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## Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention

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ARTICLE

INTERVENTION’S IDIOSYNCRASIES: THE NEED  
FOR A NEW APPROACH TO UNDERSTANDING  
SUB-FORCIBLE INTERVENTION

*Stephen Townley\**

ABSTRACT

*International law prohibits intervention in the domestic affairs of other states. But this prohibition, which is once again in the news in connection with the crisis in Venezuela, is now generally portrayed as either so strict that it precludes common elements of foreign policy like economic sanctions or so vague as to be meaningless. This Article seeks to restart what once was a thoughtful debate regarding non-intervention. It traces the negotiating history of the non-intervention norm in an effort to understand why some states have characterized it as clear in its stringency. And it unpacks the crucial concept of “coercion” to show that those states that see non-intervention as difficult to apply stand on solid ground. Throughout, the Article takes a broad, comparative approach, looking to analogies in domestic law and other areas of international law to try to explain how we got to where we are today. The Article concludes by applying the “rules” versus “standards” dichotomy to sketch a potential path forward—a reframing of the prohibition of intervention as more standard-like.*

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### I. INTRODUCTION

Intervention is in the news. During a recent meeting of the UN Security Council to discuss the situation in Venezuela, Russia accused the United States of “flagrant . . . interference in the internal affairs of another State.”<sup>1</sup> The United States responded that “[t]his discussion in the Security Council is about the right of the Venezuelan people to direct their own internal affairs,”<sup>2</sup> crystalizing a sharp disagreement regarding who should be entitled to go about their affairs without interference – the state or its people?

But this dispute is not the only controversy. There has been much debate regarding actual and asserted “intervention by propaganda,” from Russian meddling via social media in the 2016 U.S. presidential election,<sup>3</sup> to efforts to combat the alleged political activities of foreign

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1. U.N. SCOR, 74th Sess., 8452th mtg., U.N. Doc. S/PV.8452, at 12 (Jan. 26, 2019). Russia later made the pointed jibe, “How would [France] feel if the Russian Federation proposed discussing in the Security Council the issue of . . . the protests staged by the *gilets jaunes*,” *id.* at 19, likening the situation in Venezuela to the situation in France to suggest that neither warranted international scrutiny.

2. *Id.* at 25. It bears noting that the United States has also invoked the principle of non-intervention to reject scrutiny of its own policies. *See, e.g.*, President Donald Trump, President of the U.S., Remarks to the 73rd Session of the United Nations General Assembly (Sept. 25, 2018) (citing the Monroe Doctrine and noting that the U.S. “reject[s] the interference of foreign nations in this hemisphere and in our own affairs”).

3. *Cf.* Patrick Tucker, *Did Russia’s Election Meddling Break International Law? Experts Can’t Agree*, DEFENSE ONE (Feb. 8, 2017), <http://www.defenseone.com/technology/2017/02/did-russias-election-meddling-break-international-law-experts-cant-agree/135255> [<https://perma.cc/PS4D-97DV>]. Ido Kilovaty has analyzed Russia’s meddling under the rubric

funded non-governmental organizations,<sup>4</sup> to the role Al Jazeera has played in the spat between Qatar and other gulf states.<sup>5</sup> The same is true of so-called “diplomatic intervention,” in the sense of diplomatic measures, such as suspension of membership in an international organization, meant to be responsive to troubling actions by a state.<sup>6</sup> There have even reportedly been efforts to negotiate something of a non-intervention pact.<sup>7</sup>

That intervention is prohibited by international law is now of course taken as well-established. But how to define intervention has bedeviled states and scholars for equally long.<sup>8</sup> For instance, states

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of the cyber concept of “doxing” and argued that while not coercive, such actions should be considered intervention where they are “highly disruptive.” See Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT’L SEC. J. 146, 174 (2018).

4. Cf. *Russia’s Putin signs ‘foreign agents’ media law*, REUTERS (Nov. 25, 2017), <https://www.reuters.com/article/us-russia-usa-media-restrictions/russias-putin-signs-foreign-agents-media-law-idUSKBN1DP0I2> [<https://perma.cc/PRC7-XLFE>]. For the avoidance of doubt, my own view is that there is no colorable argument that funding an NGO constitutes intervention.

5. Tamara Qiblawi & Larry Register, *Qatar told to close Al Jazeera, reduce Iran ties in list of demands*, CNN (July 27, 2017), <http://www.cnn.com/2017/06/23/middleeast/gulf-nations-qatar-demands/index.html> [<https://perma.cc/W6V8-UF8E>] (demanding that Qatar “stop interfering”); cf. Alexandra Hofer & Luca Ferro, *Sanctioning Qatar: Coercive Interference in the State’s Domaine Reserve*, EJIL: TALK! (June 30, 2017), <https://www.ejiltalk.org/sanctioning-qatar-coercive-interference-in-the-states-domaine-reserve> [<https://perma.cc/YBK2-MYKQ>] (noting that Qatar appeared to assert that GCC demands constituted intervention).

6. Here again, Venezuela has figured prominently. For instance, in 2017, the MERCOSUR trade bloc suspended Venezuela. See Silvio Cascione, *Mercosur suspends Venezuela, urges immediate transition*, REUTERS (Aug. 5, 2017), <https://www.reuters.com/article/us-venezuela-politics-mercosur/mercosur-suspends-venezuela-urges-immediate-transition-idUSKBN1AL0IB> [<https://perma.cc/H3CM-FFGA>]; see also Declaracion de Lima, Declaracion Conjunta 007-17, MINISTERIO DE RELACIONES EXTERIORES (Aug. 8, 2017) [http://www.rree.gob.pe/SitePages/declaracion\\_conjunta.aspx?id=DC-007-17](http://www.rree.gob.pe/SitePages/declaracion_conjunta.aspx?id=DC-007-17) [<https://perma.cc/M6JY-LDZ5>] (a group of Latin American states indicating that they would not support Venezuelan candidacies). And more recently, members of the Lima Group have indicated that they may bar Venezuelan officials from their territories. See Lima group declaration, GOV’T OF CANADA (Jan. 4, 2019), [https://international.gc.ca/world-monde/international\\_relations-relations\\_internationales/latin\\_america-amerique\\_latine/2019-01-04-lima\\_group-groupe\\_lima.aspx?lang=eng](https://international.gc.ca/world-monde/international_relations-relations_internationales/latin_america-amerique_latine/2019-01-04-lima_group-groupe_lima.aspx?lang=eng) [<https://perma.cc/F3TJ-B49U>].

7. See John Hudson, *NO DEAL: How Secret Talks with Russia to Prevent Election Meddling Collapsed*, BUZZFEED (Dec. 8, 2017), [https://www.buzzfeed.com/johnhudson/no-deal-how-secret-talks-with-russia-to-prevent-election?utm\\_term=.qrqeaVVw0#.xa8QL664I](https://www.buzzfeed.com/johnhudson/no-deal-how-secret-talks-with-russia-to-prevent-election?utm_term=.qrqeaVVw0#.xa8QL664I) [<https://perma.cc/X7KZ-N2RJ>].

8. See Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. OF INT’L L. 345, 345 & n.1 (2009); Duncan Hollis, *The Influence of War; The War for Influence*, 32 TEMPLE INT’L COMP. L.J. 1, 10 (2018) (“The problem lies not in the rule’s existence but in its application.”); Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, at 8 (May 5, 2014) (“[C]ommentators and jurists have struggled

have frequently argued about the extent (if at all) to which economic measures such as sanctions constitute intervention.<sup>9</sup>

Two camps have emerged. Some states and scholars appear to take the view that the boundary between unlawful intervention and lawful conduct is susceptible of clear delimitation.<sup>10</sup> Those who take this view generally focus on the kind of conduct at issue (sometimes coupled with an inquiry into the intent of the “intervening” state).<sup>11</sup> Others, on the other hand, assert that the prohibition of intervention is irretrievably vague. Thus, for instance, during discussion of whether intervention should be a crime in what ultimately became the Rome Statute of the International Criminal Court, the United Kingdom opined that that the concept was “lacking the necessary precision.”<sup>12</sup> The United States expressed a similar view in a brief filed before the Iran-U.S. Claims Tribunal.<sup>13</sup> Likewise, Maziar Jamnejad and Michael Wood, in an important recent article on the non-intervention principle, have taken a jaundiced view of the principle’s clarity, pointing out that

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to identify the precise contours of the principle.”), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2479609](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2479609) [<https://perma.cc/WTK9-U72Z>].

9. See, e.g., Sarah H. Cleveland, *Norms Internationalization and U.S. Economic Sanctions*, 26 *YALE J. INT’L L.* 1, 6 (2001) (“Critics of unilateral sanctions have argued that economic intervention in the affairs of foreign states . . . violate[s] public international law principles of nonintervention and territorial jurisdiction.”).

10. See, e.g., U.N. SCOR, 74th Sess., 8452th mtg., U.N. Doc. S/PV.8452, at 12 (Jan. 26, 2019); cf. Jianming Shen, *The Non-Intervention Principle and Humanitarian Interventions Under International Law*, 7 *INT’L LEGAL THEORY* 1, 2-8 (2001). See generally *infra* Section III.A.

11. Rep. of the Special Comm. on Principles of Int’l Law Concerning Friendly Relations and Co-operation Among States, U.N. Doc. A/6799, at 51 (1967) (discussing “the nature of the action taken and the means employed”) [hereinafter Third Report of the Special Committee]; Int’l Grp. of Experts at the Invitation of the NATO Coop. Cyber Def. Ctr. of Excellence, Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations 321 (Michael N. Schmitt ed., 2017) (discussing intent); see also *infra* Part III.A.

12. Int’l Law Comm’n, Comments and Observations Received from Governments, Draft Code of Crimes Against the Peace and Security of Mankind (Part II) – Including the Draft Statute for an International Criminal Court, U.N. Doc. A/CN.4/448 & Add.1, at 101 (1993); see also *id.* at 101 (U.S.); Rep. of the Special Comm. on Principles of Int’l Law Concerning Friendly Relations and Co-operation Among States, U.N. Doc. A/5746, at 146 (1964) (UK) (It would be “unwise and unprofitable [for the Committee] to attempt to define intervention”) [hereinafter First Report of the Special Committee]; cf. Jamnejad & Wood, *supra* note 8, at 366 (citing EILEEN DENZA, *DIPLOMATIC LAW: A COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* (2006)) (discussing Dutch views on the non-intervention provision in the Vienna Convention on Diplomatic Relations).

13. Statement of Defense of the United States, *Iran v. United States*, Iran-U.S. Cl. Trib., Case No. A/30, at 43.

what will constitute prohibited intervention “depends upon context, and even on the state of relations between the states concerned.”<sup>14</sup>

The International Court of Justice (“ICJ”) has shed little light on where it stands. On the one hand, it has offered something of a definition of intervention, stating that it is an action (1) “us[ing] methods of coercion”; and (2) bearing on “matters which each State is permitted, by the principle of State sovereignty, to decide freely.”<sup>15</sup> And it has suggested that there are categories of action that are *not* intervention.<sup>16</sup> At the same time, it has not defined “coercion” and has appeared to leave open the possibility of taking a case-by-case approach to assessing whether economic measures might constitute intervention.<sup>17</sup>

Nor is the story only one of differences of view regarding how clearly intervention is defined; there has also been little effort to update the prohibition of intervention—at least with respect to actions below the level of the use of force<sup>18</sup>—since the 1970s (with the exception of a targeted flurry of scholarship regarding cyber activities<sup>19</sup>); at the same

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14. Jamnejad & Wood, *supra* note 8, at 367.

15. Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, at 108 (June 27); *see also* Philip Kunig, *Intervention, Prohibition of*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 1 (2010) (“[Intervention] is only prohibited when it occurs in fields of State affairs which are solely the responsibility of inner State actors, takes place through forcible or dictatorial means, and aims to impose a certain conduct of consequence on a sovereign State.”); Fernando R. Teson, *Changing Perceptions of Domestic Jurisdiction and Intervention*, in BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 29-30 (Tom Farer ed., 1996) (“[T]he means of the intervention must be coercive (although not necessarily forcible) and the ends of the intervention must be to influence another state (by the effect of the coercion exercised) on a matter falling under the state’s domestic jurisdiction.”); Jamnejad & Wood, *supra* note 8, at 347-48 (describing intervention as when “coercive action is taken by one state to secure a change in the policies of another,” bearing on “matters in which each State is permitted, by the principle of State sovereignty, to decide freely”).

16. *See, e.g.*, Nicar. v. U.S., 1986 I.C.J., at 114 (“There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country . . . cannot be regarded as unlawful intervention.”).

17. Jamnejad & Wood, *supra* note 8, at 371 (“What the ICJ appears to be saying in *Nicaragua* is that the particular acts at issue in the case did not amount to intervention, which is not to say that they could not in another scenario.”); *cf.* Nicar. v. U.S., 1986 I.C.J. at 126.

18. The legality of forcible humanitarian intervention is of course one of the most hotly debated topics in international legal literature.

19. *Cf.* Duncan B. Hollis, *Russia and the DNC Hack: What Future for a Duty of Non-Intervention?*, OPINIO JURIS (July 25, 2016), <http://opiniojuris.org/2016/07/25/russia-and-the-dnc-hack-a-violation-of-the-duty-of-non-intervention> [<https://perma.cc/YQV4-2P53>]. It is also possible that events in Venezuela will spark further thinking on the non-intervention norm. *Cf.* Alonso Gurmendi, *Estrada Redux: Mexico’s stance on the Venezuela Crisis and Latin America’s*

time, key, related principles in the UN Charter have undergone an evolution. So, for instance, the concept of “enforcement action” under the Charter<sup>20</sup>—a term that bears some resemblance to the term “intervention,” connoting as it does an effort to coerce—has been debated (and defined down).<sup>21</sup> Likewise, there has been considerable discussion in recent years regarding what should be deemed to constitute a threat to international peace and security (the key term that establishes the Security Council’s jurisdiction to impose binding measures),<sup>22</sup> while the related concept of the “*domaine réservé*” (that set of matters a “state is permitted to decide freely”) has received considerably less recent attention.<sup>23</sup>

This Article seeks to restart the debate on non-forcible intervention.<sup>24</sup> It explains how we got to where we are today. It then goes on to make the case for understanding the prohibition of intervention as more “standard-like” rather than as “rule-like,” arguing

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*evolving understanding of non-Intervention*, OPINIO JURIS (Jan. 8, 2019), <http://opiniojuris.org/2019/01/08/estrada-redux-mexicos-stance-on-the-venezuela-crisis-and-latin-americas-evolving-understanding-of-non-intervention> [<https://perma.cc/WZ64-9C5E>].

20. See, for example, the use of the term in Article 53 of the UN Charter. See U.N. Charter art. 53; *cf. infra* note 145.

21. See Monika Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND J. TRANSN’L L. 643, 650-51 (2007); *cf.* Michael Akehurst, *Enforcement Action by Regional Agencies, with Special Reference to the Organization of American States*, 42 BRIT. Y.B. INT’L L. 175, 187 (1967) (asserting that “the more recent practice has been to interpret the proviso [Article 53] more loosely”).

22. See generally Karel Wellens, *The UN Security Council and the New Threats to the Peace: Back to the Future*, 8 J. CONFLICT & SEC. L. 15 (2003). For instance, the Security Council advanced the practice in the 1990s by classifying humanitarian emergencies as threats to international peace and security. See, e.g., S.C. Res. 794 (Dec. 3, 1992); see also S.C. Pres. Statement 2/3500 (Jan. 31, 1992); Anna Hood, *Ebola: A Threat to the Parameters of a Threat to the Peace*, 16 MELBOURNE J. INT’L L. 29, 35 (2015). More recently, the Council deemed Ebola a threat to international peace and security, see S.C. Res. 2177 (Sept. 15, 2014), and has edged in the direction of considering the consequences of climate change a potential threat to international peace and security; *cf.* Andreas Motzfeldt Kravik, *The Security Council and Climate Change – Too Hot to Handle?*, EJIL TALK! (Apr. 26, 2018), <https://www.ejiltalk.org/author/akravik/> [<https://perma.cc/Y2DW-E2BF>]. In each case, there was a rich debate, both among states and in the literature. See, for example, statements by Brazil and Colombia during the debate following adoption of Resolution 2177. See U.N. SCOR, 69th Sess., 7268th mtg. at 28, 45, U.N. Doc. S/PV.7268, (Sept. 18, 2014); see generally Hood, *supra* (analyzing the debate).

23. As Mazier Jamnejad and Michael Wood have noted, there have been significant world-historical changes since the principle of intervention was last seriously debated. Jamnejad & Wood, *supra* note 8, at 349; see also *id.* at 380 (describing non-intervention as an “important, although obscure, subject”).

24. To be clear, I am not suggesting that the prohibition of the use of force should be made more standard-like.

that such an approach would be in keeping with a number of related trends in international law and practice, and might help square the circle between those who see the principle of non-intervention as rigid and clear, and those who dismiss it as Delphic.

The Article proceeds in five parts. First, in Part II, the Article defines the terms “standard-like” and “rule-like” and briefly sketches the history of the non-intervention principle. Part III then pinpoints efforts throughout that history to make the non-intervention principle more “rule-like” and offers two potential explanations: (1) that a debate regarding the outer limits of “force” under the UN Charter sloped over into discussion of non-intervention; and (2) that states negotiating seminal formulations of the principle were influenced by Latin American jurisprudence.

The Article proceeds in Part IV to explain why non-intervention is much harder to define than proponents of a rule-like approach would have it, taking each element the ICJ has identified—“coercion” and “matters the state is permitted to decide freely” (the “*domaine réservé*”)—in turn. Finally, in Part V, the Article sketches an argument in favor of understanding the prohibition of intervention as more “standard-like” and offers thoughts on potential ways to begin such work.

## II. RULES, STANDARDS, AND THE HISTORY OF THE NON-INTERVENTION PRINCIPLE

The terms “rule” and “standard” are long-standing tropes of domestic law; but they are seldom applied at the international level,<sup>25</sup> and so this Part will briefly sketch their contours here. The classic example of the difference between a rule and a standard concerns how drivers should approach a railroad crossing. The rule would have it that a motorist must stop and look; the standard, on the other hand, would

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25. Daniel Bodansky has, however, applied this lens to international environmental law, pointing out numerous examples of both rules and standards. See generally Daniel Bodansky, *Rules Versus Standards in International Environmental Law*, 98 AM. SOC'Y INT'L L. PROC. 275 (2004). And Amichai Cohen, Duncan Hollis, and I have all applied this framework to international humanitarian law. See generally Amichai Cohen, *Rules and Standards in the Application of International Humanitarian Law*, 41 ISR. L. REV. 41 (2008); Duncan B. Hollis, *Setting the Stage: Autonomous Legal Reasoning in International Humanitarian Law*, 30 TEMPLE INT'L & COMP. L. J. 1, 11-12 (2016); Stephen Townley, *Indiscriminate Attacks and the Past, Present, and Future of the Rules/Standards and Objective/Subjective Debates in International Humanitarian Law*, 50 VAND. J. TRANSN'T'L L. 1223 (2017).



prescribe reasonableness.<sup>26</sup> That is, a rule is self-contained in the sense that if certain facts are true, a decision-maker is inexorably expected to respond in a particular way. By contrast, a standard tends to refer to an objective (e.g., reasonableness),<sup>27</sup> and is much harder to assess *ex ante* (because events must actually have unspooled to make the assessment).<sup>28</sup> Another characteristic of a standard is that it may require weighing a number of considerations.<sup>29</sup> For instance, to give examples from international law, the ban on blinding laser weapons is a rule; on the other hand, the question of whether an attack is imminent for purposes of the right of self-defense is much more standard-like.<sup>30</sup>

There are consequences to the choice between a rule and a standard. One benefit of a rule is clarity. A standard, on the other hand, is better suited to situations where flexibility is important, for instance where one may not be able to foresee all eventualities.<sup>31</sup> On the other hand, standards tend to “leave many issues open”<sup>32</sup> and leave discretion to those that interpret them,<sup>33</sup> which, in the case of the prohibition of intervention, would be states themselves. And it is to the history of how states have defined that prohibition that this Part will now briefly turn.

The story begins in the Western Hemisphere with the 1933 Convention on Rights and Duties of States.<sup>34</sup> Article 8 of this Convention provided that “[n]o state has the right to intervene in the internal or external affairs of another.”<sup>35</sup> Acceptance of the Montevideo

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26. See generally Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985). Another well-known example is how to regulate driving speed. A rule would specify a speed limit. A standard would simply direct drivers to behave reasonably. See Bodansky, *supra* note 25, at 276.

27. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–88 (1976).

28. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559 (1992).

29. See, e.g. Lawrence Solum, *Legal Theory Lexicon: Rules, Standards, and Principles*, LEGAL THEORY BLOG (Sept. 6, 2009), <http://lsolum.typepad.com/legaltheory/2009/09/legal-theory-lexicon-rules-standards-and-principles.html> [<https://perma.cc/3ZAL-K3XR>] (“Whereas a rule defines a triggering condition and a consequence, a standard may define a set of relevant considerations and options.”).

30. Cf. Ashley Deeks, *Multi-Part Tests in the Jus Ad Bellum*, 53 HOUS. L. REV. 1035, 1052 (2016).

31. Bodansky, *supra* note 25, at 278.

32. Bodansky, *supra* note 25, at 278.

33. Bodansky, *supra* note 25, at 279.

34. Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097.

35. *Id.* art. 8; see Jose A. Cabranes, *Human Rights and Non-Intervention in the Inter-American System*, 65 MICH. L. REV. 1147, 1154 n.12 (1967) (“The Montevideo . . . conference[] codified what some authors have called the doctrine of *absolute* non-intervention.”).

Convention “marked the first occasion on which the United States had accepted the non-intervention doctrine.”<sup>36</sup> These provisions were then taken up and expanded in the 1948 Charter of the Organization of American States (“OAS”).<sup>37</sup> As one seminal book has put it, “under the Charter of Bogota [OAS Convention] that general right [to “intervene”] [was] completely abrogated, without qualification.”<sup>38</sup>

The UN Charter, on the other hand, did not speak to the prohibition of intervention by states. Rather, Article 2(7) of the Charter prohibited *the United Nations* from intervening in matters essentially within the domestic jurisdiction of states.<sup>39</sup> Thus, the content of the prohibition was left to be negotiated in the 1960s in the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, frequently called the “Friendly Relations Declaration.”<sup>40</sup> The Friendly Relations Declaration ultimately provided that “[n]o 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>41</sup>

Non-intervention was then hotly debated at several other key moments, including in the 1970s in connection with the Arab oil embargo<sup>42</sup> and in the 1980s with reference to economic sanctions imposed by Western states.<sup>43</sup> Ultimately, the ICJ delivered its judgment in the *Nicaragua* case in 1986; but it settled little with respect to the many areas of disagreement, and debate continued, for instance concerning the US embargo on Cuba.<sup>44</sup>

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36. Cabranes, *supra* note 35, at 1153 n.12. For additional detail on why the United States agreed to this, see Charles G. Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT’L L. 645, 656-57 (1945); ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE ORGANIZATION OF AMERICAN STATES 63 (1963); Cabranes, *supra* note 35, at 1159.

37. Charter of the Organization of American States arts. 19, 20, Apr. 30, 1948, 119 U.N.T.S. 3.

38. THOMAS & THOMAS, *supra* note 36, at 140; *see also* THOMAS & THOMAS, *supra* note 36, at 390; JACQUES NOEL, LE PRINCIPE DE NON-INTERVENTION: THEORIE ET PRATIQUE DANS LES RELATIONS INTER-AMERICAINES 53 (1981).

