extensive destruction of property"[81]. Therefore, 'armed attack' should be understood not only as comprising the use of conventional means of warfare but also operations in cyberspace [Guerreiro 2018:339-340].

5.2. Self-defence of others and intervention by invitation

As a consequence of customary international law as well as of Article 51 of the UN Charter, self-defence is a recognised right of each State that can be invoked and exercised when a State targeted by another State with an armed attack. This right can be exercised by the targeted State ('individual self-defence') or by a third State ('self-defence of others') or group of States ('collective self-defence') duly mandated in case of inability to address the threat. These concepts, however, must not be confused with 'intervention by invitation', which corresponds to a kind of intervention in the internal affairs of States with the difference that the intervener State is authorised by the State targeted to intervene and such intervention shall be limited to the conditions set between both States involved. Hence, such intervention is lawful and legally recognised under international law[82].

This sort of intervention is distinguished from 'self-defence of others', firstly, by the fact that in the latter the intervener State acts against another State following an armed attack and its area of operations can cover other territories rather than those of the victim State, while under an intervention by invitation the invited State takes action against non-state actors [Gray 2008:81]. Thus, one must conclude that, as for the targets, self-defence of others always takes into account the aggressor State and the intervener acts under Article 51 of the UN Charter, while intervention by invitation demands the use of force against a non-state actor[83].

5.3. Necessity

A third exception to the prohibition of intervention derives is a state of necessity, which can be invoked by a State in order to preclude the wrongfulness of an act not in conformity with an international obligation[84]. Here, a given obligation focuses on the

[79] International Court of Justice: Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons. Advisory Opinion of 8 July 1996 (hereinafter referred as "Nuclear Weapons"). Para. 86. URL: https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed 10.12.2021).

[80] Nuclear Weapons. Para. 39.

[81] Zemanek K. Armed Attack. – *Max Planck Encyclopedia of Public International Law.* 2013. URL: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e241?rskey=L2xz8k&result=1&prd=MPIL (accessed 10.12.2021).

[82] Nicaragua v USA. Para. 246.

[83] An example of a lawful intervention by invitation was given by the Russian intervention in Syria, which was also recognised by the legal department of the German Parliament. Deutscher Bundestag: Der Syrienkrieg – Akteure und Verhandlungen. 1. Juni 2017. S. 6. URL: https://www.bundestag.de/resource/blob/515094/6add202f3f24cc5c6295548c897f0d07%20/wd-2-043-17-pdf-data.pdf (accessed 10.12.2021).

[84] International Court of Justice: Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. Advisory Opinion of 9 July 2004. Para. 140. URL: https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf (accessed 10.12.2021).

respect of a State with the territorial sovereignty of other States, thus any use of force by one State that amounts to territorial occupation of a third State corresponds to an act of intervention under the form of aggression, even if it has temporary nature[85].

Primarily, the act committed under a state of necessity cannot be an answer or a consequence to a previous conduct taken by the State against which the act is directed as, for instance, the conditions that shall be met to exercise the right to self-defence[86]. Secondly, the State that relies on the need to act under a state of necessity could not have contributed, whether by action or omission, to the circumstances that motivate the Intervener State to act. Finally, a state of necessity demands the existence of a "grave danger either to the essential interests of the State or of the international community as a whole"[87]. The notions of "grave danger" and "essential interests of the State" shall be assessed on a case-by-case basis and also consider a State's economic, political, social or cultural survival.

In this sense, while acknowledging the state of necessity as part of customary international law, which can only be "accepted on an exceptional basis", also "invoked under certain strictly defined conditions" and the State concerned cannot be "the sole judge of whether those conditions have been met"[88].