39. *See* U.N. Charter art. 2(7); *cf.* BRUNO SIMMA ET AL., EDS., 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 284 (2012) (“According to its text, Art. 2(7) protects only against acts of the UN and not against acts of other states.”).

40. G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States (Oct. 24, 1970).

41. *Id.*

42. *See infra* notes 55-56 and accompanying text.

43. *See infra* notes 57-58 and accompanying text.

44. *See infra* notes 59-61 and accompanying text.

### III. *THE DESIRE FOR A NON-INTERVENTION “RULE”*

This Part seeks first to show how states (or at least a group of states) have sought time and again throughout this history to characterize the non-intervention principle as rule-like. The sections that follow then offer potential explanations for these efforts.

#### A. *Non-Intervention as a Rule*

States that see the principle of non-intervention as clear have generally taken one or both of two views—that certain actions can be defined in advance as constituting violations of the principle<sup>45</sup> or that what matters is the “intervening” state’s intention.<sup>46</sup> Both of these are rule-like in the sense that the triggering condition for deeming an action “intervention” can be defined *ex ante*. (An intention-based approach may still be rule-like, even if it is subjective rather than objective.)

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45. Thus, for instance, as early as the 1950s, states sought within the OAS to propound a list of forbidden actions. See PAN-AMERICAN UNION, INTER-AMERICAN JURIDICAL COMMITTEE, INSTRUMENT RELATING TO VIOLATIONS OF THE PRINCIPLE OF NONINTERVENTION 16-17 (1959), available at [https://babel.hathitrust.org/cgi/pt?id=mdp.35112102430321;view=lup;seq=11\[https://perma.cc/RKS8-RZ5G\]](https://babel.hathitrust.org/cgi/pt?id=mdp.35112102430321;view=lup;seq=11[https://perma.cc/RKS8-RZ5G). At the time, the elaboration of this instrument was explicitly recognized as an effort to make non-intervention rather more rule-like. See *Id.* at 22 (views of U.S. member); see also Stanley Hoffman, *The problem of Intervention, in INTERVENTION IN WORLD POLITICS* 7, 9 (Hedley Bull ed., 1984) (“One [way to define intervention] is by reference to the type of activity involved.”).

46. Hoffman, *supra* note 45, at 10 (arguing that “[t]he most important delimitation is ... by type of target,” which would necessarily entail understanding intent); Kilovaty, *supra* note 3, at 173 (“Intent is already considered by many to be a constitutive element of the norm on non-intervention.”); cf. U.N. Secretary-General, *Economic Measures as a Means of Political and Economic Coercion Against Developing Countries*, U.N. Doc. A/48/535 (Oct. 25, 1993) (“The specific intent of the country imposing the measures is the most important criteria.”). Traces of such an approach can also be found in early General Assembly products. Thus, for instance, Resolution 290 of 1949 called upon states to “refrain from any threats or acts, direct or indirect, aimed at impairing the freedom, independence or integrity of any State. . . .” See U.N. Res. 290 (IV) (Dec. 1, 1949) (emphasis added). OAS instruments on intervention also had a purpose component. See generally Gaetano Arangio-Ruiz, *Non-Intervention by a State in the Internal or External Affairs of Another State*, in 157 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 252, 257 (1977). There is some logic to such an approach, insofar as it has a parallel in jurisprudence regarding the prohibition of threats of force, which the ICJ has suggested must be *intended to be coercive*. See *Corfu Channel Case (U.K. v. Alb.)*, Judgment, 1949 I.C.J. Rep. 4, 35 (Apr. 9); see also NIKOLAS STURCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 73 (2007) (“To qualify as a violation of article 2(4), the British mission would have needed to exert political pressure on Albania.”). On the other hand, there could be some difficulty in reconciling such an approach with the ICJ’s jurisprudence regarding the use of force. See Marcelo Kohén, *The Principle of Non-Intervention 25 Years After the Nicaragua Judgement*, 25 LEIDEN J. INT’L L. 157, 161 (2012) (“The fact that it was not the intention of Uganda to overthrow the incumbent Congolese government was beside the point.”).

So, for example, during the negotiation of the Friendly Relations Declaration and of Resolution 2131 (the provisions of which were in large part incorporated into the Friendly Relations Declaration), states sought to approach the prohibition of intervention from the perspective of categories of action,<sup>47</sup> with some focusing on economic intervention,<sup>48</sup> others on propaganda,<sup>49</sup> others on diplomatic relations,<sup>50</sup> and yet others on what was then called “indirect intervention,” e.g., support to opposition movements in third states.<sup>51</sup>

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47. See Third Report of the Special Committee, *supra* note 11, at 53 (one representative arguing for “a list of situations which must be presumed to be brought about by intervention.”); see also U.N. GAOR, 20th Sess., 1st Comm., 1397th mtg. at 258, U.N. Doc. A/C.1/SR.1397 (Dec. 6, 1965) (statement in First Committee, where Resolution 2131 was negotiated, referring to Mexican views expressed during meetings of the Special Committee); Third Report of the Special Committee, *supra* note 11, at 113-14. See generally Myres S. McDouglal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L. J. 771, 792 (1958) (distinguishing military, economic, diplomatic and ideological categories of action); cf. Comment, *The Use of Nonviolent Coercion: A Study of Legality under Article 2(4) of the Charter of the United Nations*, 122 PENN. L. REV. 993, 989, 993 (1974) (adopting a similar three categories but noting that they would need to be assessed on a case-by-case basis to determine legality).

48. U.N. GAOR, 20th Sess., 1st Comm., 1405th mtg. at 315 (Jordan), U.N. Doc. A/C.1/SR.1405 (Dec. 9, 1965) (“Economic pressure was another form of intervention.”); U.N. GAOR, 20th Sess., 1st Comm., 1401st mtg. at 284 (Alg.), U.N. Doc. A/C.1/SR.1401 (Dec. 8, 1965) (“Political intervention often took the form of economic assistance.”); see also Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, Systematic Summary of the Comments, Statements, Proposals and Suggestions of Member States in Respect of the Consideration by the General Assembly of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, at 90 (comments of Thailand and Cuba), U.N. Doc. A/AC.119/L.1 (June 24, 1964).

49. U.N. GAOR, 20th Sess., 1st Comm., 1404th mtg. at 308 (Isr.), U.N. Doc. A/C.1/SR.1404 (Dec. 9, 1965) (suggesting that the misuse of radio “constituted a means of indirect intervention”); U.N. GAOR, 20th Sess., 1st Comm., 1401st mtg. at 287 (Uru.), U.N. Doc. A/C.1/SR.1401 (Dec. 8, 1965) (“[E]conomic intervention [was] the practice of financing political parties and the Press, radio and television in foreign countries and infiltrating their educational means.”); U.N. GAOR, 20th Sess., 1st Comm., 1400th mtg., at 275-76 (Guinea) U.N. Doc. A/C.1/SR.1400 (Dec. 7, 1965) (discussing “poisoning the minds of the people of a sovereign and peaceful country by the use of the modern information media”); U.N. GAOR, 20th Sess., 1st Comm., 1395th mtg. at 246 (Colom.), U.N. Doc. A/C.1/SR.1395 (Dec. 3, 1965) (discussing “resorting to propaganda”).

50. U.N. GAOR, 20th Sess., 1st Comm., 1405th mtg. at 316 (Bulg.), U.N. Doc. A/C.1/SR.1405 (Dec. 9, 1965) (“The ‘Hallstein doctrine’ . . . was a way of exerting political pressure on countries that had decided to normalize their relations with the German Democratic Republic.”); *id.* at 315 (Jordan) (“Yet another type of intervention was . . . pressure of all kinds which was exerted by certain State to obtain votes.”).

51. U.N. GAOR, 20th Sess., 1st Comm., 1398th mtg. at 261 (U.K.), U.N. Doc. A/C.1/SR.1398 (Dec. 6, 1965) (noting that the USSR’s first draft made “no mention of subversive activities . . . which caused as much concern to many Governments as did direct and

At the same time, the first Latin American proposal for what became Resolution 2131 spoke of actions “*intended* to impair the sovereignty, the autonomy, the security or the political, economic and cultural integrity of States.”<sup>52</sup> During the negotiation of the Friendly Relations Declaration, the United Kingdom suggested that intervention be defined as action taken “*in order to coerce* another State.”<sup>53</sup> (Indeed, despite purporting to condemn intervention for any and all purposes, the Friendly Relations Declaration includes an opaque motive clause.<sup>54</sup>)

States invoked these same rule-like approaches during the other touchstone moments in the history of the non-intervention principle. During the 1970s, in assessing the legality of the Arab oil embargo, one advocate defended it on the basis that “it is the objective of the measures that stands out as the most pertinent criterion for their legitimacy.”<sup>55</sup> Another scholar agreed—although perhaps more as a matter of *lege ferenda* rather than *lex lata*—stating that “[c]riteria concerned with the motives or purposes of the accused State are likely to be more valuable [than an effects-based test].”<sup>56</sup> Likewise, during

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armed attack”); U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. at 270 (Australia), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965) (noting that “[a] new factor was the advocacy by Peking of what it called ‘wars of national liberation’ in Latin America”); *see also id.* at 274 (Rwanda) (discussing “subversive activities promoted from outside a country with the aim of overthrowing its legally established institutions”).

52. U.N. Gen. Assemb., Rep. of the 1st Comm., The Inadmissibility of Intervention in the Domestic Affairs of State and the Protection of Their Independence and Sovereignty, U.N. Doc. A/6220, at 4 (Dec. 21, 1965).

53. Third Report of the Special Committee, *supra* note 11, at 45; *see also id.* at 51 (one state suggesting that if another state “sought or threatened to exercise that right [not to recognize a government] *in order to influence* another State” it constituted intervention) (emphasis added); Rep. of the 1966 Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, U.N. Doc. A/6230, at 70 (June 27, 1966), (“Some representatives thought, moreover, that the legal concept of non-intervention related largely to the intention of one State to force another State.”) [hereinafter Second Report of the Special Committee].

54. *Compare* G.A. Res. 25/2625, at 5 (Oct. 24, 1970) (“No State or group of States has the right to intervene . . . for any reason whatever.”) *with id.* (“No State may use or encourage the use of economic political or any other type of measures to coerce another State *in order to* obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”) (emphasis added); *cf. infra* notes 96-105 and accompanying text.

55. Ibrahim F.I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT’L L. 591, 619 (1974); *see also* Richard B. Lillich, *Economic Coercion and the International Legal Order*, 51 INT’L AFF. 358, 367 (1975) (the test “rests more upon subjective than objective standards”).

56. Derek W. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT’L L. 245, 248 (1976); *see also* Tom J. Farer, *Problems of an International Law of Intervention*, 3 STAN. J.

the 1980s, in connection with the debate regarding so-called “economic coercion,” states focused on categories of action in seeking to define intervention<sup>57</sup> and prominent scholars such as Oscar Schacter endorsed proposals to enumerate those measures that would constitute prohibited intervention in connection with a civil war.<sup>58</sup>

Finally, during more recent debates, including regarding the Cuba embargo, both ways of framing the rule-like-ness of the prohibition of intervention remained on display.<sup>59</sup> When Cuba first brought the issue of the US embargo to the General Assembly, it made much of the Cuban Democracy Act of 1992, suggesting that its passage made clear that the US had an unlawful objective, namely to force a change in the Cuban political system.<sup>60</sup> At the same time, in reacting to Cuba’s

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INT’L STUD. 20, 20 (1968) (“At a minimum, intervention involves behavior which has as its conscious and primary objective the production of an effect in the target state.”)

57. U.N. Secretary-General, *Economic Measures Taken by Developed Countries for Coercive Purposes, Including their Impact on International Economic Relations*, at 11, U.N. Doc. A/40/596 (Oct. 16, 1985) [hereinafter 1985 SyG Report]; *cf. id.* at 12 (suggesting that ultimately this would be susceptible to adjudication).

58. Oscar Schacter, *The Use of Force: Self-Defense*, in 178 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW at 150, 162 (1982). At the same time, states also pursued General Assembly adoption of a sequence of resolutions asserting unequivocally that “coercive and restrictive measures . . . for exerting political pressure” “are at variance with the Charter of the United Nations,” appearing to make reference to the question of the intervening state’s intention. *See, e.g.*, G.A. Res. 38/197 (1983). And an expert group convened in 1989 came to the conclusion that whether ‘economic coercion’ was lawful should turn in large part on the intention of the ‘sending’ state, stating that “[t]here was general consensus that the intent of the sender country was an important criterion.” U.N. Secretary-General, *Economic Measures as a Means of Political and Economic Coercion Against Developing Countries*, ¶ 9, U.N. Doc. A/44/510 (Oct. 10, 1989). For example, Argentina relied on the UK’s asserted purpose in arguing that economic measures adopted in the wake of the Falklands dispute were unlawful. 1985 SyG Report, *supra* note 57, at 15 (“[T]he measures were adopted for reasons that are not economic but strictly political”); *see also id.* at 21 (Bulgaria) (asserting that the U.S. embargo against Nicaragua had as “its sole purpose . . . to serve the political goals of the administration of the United States”); *id.* at 46 (Haiti) (“the use of economic sanctions for political purposes”).

59. Other rule-like tests have sometimes been advanced. For instance, some have looked to how abruptly an action is taken. *See* Clive Parry, *Defining Economic Coercion in International Law*, 12 TEX. INT’L L. J. 1, 4 (1977) (“[I]s it not again the abruptness of this thing which is somehow objectionable?”); *see also* Sherrie Lipsky, Comment, *The Legitimacy of Economic Coercion: The Carter Foreign Aid Policy and Nicaragua*, 5 LOY. L.A. INT’L & COMP. L. REV. 101, 110 (1982) (characterizing US action vis-à-vis Nicaragua as “abrupt and without prior notice, with devastating results”).

60. Letter Dated 6 November 1992 from the Permanent Representative of Cuba to the United Nations Addressed to the Secretary-General, U.N. Doc. A/47/654 (Nov. 10, 1992). For another recent intention-based approach, *see* Steven Barela, *Cross-Border Cyber Ops to Erode Legitimacy: An Act of Coercion*, JUST SECURITY (Jan. 12, 2017), <https://www.justsecurity.org/36212/cross-border-cyber-ops-erode-legitimacy-act-coercion> [<https://perma.cc/4KHJ-B9E8>]. *See also* Hofer & Ferro, *supra* note 5 (asserting that that intervention should be defined as

proposed UN General Assembly resolution on the topic, a number of states that shared Cuba's concerns framed the issue in categorical terms.<sup>61</sup>

There has also long been a tendency to say that certain subjects are either clearly *within* the *domaine réservé* or *without*.<sup>62</sup> For instance, the principle of non-intervention has always been understood to protect the freedom of a state to choose its political, economic, and social system.<sup>63</sup> This has led both scholars and states to suggest that anything to do with elections<sup>64</sup>—or even political debate<sup>65</sup>—must be within a state's *domaine réservé*.<sup>66</sup>

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“‘abnormal’, ‘improper’ or ‘arbitrary’ interference. . . . for the sole purpose of harming or damaging another State”) (emphasis added).

61. U.N. GAOR, 47th Sess. at 24 (Venezuela), U.N. Doc. A/47/PV.70 (Dec. 9, 1992) (arguing that the “exercise [of] jurisdictional sovereignty extraterritorially is . . . inadmissible”); *id.* at 28 (Mexico) (when “a country claim[s] that its legislation appli[es] to [another state’s] trade with third countries,” that is a violation of “the principle of non-intervention.”); *see also id.* at 44-45 (Tanzania).

62. *See, e.g.*, Teson, *supra* note 15, at 32, 37.

63. The USSR, for instance, emphasized during negotiation of the Friendly Relations Declaration the importance of states’ being able to choose their political system. *See* Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 1st Sess., 28th mtg., at 15. *See also* S.C. Res. 562 (May 10, 1985) (adopted in reaction to US economic sanctions against Nicaragua, “[r]eaffirms the sovereignty and inalienable right of [all States] freely to decide their own political, economic and social systems”).

64. CHATHAM HOUSE, THE PRINCIPLE OF NON-INTERVENTION IN CONTEMPORARY INTERNATIONAL LAW: NON-INTERFERENCE IN A STATE’S INTERNAL AFFAIRS USED TO BE A RULE OF INTERNATIONAL LAW: IS IT STILL? 7 (2007) (asserting that “[i]nterference in political activities (such as through financial or other support for particular political parties or candidates, or even perhaps comment on upcoming elections or on the candidates)” constitutes intervention), available at <http://studylib.net/doc/8433936/the-principle-of-non-intervention-in> [<https://perma.cc/52DL-JSYE>]; Michael N. Schmitt, *Grey Zones in the International Law of Cyberspace*, 42 *YALE J. INT’L L.* 1, 7 (2017) (“[E]lections fall within the *domaine reserve*.”); *cf. also* Brian Egan, International Law and Stability in Cyberspace, Remarks at Berkeley Law, 13-14 (Nov. 10, 2016) (“[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.”), available at <https://www.justsecurity.org/wp-content/uploads/2016/11/Brian-J.-Egan-International-Law-and-Stability-in-Cyberspace-Berkeley-Nov-2016.pdf> [<https://perma.cc/7RPL-3MSB>].

65. *Cf.* U.N. SCOR, 71st Sess., 7621st mtg. at 29, U.N. Doc. S/PV.7621 (Feb. 15, 2016) (Russian Federation asserting that support for “Euro Mайдan” movement in Ukraine constituted intervention).

66. There is also a long-held view that there are certain inherently governmental functions that are reserved to the territorial state. Schmitt, *Grey Zones*, *supra* note 64, at 5-6; Craig Forcese, *Pragmatism and Principle: Intelligence Agencies and International Law*, 102 *VA. L. REV. ONLINE* 67 (2016), available at <http://www.virginialawreview.org/volumes/content/pragmatism-and-principle-intelligence-agencies-and-international-law> [<https://perma.cc/L7GT-QQ7M>]. This is generally discussed in the context of limitations on a third state’s undertaking

But why have states assumed that non-intervention could so readily be defined, whether by reference to the kind of action taken or the acting state's motive? The next Section turns to that question.

*B. The Origins of the Rule-Based Approach*

This Section offers two potential explanations for this desire that the non-intervention principle be—and indeed, widespread sense that *it is*—rule-like in its clarity. First, during the 1960s and early 1970s, there were robust debates regarding how to define force. One camp offered a broad understanding that would have encompassed coercive economic or political measures.<sup>67</sup> The other insisted that the prohibition of the use of force be understood restrictively as concerning only military-type action.<sup>68</sup> When the latter prevailed, the expansionist camp pivoted and began to argue that the non-intervention principle should be understood to cover the very same measures they had sought to include within the ambit of the prohibition of the use of force.<sup>69</sup> Since the prohibition of the use of force was (at least in the 1960s and

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enforcement activities, Dan E. Stigall, *Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law*, 3 NOTRE DAME J. INT'L & COMP. L. 1, 16-17 (2013); INT'L BAR ASS'N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 10 (2009); Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 54 (2002). But one can assume that these functions would likewise be seen as part of the territorial state's *domaine réservé*. Cf. Jamnejad & Wood, *supra* note 8, at 346 (noting that the non-intervention principle is “closely linked . . . to the international legal limits on a state's jurisdiction to prescribe and to enforce”). These inherently governmental functions have also tended to be delimited on a category-by-category basis. Cf. Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, (Sept. 12, 2011), appdx A.

67. Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT'L L. 405, 408 (1985) (“[One] line of interpretation insist[ed] that Article 2(4) outlaws any form of coercion.”).

68. See, e.g., Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT'L L. 421, 427-29 (2011).

69. See *infra* notes 78-81 and accompanying text.



1970s<sup>70</sup>) understood as rather rule-like,<sup>71</sup> a presumption of clarity may have come along for the ride when the locus of debate shifted from the definition of force to the prohibition of intervention. The second potential reason for the sense that the principle of non-intervention is rule-like is that the current law of non-intervention has deep roots in Latin American jurisprudence, where non-intervention has historically tended to be understood in quite categorical terms.<sup>72</sup>

These two potential reasons are of course related—in that those states that approached the debate regarding the use of force in a rule-like way would presumably also have wished to define the prohibition of intervention in a rule-like way, whether or not they saw some link between the two discussions. Nevertheless, the sub-sections that follow tease them apart in an effort at greater descriptive clarity.

### 1. Debates Over Article 2(4)

At the time of the negotiation of the Friendly Relations Declaration, the debate regarding how to define “force” was hot.<sup>73</sup>

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70. There have been recent debates regarding what forms of cyber activity constitute uses of force (or armed attacks). See, e.g., Michael N. Schmitt, *Peacetime Cyber Responses and Wartime Cyber Operations Under International Law: An Analytical Vade Mecum*, 8 HARV. NAT'L SEC. J. 240, 245 (2017); Waxman, *supra* note 68, at 431. There have also been debates regarding whether force below a certain threshold is sufficiently *de minimis* to escape regulation under the Charter (although it would still be subject to law enforcement rules). See Olivier Corten, *Regulating Resort to Force: A Response to Matthew Waxman From a 'Bright-Liner,'* 24 EUR. J. INT'L L. 191, 193 (2013); Mary Ellen O'Connell, *The True Meaning of Force*, 108 AJIL UNBOUND 141 (2014), available at <https://www.asil.org/blogs/true-meaning-force>; Mary Ellen O'Connell, *The True Meaning of Force: A Further Response to Tom Ruys in the Interest of Peace*, 108 AJIL UNBOUND 153 (2014) (describing a “threshold”), available at <https://www.asil.org/blogs/true-meaning-force-further-response-tom-ruys-interest-peace>. There are also questions about whether there may be uses of force that do not constitute an armed attack. *Military & Paramilitary Activities in & Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, at 101 (June 27). I do not engage here questions regarding how to understand exceptions to the prohibition, where Matthew Waxman has posited a divide between the “bright-liners” and balancers. See Matthew C. Waxman, *Regulating Resort to Force: Form and Substance of the UN Charter Regime*, 24 EUR. J. INT'L L. 151, 152 (2013).

71. See 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 242 (2009). Likewise, many assert that the term “armed attack” is clear. See, e.g., Waxman, *supra* note 68, at 159-60.

72. See *infra* notes 88-90 and accompanying text.

73. As one author has put it, the question of whether the “general principle of the illegality of the threat or use of force include[s] economic and political pressure . . . has been [a problem] of major concern.” Hartmut Brosche, *The Arab Oil Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations*, 7 CASE WESTERN RES. J. INT'L L. 1, 17-18 (1974); Jordan J. Paust, Comment, *International Law and Economic Coercion: “Force,” the Oil Weapon and Effects Upon Prices*, 3 YALE J. INT'L L. 213,

States sought to resolve this dispute during the negotiation of Article 52 of the Vienna Convention on the Law of Treaties,<sup>74</sup> but failed.<sup>75</sup> They again sought to address this issue in the context of defining aggression,<sup>76</sup> and again failed.<sup>77</sup> This then was the backdrop against which the Friendly Relations Declaration was negotiated.

Czechoslovakia quickly proposed to include “economic, political or any other form of pressure” in the definition of force.<sup>78</sup> Others, such as the United Kingdom, again resisted.<sup>79</sup> At the same time, the initial instinct of some states was to treat “intervention” as coextensive with “force.”<sup>80</sup> So, for instance, the United States, Australia, Canada, France, Italy, and the United Kingdom submitted a proposal

214 (1976); *see also* J. Curtis Henderson, *Legality of Economic Sanctions Under International Law: The Case of Nicaragua*, 43 WASH. & LEE L. REV. 167, 180 (1986).

74. Sir Humphrey Waldock (Special Rapporteur), *Fifth Rep on the Law of Treaties*, 18-19, U.N. Doc. A/CN.4/183 & Add. 1-4/1966 (Jan. 18, 1966) (“A number of Governments suggest that the article should be expanded so as to make it cover other forms of pressure. . .”).