5.4. Humanitarian interventions

Although the notion of humanitarian intervention emerged in the 19th century [Calvo 1896:302-314], it is unlikely that State practice was consistent enough and that the idea was supported by a significant majority of the international community between this period and early 20th century so that a new customary norm was developed back then. In fact, by the end of World War II, not only a global pattern or a certain behaviour was far from being in progress and duly accepted but also the set of principles enshrined in the UN Charter dismiss any possible doubts as to whether unilateral humanitarian interventions are accepted under international law. As an example, Article 1(3) of the UN Charter makes it clear that international problems of humanitarian character are solved through international co-operation and not unilaterally by each State according to its own view of the situation.

Concurrently, State practice since 1945 did not show any significant changes on the principle of non-intervention, not even under exceptional circumstances, besides the previously identified cases of preclusion. Indeed, military interventions conducted by State in another country and justified as having a humanitarian motivation were rare during the Cold War, namely, the unilateral interventions of India in East Pakistan (1971), Viet Nam in Democratic Kampuchea (1978), Tanzania in Uganda (1979), France in Central African Republic (1979), USA in Panama (1989) and Iraq (1991). From 1992, most of the military interventions carried out by States, international organisations or military alliances were justified with an alleged humanitarian purpose and gained traction within groups of States: Somalia (1992), Haiti (1994), Rwanda (1994), Yugoslavia (1999), Timor-Leste (1999) and Sierra Leone (2000).

Looking at the present century, the 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) inspired by the 'We the Peoples' report that was coined by the then UN Secretary-General K. Annan, under which the latter stresses that there could be situations where the violation of sovereignty is a necessary evil in order to protect humanity from serious violations of human rights [Annan 2000:48]. ICISS report also focused on the problem of sovereignty and although it supported the need to intervene with the authorisation of the UN bodies it proposed 13 elements that shall be met in order to legitimise a humanitarian intervention [The Responsibility... 2001:389].

In 2004, through the Report of the High-level Panel on Threats, Challenges and Change entitled "A more secure world: our shared responsibility", the UNGA endorsed "the emerging norm that there is a collective international responsibility to protect" emphasising that such norm is "exercisable by the Security Council authorising military intervention

[85] International Law Commission: Report of the International Law Commission on the work of its Fifty-third session (23 April–1 June and 2 July-10 August 2001). P. 205. URL: https://digitallibrary.un.org/record/449524/files/A_56_10-EN.pdf (accessed 10.12.2021).

[86] Ibidem. P. 194-195.

[87] Ibidem. P. 195.

[88] International Court of Justice: Case concerning Gabčíkovo-Nagymaros Project (Hungary/Slovakia). Judgment of 25 September 1997. Para. 51. URL: https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf (accessed 10.12.2021).

as a last resort"[89]. This statement clearly narrowed any attempts suggesting that unilateral humanitarian interventions could be in line with international law. It came months ahead of the 2005 World Summit Outcome that underscored the global commitment with the "responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity"[90].

By this stage it seems evident the emergence of R2P as a "global constitutional norm" [Peters 2009:189-190], even though it does not legitimate the compliance with an unilateral obligation by third States, but rather makes such obligation always depend of express authorisation by the UN. This belief is supported not only by the cases previously identified but is also reinforced by the fact that the African Union establishes five elements that shall be met to justify a humanitarian intervention when it comes to dealing with war crimes, crimes against humanity and genocide[91].

Although there is consensus regarding the existence of a norm legitimising the violation of State sovereignty to pursue the protection of humanity, in the end, there is not much understanding regarding the circumstances that should be present in order to legitimise a humanitarian intervention under the R2P norm. Complementary to this, there are those who admit that unilateral humanitarian interventions derive from a norm of contemporary customary international law even though strict criteria shall be complied with [Greenwood 2003:158-159] and those who support the need to meet six elements in order to legitimise exceptional humanitarian interventions [Cassese 1999:23-30].