75. During negotiation of the VCLT, the price of dropping demands to expand the definition of force in Article 52 was adoption of a Declaration titled the “Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.” *See* United Nations Conference on the Law of Treaties, *Final Act of the United Nations Conference on the Law of Treaties*, U.N. Doc. A/Conf.39/26.

76. U.N. GAOR, 29th Sess., 6th Comm., 14571st mtg. at 42, U.N. Doc. A/C.6/SR.1471 (1974).

77. Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT’L L. 224, 224 (1977) (“The status of extreme economic coercion . . . remains as legally problematic as ever.”)

78. *See* First Report of the Special Committee, *supra* note 12, at 84; *see also id.* at 84 (Yugoslavia); *id.* at 85 (Yugoslavia, India, Ghana). *See generally* Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT’L L. 713, 724 (1971); Piet-Hein Houten, *Principles of International Law Concerning Friendly Relations and Cooperation Among States*, 61 AM. J. INT’L L. 703, 707 (1967).

79. First Report of the Special Committee, *supra* note 12, at 21.

80. First Report of the Special Committee, *supra* note 12, at 116 (“The scope of the word ‘intervention’ is indicated by the wording of Article 2, paragraph 4.”) (U.S.); Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 1st Sess., 29th mtg. at 8 (U.S.) (“State intervention . . . was dealt with only obliquely in Article 2(4).”); *see also* Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 1st Sess., 26th mtg. at 5 (U.K.) (“The prohibition of the use or threat of force had absorbed much of the classic conception of intervention.”). Even states that took a broad view of the prohibition of the use of force appear at times to have equated the prohibition of the use of force and the prohibition of intervention in terms of the character of the acts that were prohibited. *Cf.* Special Comm. On Principles of International Law Concerning Friendly Relations and Co-operation Among States, 1st Sess., 17th mtg. at 8 (Yugoslavia) (suggesting that what mattered in distinguishing force from intervention was whether the pressure came from without or from within a state).

emphasizing the availability of self-defense against intervention,<sup>81</sup> suggesting that they saw intervention as equivalent to an armed attack.

When states were again unable to reach agreement on the question of the definition of force, those that had sought an expansive prohibition of coercive activity took the fight to the definition of intervention.<sup>82</sup> As one scholar has said, negotiators left this “to the separate principle of non-intervention.”<sup>83</sup> Thus, one potential explanation for the theology of non-intervention may be that those states were left with the expectation that when the debate shifted from the scope of the prohibition of the use of force to the content of the non-intervention principle, the measures with which they were concerned would still be treated in a rule-like way.

## 2. Latin American History

The second potential reason why states may have come into and away from the negotiation of the Friendly Relations Declaration assuming that the non-intervention principle was a rule has to do with its intellectual origins. As Gaetano Arrangio-Ruiz has trenchantly put it, “[m]any seem[ed] to think [during the Friendly Relations Declaration negotiation] that to question, even in part, the ‘legitimacy’ of a concept of non-intervention (as distinguished from the duty spelled out in Article 2.4 of the United Nations Charter) would constitute an offense to the States of Latin America.”<sup>84</sup>

Indeed, the non-intervention elements of the Friendly Relations Declaration were drafted by Latin American states. After a first meeting of the Special Committee that produced no agreement on the non-intervention principle, the then-Union of Soviet Socialist Republics (“U.S.S.R.”) tried an end-around, proposing a draft of what became Resolution 2131.<sup>85</sup> After vituperative discussion of the U.S.S.R. proposal, it was a group of Latin American states that

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81. Second Report of the Special Committee, *supra* note 53, at 146-47.

82. First Report of the Special Committee *supra* note 12, at 121; *cf.* Special Comm. on Principles of International Law Concerning Friendly Relations and Co-operation Among States, 1st Sess., 9th mtg. at 15 (Mex.) (suggesting that pressure was illegal but perhaps best dealt with as a prohibited intervention).

83. Brosche, *supra* note 73, at 26

84. GAETANO ARANGIO-RUIZ, *THE UNITED NATIONS DECLARATION ON FRIENDLY RELATIONS AND THE SYSTEM OF THE SOURCES OF INTERNATIONAL LAW* 94 (1979).

85. G.A. Res. 2131 (XX), Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Dec. 21, 1965).

brokered a deal on an amended draft,<sup>86</sup> which then formed the basis for the non-intervention wording of the Friendly Relations Declaration.<sup>87</sup>

And intervention was understood in Latin America quite broadly,<sup>88</sup> for instance to include non-recognition.<sup>89</sup> In fact, a number of Latin American states were among those that pushed the view that economic coercion should be considered aggression.<sup>90</sup> Thus, given the way non-intervention was understood in Latin America, it is perhaps unsurprising that some have had the sense that the prohibition of intervention as reflected in the Friendly Relations Declaration was likewise clear.<sup>91</sup>

#### IV. THE PROBLEMS WITH A RULE-BASED APPROACH

The prior Part sought to determine why some states may believe that what the non-intervention principle prohibits can be clearly defined; this Part explores why theirs is a fool's errand. The sections

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86. U.N. GAOR, 20th Sess., 1st Comm., 1420th mtg. at 420, U.N. Doc. A/C.1/SR.1420 (Dec. 18, 1965) (statement by Peru).

87. Some states did not support importing the language of Resolution 2131. France, for instance, said that Resolution 2131 "should not in any circumstances be invoked as a precedent in the Sixth Committee or in the Special Committee." U.N. GAOR, 20th Sess., 1st Comm., 1422d mtg. at 432, U.N. Doc. A/C.1/SR.1422 (Dec. 20, 1965); see also Second Report of the Special Committee, *supra* note 53, at 74.

88. See *supra* notes 35-38 and accompanying text.

89. Cf. NOEL, *supra* note 38, at 42; *id.* at 81 (discussing US policy toward Mexico under Huerta).

90. Martin Domb, *Defining Economic Aggression in International Law: The Possibility of Regional Action by the Organization of American States*, 11 CORNELL J. INT'L L. 85, 86-87 n.12 (1978). Ultimately, Latin American practice proved more flexible than their expressed views. Cabranes, *supra* note 35, at 1173, 1175. But through at least 1965 there was a "rigid interpretation of the of the principle of 'non-intervention.'" LAWRENCE J. LEBLANC, *THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS* 12 (1977); see also Hernan Vales, *The Latin American View on the Doctrine of Humanitarian Intervention*, J. OF HUMANITARIAN ASSISTANCE (Feb. 14, 2001), [https://sites.tufts.edu/jha/archives/1491#\\_ednref54](https://sites.tufts.edu/jha/archives/1491#_ednref54) [<https://perma.cc/J4UU-HD5S>] (describing the events of 1965 as reflecting that "Latin American states made for the first time a balancing test between human rights and democratic values, on one side, and an absolute Principle of Non-intervention on the other"). More recently, the Latin American understanding of the principle has evolved. Domingo E. Acevedo & Claudio Grossman, *The Organization of American States and the Protection of Democracy*, in BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS 132, 136 (Tom Farer ed., 1996) (suggesting that "collective action against illegitimate governments did not constitute a violation of the principle of nonintervention"); Kathryn Sikkink, *Reconceptualizing Sovereignty in the Americas: Historical Precursors and Current Practices*, 19 HOUS. J. INT'L L. 705, 716 (1997) (arguing that the non-intervention principle is not "an end value in and of itself, but more as a means secure other desired goals").

91. See generally *supra* Section III.A.

that follow identify three problems with treating the prohibition of intervention as a rule: first, the texts that speak to the prohibition are inconsistent with each other; second, treating the prohibition as a rule glosses over profound conceptual uncertainty regarding the definition of “coercion” under international law; and third, the rule-like approach is at odds with recent developments.

To be sure, textual inconsistencies could be a problem for a standard too. But what makes a rule a rule is its ostensible *ex ante* clarity.<sup>92</sup> And textual inconsistency is easier to resolve *ex post*, taking into consideration the totality of the circumstances; likewise, standards tend to require reference to extrinsic concepts (such as interpreting reasonableness by reference to the behavior of a reasonable person), rather than being confined to the four corners of the text. This Part turns first to the textual inconsistencies.

#### A. *Textual Concerns*

Put simply, the various instruments that speak to the non-intervention principle differ one from another in small but significant ways. For instance, Article 20 of the OAS Charter provides that “[n]o State may use or encourage the use of coercive measures of an economic or political character *in order to force* the sovereign will of another State and obtain from it advantages of any kind.”<sup>93</sup> Likewise, the Friendly Relations Declaration states that “[n]o State may use or encourage the use of economic political or any other type of measures to coerce another State *in order to obtain from it* the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”<sup>94</sup> The Helsinki Final Act, by contrast, speaks of acts “*designed* to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty.”<sup>95</sup> The “design” of an act has greater extrinsic character than the purpose of the actor in carrying out an act.

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92. See Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 *DUKE L. J.* 557, 559 (1992).

93. Charter of the Organization of American States art. 20 (emphasis added).

94. G.A. Res. 2625, *supra* note 40.

95. Conference on Security and Co-operation in Europe, Final Act princ. VI, Aug. 1, 1975 (emphasis added) [hereinafter Helsinki Final Act]. The same approach is taken in the Charter of Economic Rights and Duties of States. See Charter of Economic Rights and Duties of States art. 32. I do not focus on this document given that it is not generally regarded as reflecting agreement on legal norms. Cf. Jamnejad & Wood, *supra* note 8, at 354.

But the ambiguities are greater than just the question of intent versus character of the act: the relevant intent is also in question. Both the OAS Charter and the Friendly Relations Declaration contemplate that the purpose of the intervention must be both to coerce *and to obtain an advantage*.<sup>96</sup> Gaetano Arangio-Ruiz suggests that this should be understood as a requirement that the intervention be in pursuit of an “undue” advantage.<sup>97</sup> This was an argument adduced by the United States to defend its trade measures against Nicaragua (that the intent was not improper).<sup>98</sup> Likewise, a similar sense may underlie the Institut de Droit International’s resolution suggesting that states may apply pressure in response to violations by the “target” state of their human rights obligations.<sup>99</sup> Such pressure would not be “in order to obtain an undue advantage.”

At the same time, however, the Friendly Relations Declaration purports to prohibit intervention “for any reason whatsoever.”<sup>100</sup> This apparently all-encompassing statement is all the more striking since the Declaration differs from Resolution 2131, on which many of the relevant provisions of the Declaration were based, by making the requirements of a coercive purpose and the aim of securing an advantage conjunctive rather than disjunctive.<sup>101</sup> The Helsinki Final Act offers yet another formulation of the relevant concept.<sup>102</sup> It refers to the subordination of the target’s state interest “and thus” to advantages that will inure to the acting state—appearing to assume that any coercion will necessarily yield advantages.<sup>103</sup> Finally, the Charter of Economic Rights and Duties of States did not include the concept of

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96. See Charter of the Organization of American States art. 20 (“in order to force the sovereign will of another State and obtain from it advantages of any kind”); G.A. Res. 2625, *supra* note 40 (“in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”).

97. Gaetano Arangio-Ruiz, *Non-Intervention by a State in the Internal or External Affairs of Another State*, 157 COLLECTED COURSES HAGUE ACAD. OF INT’L L. 252, 263 (1977).

98. E.Y. Benneh, *Economic Coercion, the Non-Intervention Principle and the Nicaragua Case*, 6 AFR. J. INT’L & COMP. L. 235, 241 (1994).

99. Institut de Droit International, *The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States*, Session of Santiago de Campostela, art. 2 (1989).

100. G.A. Res. 2625, *supra* note 40.

101. Compare G.A. Res. 2625, *supra* note 40 (“in order to force the sovereign will of another State and obtain from it advantages of any kind”) (emphasis added) with G.A. Res. 2131 (Dec. 21, 1965) (“ . . . in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind”) (emphasis added).

102. See Helsinki Final Act, *supra* note 95.

103. Helsinki Final Act, *supra* note 95, at VI.

securing advantages at all,<sup>104</sup> which Richard Lillich has suggested was intentional—that, in the wake of the Arab oil embargo, developing states decided they might wish to have the “option of engaging in some of the economic pressures for which they had so consistently castigated the industrial countries.”<sup>105</sup> With these myriad formulations, it is hard to argue that the definition of intervention is sufficiently clear-cut to be a rule.

### B. *Conceptual Concerns*

The second problem with treating the principle of non-intervention as a rule is conceptual: whether one understands coercion as turning upon the acting state’s intent or upon the effect on the “victim” state, it can ultimately only be approached as a standard; and while the *domaine réservé* has always been understood as inherently evolutive, the related practice of the Security Council has made the question of what constitutes a matter of international concern ever less susceptible to rule-like analysis. This Section explores both of these issues.

#### 1. Coercion

Unlike under domestic US law, where the term has been much discussed in the context of federalism, there is profound confusion regarding how to unpack the international law concept of coercion.<sup>106</sup> Presumably, defining coercion as unlawful pressure would be unhelpfully tautological. But if coercion is “compulsion”—in that

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104. See G.A. Res. 3281 (Dec. 12, 1974).

105. Richard B. Lillich, *Economic Coercion and the “New International Economic Order”*: A Second Look at Some First Impressions, 16 VA. J. INT’L L. 233, 237 n.21 (1976).

106. Kilovaty, *supra* note 3, at 168 (“[I]t is immensely difficult to define the boundary between coercive and non-coercive actions.”); Detlev F. Vagts, *Coercion and Foreign Investment Rearrangements*, 72 AM. J. INT’L L. 17, 28 (1978) (discussing coercion and stating “[w]e find this body of law to be still in a primitive condition”); see, e.g., Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Constitutional Conditions*, 91 TEX. L. REV. 1282, 1294 (2013) (distinguishing “coercion” from “compulsion”). Compare, e.g., *id.* at 1331, with Einer Elhauge, *Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503, 507 (2016); see also Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause after NFIB*, 101 GEO. L. REV. 862 (2013).

whether an action is coercive turns on its effect<sup>107</sup> – it would be very hard to identify in a rule-like way.

To take a parallel example, the scholarship regarding the prohibition of threats of force has suggested that what counts as a threat will necessarily vary state-by-state.<sup>108</sup> Likewise, Article 18 of the draft Articles on State Responsibility defines coercion as “conduct which forces the will of the coerced State . . . *giving it no effective choice* but to comply.”<sup>109</sup> But what might leave one state no effective choice could have little impact on another.

In general, this kind of effects test can only be applied in a standard-like way. Take the international criminal law defense of duress, which requires that an individual actually be coerced into taking the action for which he or she seeks to avoid liability.<sup>110</sup> Without wishing to engage the debate about whether duress is a justification or

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107. Berman, *supra* note 106, at 1292 (Compulsion “is a description . . . of certain circumstances of action, namely those in which, for one reason or another, our choices are very substantially constrained.”).

108. Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 239, 241 (1988) (discussing the “subjective character of perceptions of threat”); *id.* at 245 (arguing that how a real threat is “depends on the target’s rational or irrational belief system”); FRANCIS GRIMAL, *THREATS OF FORCE: INTERNATIONAL LAW AND STRATEGY* 46 (2013) (“For a threat to be effective, the ‘target’ state must perceive the action as a threat. This in turn depends on the target’s rational or irrational belief system.”); Mohamed Helal, *Of Fire and Fury: The Threat of Force and the Korean Missile Crisis*, OPINIO JURIS (Aug. 30, 2017), <http://opiniojuris.org/2017/08/30/of-fire-and-fury-the-threat-of-force-and-the-korean-missile-crisis> [https://perma.cc/TY23-C8R6] (“Determining the legality of threats of force will always depend on their political context and strategic circumstances.”); *cf.* THOMAS & THOMAS, *supra* note 36, at 161 (“This does not . . . imply that to be an intervention the interference must actually compel.”).

109. Int’l Law Comm., *Draft Articles on State Responsibility of States for Internationally Wrongful Acts*, with commentaries, at 69 (2001); *see also* James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility*, 40 VAND. J. TRANS’L L. 611, 619 (2007). Consider also Article 52 of the Vienna Convention on the Law of Treaties, which provides that a treaty is void if its conclusion was procured by the threat or use of force in violation of international law. Scholars have argued that in order to assert that a treaty is invalid on this basis, one must show that the illegal use of force *caused* agreement to the treaty. *See* Michael Bothe, *Consequences of the Prohibition of the Use of Force – Comments on Arts. 49 and 70 of the ILC’s 1966 Draft Articles on the Law of Treaties*, 27 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VOLKERRECHT 507 (1967), *quoted in* Stuart S. Malawer, *Imposed Treaties and International Law*, 7 CASE W. INT’L L. J. 4, 136 (1977).

110. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1340 (1989); Sarah J. Heim, Note, *The Applicability of the Duress Defense to the Killing of Innocent Persons by Civilians*, 46 CORNELL INT’L L. J. 165, 170 (2013) (discussing Nuremberg requirement that the defendant have “performed the coerced act against his will”); *cf.* Benjamin J. Risacher, Note, *No Excuse: The Failure of the ICC’s Article 41 ‘Duress’ Definition*, 89 NOTRE DAME L. REV. 1403, 1405 & n.8, 1411 (2014) (praising an approach that “focuses on the individual and not the act”).



excuse, suffice to say that it tends to be understood from the perspective of the “reasonable person” in the specific situation<sup>111</sup>—a quintessential standard. The same would have to be true were one to seek to understand whether a state was “actually coerced.”

But perhaps the question is not the act’s effect, but the acting state’s intent?<sup>112</sup> As indicated above, an intent test can be a rule.<sup>113</sup> But state intent is notoriously difficult to discern.<sup>114</sup> For that reason, those that have sought to discern state intent in other contexts have relied upon standard-like tests.<sup>115</sup>

## 2. *Domaine Réservé*

A rule-like approach also fails to address the full complexity of how to define the *domaine réservé*. It has been accepted since the Permanent Court of Justice’s decision in the *Nationality Cases* that the *domaine réservé* is variable based on a state’s international obligations,<sup>116</sup> which necessarily means that its boundaries may differ as between states and may change over time. However, at least those metes and bounds could theoretically be discerned *ex ante*. The problem is that there is a further complication having to do with the interplay between the prohibition of state intervention and the specific prohibition of intervention by the United Nations in Article 2(7) of the UN Charter.<sup>117</sup>

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111. Luis E. Chiesa, *Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond*, 41 VAND. J. TRANST’L L. 741, 756-57 (2008) (citing sources describing reasonable expectations).

112. See *supra* Section III.A; cf. Kunig, *supra* note 15, at ¶ 25 (“In order to determine prohibited economic intervention, it can be of value to look [among other factors] at the motivation of a State and identify the object of the State action.”). Of course, there could be examples of actions that evince a potentially improper intent but are not ‘coercive’ – for instance, espionage. Cf. Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT’L L. 291, 304 (2015).

113. See *supra* note 46 and accompanying text.

114. See generally Eric Wyler, *From ‘State Crime’ to ‘Serious Breaches of Obligations Under Peremptory Norms of General International Law,’* 13 EUROPEAN J. INT’L L. 1147, 1150 (2002) (discussing “relinquishing the *culpa* of the culprit committing the wrongful act in favour of a more objective defence of international *ordre public*”); cf. Jean-Pierre L. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity under the U.N. Charter*, 4 CAL. W. INT’L L.J. 203, 255 (1974) (discussing reasons not to read Article 2(4) as concerning the intention of the acting state).

115. See, e.g., Aditi Bagchi, *Intention, Torture, and the Concept of State Crime*, 114 PENN. ST. L. REV. 1, 25, 30 (2009) (“Objective state intent should hinge on social context.”).

116. Katja S. Ziegler, *Domaine Réservé*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 2 (2013).

117. U.N. Charter art. 2(7).

The latter explicitly includes an exception for “enforcement action” taken by the Security Council. That is, Article 2(7) does not preclude the United Nations from acting if *either* the matter is not one essentially within states’ domestic jurisdiction *or* if the Security Council is taking enforcement action.<sup>118</sup> The existence and interplay of these two escape hatches has knock-on consequences for understanding the *domaine réservé*.

Before the Council takes enforcement action, it must make a predicate finding—that a threat to international peace and security exists.<sup>119</sup> On this basis, one might take the view that the two exceptions in fact collapse into one—that is, once the Council has determined that a situation constitutes a threat to international peace and security, it is necessarily no longer a matter of domestic concern.<sup>120</sup> However, the suggestion that the use of the phrase “enforcement action” is meaningless is not consistent with the negotiating history of Article 2(7).<sup>121</sup>

At the same time, it also has to be right that where the Council has made a threat determination, the situation is indeed no longer within the *domaine réservé* of the relevant state.<sup>122</sup> One way to reconcile this tension is to focus on the difference in how each escape hatch functions.

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118. See Kristen Walker, *An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law*, 26 N.Y.U. J. INT’L L. & POL. 173, 176, 178 (1994) (“[O]nly areas of activity not currently regulated by international law fall within the reserved domain . . . Where a matter does fall outside the competence of the United Nations, Article 2(7) arguably operates to preclude any United Nations actions with the exception of discussion and Chapter VII enforcement actions.”).

119. Lori Fisler Damrosch, *Introduction*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 1, 10 (Lori Fisler Damrosch ed., 1993).

120. Cf. Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT’L L. 519, 524, n.23 (1994) (asserting that “domestic conflicts had to be a threat to international peace before the Security Council could exercise jurisdiction”).

121. The original “four power” draft of what became Article 2(7) had proposed to except actions the Security Council might take to respond to a threat to international peace and security. This was, however, amended by Australia, which was concerned that the original formulation would provide an incentive to *create* threats to international peace and security in order to allow for the Security Council to pressure one’s adversary. Kawser Ahmed, *The Domestic Jurisdiction Clause in the United Nations Charter: A Historical View*, 10 SING. Y.B. INT’L L. 175, 181 (2006); Ruth Gordon, *United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond*, 15 MICH. J. INT’L L. 519, 524, 538 n.103 (1994).

122. See also Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT’L L. 1, 14 (1968) (“[O]nce certain activities constitute a threat to international peace and security, they cease to be . . . ‘matters essentially within the domestic jurisdiction of a state.’”).

The exception for “enforcement action” fits the classical theology of the prohibition of intervention—it focuses on a particular action taken.

The question of whether a matter is within a state’s domestic jurisdiction—and, in particular, whether the Security Council deems it so (evidenced at least in part by whether it makes a threat determination)<sup>123</sup>—functions differently. First, threat determinations are case specific. As Myres McDougal and Michael Reisman said some time ago, “the framers [] reject[ed] all proposed definitions of the key terms [such as] “threat to the peace” . . . [leaving] the Security Council. . . large freedom to make *ad hoc* determinations.”<sup>124</sup> Second, the “situation” relevant to the determination of whether a threat to international peace and security exists can be defined more or less broadly. Thus, for instance, the Council has found that the humanitarian situation in particular states is a threat to international peace and security.<sup>125</sup> In the case of Syria, for instance, this was a clear choice, as Russia did not want to suggest that the situation in Syria *writ large* was a threat to international peace and security.<sup>126</sup> And third, as one author has noted, once the Security Council deems that a threat to international peace and security exists, it may act with respect even to matters that would ordinarily not be of international concern.<sup>127</sup>

This all suggests that the question of whether a matter is within a state’s domestic jurisdiction does not turn only on whether international law touches the particular matter, but also on an increasingly nuanced understanding of particular facts and

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123. *Cf. supra* note 119.

124. McDougal & Reisman, *supra* note 122, at 7. *Cf. Gordon, supra* note 120, at 549; *id.* at 553; Jane E. Stromseth, *Iraq’s Repression of Its Civilian Population: Collective Responses and Continuing Challenges*, in *ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS* 77, 87-88 (Lori Fisler Damrosch ed., 1993).