Such traditional stances may be hard to accept given that they do not bring objective conditions to safeguard stability and they also do not contribute to the development of a customary norm. Based on the above elements, for a humanitarian intervention to be lawful it is required that (i) evidence is given to demonstrate that widespread violations of human rights are under way or about to occur and the State where they are taking or will take place is unable or unwilling to address the threat; (ii) in case there is enough time to prevent the atrocities, the UN bodies shall be involved primarily in the resolution of the problem; (iii) if possible, the UN should try to bring forward ways to cease breaches of international law; (iv) it must be clear the need to intervene with the purpose of protecting a community with whom the intervener State has affinities with and the latter cannot pursue any political or economic goals and shall not bring about an unnecessary regime change.

The temporal component as well as the imminence of an armed attack or the escalation of atrocities is key elements that can determine the need to unilaterally intervene under the self-defence of others framework in case the UN bodies are unable to make a decision. In the end, although it must be seen as a fundamental right to the existence of every State, the principle of territorial integrity cannot unconditionally come before the need to address violations of human rights. Over the last decades international law has turned to the people and has been facing what A.A.C. Trindade calls a "process of its *humanization*" gradually abandoning "the element of territory"[92].

Such a reality demands that in situations of systematic oppression, subjugation or tyranny against the whole or a part of the civilian population the State where atrocities take place cannot rely on its territorial integrity while at the same time the same State does not show any clear sign of coming up with a solution to address the threat. More importantly, no "State can invoke territorial integrity in order to commit atrocities", otherwise that would create an unacceptable and an unreasonable paradox over the ends every State shall pursue, "which was created and exists for human beings and not vice-versa"[93].

6. The legal status of the principle of non-intervention

Looking at the activities conducted by a significant majority of States since the Charter of the Unit-

[89] UN: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change "A more secure world: our shared responsibility". New York: United Nations. 2004. P. 57

[90] UN: Resolution adopted by the General Assembly on 16 September 2005 "2005 World Summit Outcome", adopted without a vote. URL: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement (accessed 10.12.2021).

[91] Article 4(h) and (j) of the Constitutive Act of the African Union. URL: https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (accessed 10.12.2021).

[92] Unilateral Declaration of Independence. Separate opinion of Judge Cançado Trindade. Para. 170.URL: https://www.icj-cij.org/public/files/case-related/141/141-20100722-ADV-01-08-EN.pdf (accessed 10.12.2021).

[93] Ibidem. Para. 175-176.

ed Nations entered into force, it is important to restate that although it does not have the power to take decisions with direct binding effect, the UNGA provides a "formidable forum where all issues can be addressed" without being hamstrung by the constraints of any power of veto [Pellet 1995:425]. Therefore, the UNGA tends to faithfully reflect the vision of the community of States as a whole over any event, so that we might say that there has been "an increasing insistence on the authoritative character of General Assembly resolutions on intervention" [Schachter 1981:3-4] and it can declare a rule and attribute it to a source of international law [Bleicher 1969:447].

This way, the UNGA ends up producing a significant number of resolutions and declarations which attest the interpretation given by Member States to the rules of law and also reflect international customary law [Shaw 2008:115]. And even if such declarations do not correspond to *lex lata,* it is quite clear that they define a legal situation [Asamoah 1966:19] and are important elements of the functions of codification and progressive development of international law, which are entrusted to the UNGA [Asamoah 1966:19-23; Crawford 2012:405][94].

Therefore, such resolutions are not only declaratory of customary international law[95] but in some cases can also be seen as an "internationally legal instrument" to where principles need to be converted in order to make it possible for States to invoke their respective rights[96] as these resolutions reflect State "practice and opinio juris and thus giving rise readily to an instant customary law" [Charlesworth 1987:28]. For such reasons, the resolutions adopted by the General Assembly are recognised as a "solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected"[97] and are, therefore, distinguished from recommendations [Tunkin 1966:36], which means that the consent to the text of a declaration under the form of resolution "may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves"[98].

In this regard, the steps taken by the Member States of the UNGA regarding non-intervention developed over the years in a way that its status as a principle of customary international law easily became clear. At the same time, the fact that non-intervention was dealt with in depth in the aforementioned resolutions and that each of these were always adopted by overwhelming majorities strengthens the conviction about the specific acts that the peoples consider to be a threat to their existence.