125. The closest the Council may have come to relying solely on human rights as a basis for finding a threat to international peace and security may be Haiti in 1994. *See* S.C. Res. 841 (June 16, 1993); *see also* Gordon, *supra* note 120, at 573.

126. *See* S.C. Res. 2165 (Jul. 14, 2014) (“Determining that the deteriorating humanitarian situation in Syria constitutes a threat to peace and security in the region”); *cf. S.C. Res. 2118* (Sept. 21, 2013) (making a limited threat determination regarding the use of chemical weapons in Syria).

127. *See* Gordon, *supra* note 120, at 525 n.33; JAMES COCKAYNE ET AL., *THE UNITED NATIONS SECURITY COUNCIL AND CIVIL WAR: FIRST INSIGHTS FROM A NEW DATASET* 15 (2010) (“In the early 1990s, it [the Security Council] increasingly addressed governance and internal political relations in civil-war-affected countries.”).

circumstances<sup>128</sup> – the antithesis of a rule. This sense, moreover, is not limited to the idiosyncratic world of the Security Council.<sup>129</sup>

### C. *Inconsistency with Recent Developments*

The third problem is that recent developments have given the lie to the notion that the prohibition of intervention is rule-like. Consider for example the nostrum that elections are inherently sovereign.<sup>130</sup> What then to make of the development around the world of provisions regarding multilateral responses to interruptions of democracy?<sup>131</sup> In the OAS, for instance, in 1992, states adopted the Washington Protocol, which provides for the possibility of suspension from the organization of a state the democratically elected government of which is overthrown by force;<sup>132</sup> and in 2001, states adopted the Inter-American Democratic Charter,<sup>133</sup> which covers a broader<sup>134</sup> set of interruptions of the democratic order.<sup>135</sup>

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128. Consider also by analogy US practice regarding what constitutes a sufficient interest to justify U.S. military action. The US Department of Justice's Office of Legal Counsel has suggested that humanitarian matters similar to those that have been deemed to constitute potential threats to international peace and security may also qualify as sufficient such interests. *See, e.g.*, Memorandum Opinion for the Counsel to the President, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, Slip Op. at 11 (May 31, 2018) ("In recent years, we have also identified the U.S. interest in mitigating humanitarian disasters.").

129. SIMMA, *supra* note 39, at 303 (describing "widespread agreement [regarding] the powers of the UN organs . . . to initiate and undertake measures of conflict prevention outside Chapter VII without violating Art. 2(7)").

130. *See supra* note 64 and accompanying text.

131. *Cf. OAS Resolution on Venezuela Invalid, Says Top Venezuelan Official*, XINHUA (June 6, 2018), [http://www.xinhuanet.com/english/2018-06/07/c\\_137237326.htm](http://www.xinhuanet.com/english/2018-06/07/c_137237326.htm) [<https://perma.cc/6MYZ-MLBT>] (arguing that such provisions are inconsistent with the OAS Charter itself).

132. Protocol of Amendments to the Charter of the Organization of American States, *opened for signature* Dec. 14, 1992, art. 9, 33 I.L.M. 1005. The OAS also took diplomatic action when democracy was interrupted even prior to adoption of this protocol, which suggests that it is not sufficient to argue that states agreed to the protocol and therefore that actions under the protocol cannot be intervention. For instance, in 1991 the OAS ad hoc Meeting of Consultation recommended a range of diplomatic and economic measures against those involved in the coup against Aristide. *See* Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119, 132 (Lori Fisler Damrosch ed., 1993).

133. Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, 40 I.L.M. 1289 (2001).

134. Ruben M. Perina, *The Inter-American Democratic Charter: An Assessment and Ways to Strengthen It*, in BROOKINGS INSTITUTION, THE ROAD TO HEMISPHERIC COOPERATION: BEYOND THE CARTAGENA SUMMIT OF THE AMERICAS at 77, 80.

135. *See* Gurmendi, *supra* note 19 (noting that "[p]articipating in such a decision [under the Democratic Charter] would unquestionably go against the spirit of the Estrada Doctrine, as

Likewise, the United Nations, including the Security Council, routinely engages on elections issues,<sup>136</sup> even when they have not determined that a threat to international peace and security exists. For instance, the Security Council has called upon Burundi to respect the Arusha Peace and Reconciliation Agreement,<sup>137</sup> which was understood as a demand that the President of Burundi not seek a third term, and threatened sanctions.<sup>138</sup> The Security Council did this despite not determining that the situation in Burundi constituted a threat to international peace and security. Likewise, with respect to the Democratic Republic of the Congo, the Security Council has underscored the need to abide by the DRC constitution in the holding of elections.<sup>139</sup> And, indeed, during a recent Security Council debate, China felt compelled to remind that “[they] see elections as a country’s internal affair,” when other members raised concerns about voting irregularities.<sup>140</sup> This all suggests either that what the UN is doing is not “intervention” or that elections are not necessarily a matter for states themselves to decide under *all* circumstances (e.g., where there is a risk of significant violence).

More broadly, another relatively recent development—the emergence of what could be called “sticky consent”—is also hard to square with a rule-like approach to the prohibition of intervention.

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it specifically passes judgment on another state’s internal affairs”); *see also* Jacob P. Wobig, *Regional Regimes for the Defense of Democracy and Coups D’Etat*, at 22-23 (May 19, 2013) (unpublished Ph.D. dissertation, Graduate College of the University of Nebraska) (canvassing other examples), *available at* <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1023&context=poliscitheses> [<https://perma.cc/E2F3-2WTL>].

136. An early example is the Council’s reaction to the coup in Haiti in 1991. *See* S.C. Res. 841 (June 16, 1993).

137. *See* S.C. Res. 2248 (Nov. 12, 2015).

138. *Id.* at ¶ 6.

139. Press Release, Security Council, Security Council Press Statement on Situation in Democratic Republic of the Congo, U.N. Press Release SC/12449-AFR/3414 (July 15, 2016); *see also* President of the Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2016/18 (Dec. 5, 2016) (expressing concern “about the risk of destabilization for the country and the region . . . in the absence of a swift and consensual resolution to the current political crisis”). Most recently, the Council sent a series of pointed messages in advance of the December 2018 elections. *See, e.g.*, Press Release, Security Council, Security Council Press Statement on Situation in Democratic Republic of the Congo, U.N. Press Release SC/13632 (Dec. 18, 2018) (“The members of the Security Council reiterated their call on all parties — Government and opposition — to engage peacefully and constructively in the electoral process, in order to ensure transparent, peaceful and credible elections and to preserve peace and stability in the Democratic Republic of the Congo and the region.”).

140. *See* U.N. SCOR, 74th Sess., 8452nd mtg. At 12, U.N. Doc. S/PV.8452 (Jan. 26, 2019).

Consent is “sticky” where it is given in such a way that it cannot later easily be retracted. The paradigmatic form of “sticky consent” is the Security Council’s ability to authorize the use of force: by ratifying the UN Charter, states consented in advance to accept any decision the Council might take.<sup>141</sup>

Sticky consent is growing more prevalent. During the Cold War, some argued that even present consent could not render intervention lawful (so-called “intervention by invitation”).<sup>142</sup> At a minimum, the United States and others appear to have taken the view that a state could not consent *in advance* to the use of force on its territory.<sup>143</sup> More recently, however, not only has it become substantially clearer that—at least from the perspective of state practice—consent is a sufficient legal basis for what otherwise might be considered intervention,<sup>144</sup> but states have also relied on *ex ante* consent to justify subsequent non-consensual action.<sup>145</sup>

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141. See U.N. Charter art. 25.

142. See, e.g., Georg Nolte, *Intervention by Invitation*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 2 (2010) (“[D]uring the early period of the Cold War (1947-1991), a significant number of States considered that interventions at the invitation of the government could violate the principles of non-intervention.”).

143. Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT’L L. 418, 419 (1980) (discussing the U.S.S.R.-Afghanistan Treaty of Friendship and Soviet use of force); see also James P. Rowles, *The United States, the OAS, and the Dilemma of the Undesirable Regime*, 13 GA. J. INT’L & COMP. L. 385, 395-96 (1983); cf. Eliav Lieblich, *Intervention and Consent: Consensual Forcible Interventions in Internal Armed Conflicts as International Agreements*, 29 B.U. INT’L L. REV. 337, 371 (2011).

144. See, e.g., *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 196, ¶ 43 (Dec. 19). For example, the United States justified strikes against ISIS in Iraq by reference to Iraq’s consent. Cf. Dapo Akande & Zachary Vermeer, *The Airstrikes against Islamic State in Iraq and the Alleged Prohibition on Military Assistance to Governments in Civil Wars*, EJIL: TALK! (Feb. 2, 2015), <https://www.ejiltalk.org/the-airstrikes-against-islamic-state-in-iraq-and-the-alleged-prohibition-on-military-assistance-to-governments-in-civil-wars> [<https://perma.cc/FW8B-WPNF>].

145. See Oona A. Hathaway et al., *Consent-Based Humanitarian Intervention: Giving Sovereign Responsibility Back to the Sovereign*, 46 CORNELL J. INT’L L. 499, 559 (2013) (“[B]y signing a treaty of guarantee, a state agrees that any future intervention undertaken under the treaty’s auspices would not violate its sovereignty.”); Peter E. Harrell *Modern-Day Guarantee Clauses and the Legal Authority of Multinational Organizations to Authorize the Use of Military Force*, 33 YALE J. INT’L L. 417, 430 (2008) (“[P]rior agreement to the treaty trumps the state’s current objection as long as the treaty is otherwise valid.”). This trend has been further facilitated by changing interpretations of Article 53 of the UN Charter. Article 53 prohibits regional organizations from undertaking “enforcement action” absent Security Council authorization. See U.N. Charter art. 53. The classical view had been that – at a minimum – “enforcement action” within the meaning of Article 53 included any use of force. See Marvin G. Goldman, Comment, *Action by the Organization of American States: When Is Security Council Authorization Required Under Article 53 of the United Nations Charter?*, 10 UCLA L. REV. 837, 847-8

For example, both the African Union and Economic Community of West African States (“ECOWAS”) have treaty-given power to authorize intervention,<sup>146</sup> and they have recently invoked or threatened to invoke these authorities. In December 2015, the AU Peace and Security Council (“PSC”) authorized an African Prevention and Protection Mission in Burundi (“MAPROBU”) and indicated that if the mission were not accepted by Burundi, the PSC would recommend that the AU invoke Article 4(h) to permit it to act on Burundian territory without consent.<sup>147</sup> The Security Council’s response did not question the potential ability of the African Union to authorize such a mission.<sup>148</sup> More significantly, ECOWAS actually authorized intervention in Gambia in the wake of an effort by the then-President unconstitutionally to retain power,<sup>149</sup> and the Security Council welcomed this decision.<sup>150</sup>

“Sticky consent” has also manifested itself in more subtle ways, including with respect to peacekeeping operations. Originally, peacekeeping missions were very explicitly understood as operating on

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(1963). But it appears increasingly the case that states take the view that where there is a treaty basis for action, there is no violation of Article 53 where a regional organization uses force consistent with that treaty, on the (somewhat tautological but practical) logic that “enforcement action” is limited to an action that would be unlawful absent Security Council authorization.

146. *See* Constitutive Act of the African Union [AU] art. 4(h); Economic Community of West African States [ECOWAS], Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security, art. 25 (1999). For a useful overview of the provisions permitting intervention in Africa *see generally* Jeremy I. Levitt, *Pro-Democratic Intervention in Africa*, 24 *WIS. INT’L L. J.* 785 (2006). The OAS also has authority to authorize certain coercive measures, an authority which was relied upon for instance in the 1960s with regard to Cuba and the Dominican Republic. *See* Inter-American Treaty of Reciprocal Assistance (“Rio Treaty”) arts. 6, 8.