More recently, despite the dissenting voices [Lahmann 2020:237], the principle of non-intervention was suggested to be expressly recognised as *jus cogens* norm by an undetermined number of UN Member States[99] and even though the ILC Committee decided to limit the list to the norms that it had most undoubtedly designated as peremptory norms of general international law in the past, not only it did not deny that the principle of non-intervention holds the status of jus cogens norm, but it also paved the way for its recognition as such by recalling its draft Conclusion 23 to allow the recognition of "other possible peremptory norms of general international law"[100].

7. Final remarks

Over the present study evidence was provided in order to demonstrate that the principle of non-intervention comprises both the use and threat of use of force ('intervention') and other methods ('interference'). Therefore, the prohibition of intervention shall be interpreted in a broader sense rather then referring only to acts of 'intervention' in a stricter sense. As we have also observed, other principles rather than those directly enshrined in the UN Charter can arise from the combination of elements strongly supported by State practice. In the same way, the ILC

[94] Nicaragua v USA. Paras. 188-195.
[95] DR Congo v Uganda. Paras. 162, 300.
[96] United Nations Conference on Trade and Development, *Proceedings of the United Nations Conference on Trade and Development: Third Session, Santiago de Chile, 13 april to 21 may 1972 – report and annexes.* Vol. I. New York: United Nations. 1973. Para. 210.
[97] UN Office of Legal Affairs: Memorandum by the Office of Legal Affairs – on the use of the terms "Declaration" and "Recommendation". 1962. URL: https://digitallibrary.un.org/record/757136/files/E_CN.4_L.610-EN.pdf (accessed 10.12.2021).
[98] Nicaragua v USA. Para. 188.
[99] International Law Commission: Statement of the Chair of the Drafting Committee, Mr. Claudio Grossman Guiloff "Peremptory Norms of General International Law (*Jus Cogens*)". 2019. URL: https://legal.un.org/ilc/documentation/english/statements/2019_dc_chairman_statement_jc.pdf (accessed 10.12.2021).
[100] Ibidem.

recognised in 2019 that the forms of evidence that are able to identify a peremptory norm "are not limited to" the examples referred in Conclusion 8 and accepted that there could exist other *jus cogens* norms in addition to the eight identified in Conclusion 23, both of the *draft conclusions on peremptory norms of general international law* (jus cogens). In fact, in 2006, the ILC had already affirmed that "there is no single authoritative list of *jus cogens* norms"[101] and besides "the most frequently cited examples of *jus cogens* norms" it shall be accepted that "other rules may have a *jus cogens* character inasmuch as they are accepted and recognised by the international community of States as a whole"[102].

Having in mind the elements identified throughout this study, it has to be concluded that the dynamics unleashed by the Member States of the United Nations in both the Security Council and the General Assembly occurred in such an overwhelming way that they must be seen as evidence of established and substantial practice. If there were no doubts whether the principle of non-intervention is part of customary international law [Bordin 2018:77], the repeated assertion over the decades of the singular importance of this principle to international peace and security strengthens the conviction that more than a principle of customary international law, presently, non-intervention has generated a prohibition of intervention with the nature of a *jus cogens* norm [Gregorio, Stremlau 2021:7]. Nevertheless, such conclusion is not unanimous among the universe of legal scholars, thus being countered by publicists who accept that the prohibition of intervention reflects a customary norm; although they expressly deny that the prohibition of intervention holds the status of [D'Amato 2001; Jamnejad, Wood 2009:380].

Thus, the prohibition of intervention unequivocally aims at the protection of the sovereign and inalienable right of every State to freely determine its political, economic, social and cultural systems, to develop its foreign relations and to exercise sovereignty over its natural resources, in due respect of the will of its people and without being subject to any kind of external intervention, interference or threat.

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[102] Ibid. Para. 33.

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