147. African Union [AU], *Communiqué of the 565th meeting of the PSC on the situation in Burundi* (Dec. 28, 2015), <http://www.peaceau.org/en/article/communique-of-the-565th-meeting-of-the-psc-on-the-situation-in-burundi> [<https://perma.cc/YL5T-3VY4>].

148. Press Release, Security Council, Security Council Press Statement on Situation in Burundi, U.N. Press Release SC/12174-AFR /3293 (Dec. 19, 2015) (“The members of the Security Council took note with interest of the decision by the African Union Peace and Security Council to authorize the deployment of an African Prevention and Protection Mission in Burundi (MAPROBU) to address the situation in Burundi.”), *available at* <http://www.un.org/press/en/2015/sc12174.doc.htm>.

149. Economic Community of West African States [ECOWAS], *Final Communiqué of the Fiftieth Ordinary Session of the ECOWAS Authority of Heads of State and Government* (Dec. 17, 2016). This was authorization of non-consensual force since at the time the newly-elected President had not assumed office (and so, regardless of one’s view on the question of whether consent requires effective control of territory, was clearly unable to give consent).

150. S.C. Res. 2337, ¶ 4 (Jan. 19, 2017) (“[w]elcomes the decisions on the Gambia”). The Council, was however, at pains to be clear that it was not itself authorizing the use of force.

the basis of consent.<sup>151</sup> However, most contemporary peacekeeping missions are authorized under Chapter VII of the UN Charter (the part of the Charter concerned with uses of force). Why? One possibility is that the Council is authorizing these missions to take actions the host state could not themselves take (and therefore to which the state arguably could not consent).<sup>152</sup> But assuming that is not the case, it must be because the mission would have authority to continue operations even were consent withdrawn.<sup>153</sup>

The advent of “sticky consent” has consequences for how we should think about the prohibition of intervention. On one level, the legality of intervention could still be rule-like insofar as the question could be, “did the victim state consent by treaty to the acting state’s intervention.” But even if that were the question, in order to answer it, one would generally need to undertake a case-specific analysis of whether the relevant treaty-based mechanism was appropriately applied.<sup>154</sup> So, for instance, that could mean determining whether war crimes, genocide or crimes against humanity are occurring.<sup>155</sup> And that question, in turn, may require the application of standards. For instance, proportionality, which is key to many war crimes analyses, is a

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151. See, e.g., *Certain Expenses of the United Nations*, Advisory Opinion, 1962 I.C.J. Rep. 170 (July 20) (“The verb ‘secure’ as applied to such matters as halting the movement of military forces . . . might suggest measures of enforcement, were it not that the Force was to be set up ‘with the consent of the nations concerned.’”).

152. Cf. Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. J. INT’L L. 1, 4-5 (2013).

153. This is not unique to the context of peacekeeping operations. See, e.g., S.C. Res. 2387, ¶ 65 (Nov. 15, 2017) (authorizing French forces in the CAR); S.C. Res. 2364, ¶ 37 (Jun. 29, 2017) (authorizing French forces in Mali). In each case, France also enjoyed the consent of the territorial state, but they nevertheless also sought Chapter VII authorization from the Security Council.

154. For instance, in assessing the legality of US action in Grenada, Peter Harrell analyzed whether the Organization of Eastern Caribbean States had grounds to order the use of force. Harrell, *supra* note 145, at 437 (“The language of the OECS charter’s defense provisions . . . simply did not authorize the use of force under the circumstances present in late 1983.”). Likewise, what discussion there has been surrounding the Gambia has focused on ECOWAS’s authority. See Elkanah Oluwapelumi Babatunde, *ECOWAS and the Maintenance of International Peace and Security: Protecting the Right to Democratic Governance*, 6 U. COLLEGE LONDON J. L. & JURIS. 46, 60 (2017). And the same was true of the AU PSC’s decision regarding Burundi. See Solomon Dersso, *World Peace Foundation, To Intervene or Not to Intervene: An Inside View of the AU’s Decision-Making on Article 4(h) and Burundi*, WORLD PEACE FOUND., (Feb. 2, 2016), [https://sites.tufts.edu/wpff/files/2017/05/AU-Decision-Making-on-Burundi\\_Dersso.pdf](https://sites.tufts.edu/wpff/files/2017/05/AU-Decision-Making-on-Burundi_Dersso.pdf) [<https://perma.cc/A86Z-J7Z7>] (“[P]erhaps the most crucial [question] was whether Burundi did indeed manifest the imminent danger of the occurrence of the grave circumstances as envisaged under Article 4(h) of the [AU] Constitutive Act.”).

155. Cf. Constitutive Act of the African Union [AU] art. 4(h).



standard,<sup>156</sup> and so is the requirement that an attack be widespread and systematic in order to qualify as a crime against humanity.<sup>157</sup>

### V. CONCLUSION

Where then does this leave things? Is the prohibition of intervention still meaningful? Is there any way to bridge the gap posited in the Introduction to this Article between those who see the prohibition as a rule and those who dismiss it as too vague to be of use? The answer is a qualified “yes,” but that it has been much too ‘mythologized,’ to use Louis Henkin’s apt description of sovereignty.<sup>158</sup>

So much (in some cases well-deserved) ink has been spilled on questions regarding the legality of forcible humanitarian intervention<sup>159</sup> and re-conceptualizations of sovereignty.<sup>160</sup> However, too little attention has been paid to the question of how these debates should affect the broader understanding of the prohibition of intervention.<sup>161</sup> If, for instance, sovereignty inheres (at least in part) in the people, rather than their representatives (the state), is not the question of what the state has the right to decide for itself necessarily a more complicated one?<sup>162</sup> Likewise, if consent inoculates an action from being considered intervention, should the democratic legitimacy

156. See Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L. J. 163, 187 (2011).

157. See Rome Statute of the International Criminal Court art. 7(1), Jul. 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002).

158. Louis Henkin, *The Mythology of Sovereignty*, in *ESSAYS IN HONOUR OF WANG TIEYA* 351 (Ronald St. John MacDonald ed., 1994) (noting that “sovereignty has also spun a mythology”).

159. See, e.g., Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1011 (2016).

160. Michael Reisman, for instance, argued in 1990 that sovereignty had become popular sovereignty rather than state sovereignty. See generally W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866 (1990).

161. Cf. Niki Aloupi, *The Right to Non-intervention and Non-interference*, 4 CAMBRIDGE J. INT’L & COMP. L. 566, 580 (2015) (“[I]t appears generally accepted-even if the debate is not absolutely closed-that humanitarian interference . . . without any use of force and military action . . . should be considered lawful under international law.”).

162. Cf. Tom J. Farer, *Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere’s Prospect*, 15 HUM. RTS. Q. 716, 721 (1993) (“Because the principle of non-intervention draws its authority from the right of peoples to decide their own fate freely, that right is obviously violated when the power to rule is violently appropriated.”); U.N. GAOR, 60th Sess., 68th mtg. at 8, U.N. Doc. A/60/PV.68, (Dec. 22, 2005) (explanation of Vote by the United States on resolution on sanctions) (“It is therefore a question not of so-called coercion against developing countries, but of extending a hand of support to their peoples.”).

of the government granting the consent matter?<sup>163</sup> That is, to return to the exchange highlighted in the introduction, isn't what was at issue in the dispute between the US and Russia that deep question of whose sovereignty matters for purposes of assessing whether an action is intervention?

The first step toward articulating a modern approach to the non-intervention principle would be to reframe it as a standard.<sup>164</sup> So for instance Ido Kilovaty suggests that whether a cyber intrusion constitutes intervention should turn on the extent of its disruptiveness.<sup>165</sup> Likewise, Rosalyn Higgins some time ago observed that "one is dealing with a spectrum," when it comes to intervention.<sup>166</sup> This approach would be consistent with other areas of law that have also wrestled with questions of effect and purpose. Thus, for instance, the concept of abuse of rights<sup>167</sup> is generally understood as a standard, turning upon reasonableness.<sup>168</sup>

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163. Cf. Karine Bannelier & Theodore Christakis, *Under the UN Security Council's Watchful Eyes: Military Intervention by Invitation in the Malian Conflict*, 26 LEIDEN J. INT'L L. 855, 863 (2013) (discussing limits on intervention by invitation where it is designed to suppress popular will); Gregory H. Fox, *Intervention by Invitation*, in OXFORD HANDBOOK ON THE USE OF FORCE 816, 833 (Marc Weller ed., 2015) (discussing validity of intervention by invitation based on democratic status of government); Roger Bond Choquette, Note, *A Rebuttable Presumption against Consensual Nondemocratic Intervention*, 55 COLUM. J. TRANSNAT'L L. 138 (2016).

164. One of the closest arguments to mine is that of Louis Sohn, who in a short piece in 1983 pointed out the various 'gradations' of kinds of intervention. See Louis B. Sohn, *Gradations of Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 225 (1983). My argument is also broadly consistent with those that have rejected a rigid, disaggregated understanding of sovereignty. Compare Michael N. Schmitt & Liis Vihul, *Respect for Sovereignty in Cyberspace*, 95 TEX. L. REV. 1639, 1669 (2017) (arguing that sovereignty may protect a state from more than is within the four corners of 'intervention'), with Gary P. Corn & Robert Taylor, *Symposium on Sovereignty, Cyberspace, and Tallinn Manual 2.0, Sovereignty in the Age of Cyber*, 111 AMER. J. INT'L L. UNBOUND 207, 208 (2017) ("Below these thresholds, there is insufficient evidence of either state practice or opinio juris to support assertions that the principle of sovereignty operates as an independent rule of customary international law that regulates states' actions.").

165. Kilovaty, *supra* note 3, at 172.

166. Rosalyn Higgins, 1 *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* 273 (2009).

167. Compare Alexandre Kiss, *Abuse of Rights*, in MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW ¶ 1 (2006), with Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L. J. 389, 389 (2002).

168. In the *Conditions of Admission of a State to the United Nations* case, the ICJ held that the criteria laid down in the UN Charter for admission to the UN were exhaustive, but that "Article 4 does not forbid the taking into account of any factor which it is possible *reasonably* and in good faith to connect with the conditions laid down in that Article." *Conditions of Admission of a State to Membership in the United Nations, Advisory Opinion*, 1948 I.C.J. Rep. 63 (May 28) (emphasis added). See also Jan Klabbers, *How to Defeat a Treaty's Object and*

One could of course argue that understanding non-intervention as a standard will give greater leeway to states to intervene without consequence (because violations of standards are harder to detect<sup>169</sup>). That is, however, a false choice. The more accurate choice is likely between a standard and a prohibition that gradually falls into desuetude because states cannot agree on its content. Moreover, articulating the prohibition of intervention as a standard gives it at least a chance to develop further.<sup>170</sup>

It is beyond the scope of this Article to suggest exactly what such a standard might look like, but one fruitful area of exploration might be to look to domestic law for inspiration.<sup>171</sup> Thus, for instance, in *Lee v. Weisman*, the US Supreme Court framed the question of coercion as turning on whether a student had “a reasonable perception that she [wa]s being forced by the State to pray.”<sup>172</sup> Why not conceive coercion as turning on reasonable state expectations? Or, taking it further, it could perhaps turn on whether an action would unreasonably interfere with the ordinary relationship between a state and its citizens.<sup>173</sup> Such an approach might be a way to reimagine coercion in the age where some postulate an international right to democratic governance.

Likewise, in thinking about public forum doctrine under the First Amendment, Robert Post has argued against the concept of labeling places on the basis of their historical usage (akin to how too often the *domaine réservé* is conceived); instead, he favors looking to the purpose for which the government uses a space.<sup>174</sup> A corollary might be to think about *the specifics* of a particular area of government action in qualifying it as a matter of domestic jurisdiction, or not.<sup>175</sup> These are

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*Purpose Pending Entry into Force: Toward Manifest Intention*, 34 *VAND. J. TRANSNAT'L L.* 283, 330 (2001) (suggesting a standard-like test for assessing whether an action should be deemed to defeat a treaty's object and purpose).

169. See *supra* note 33 and accompanying text.

170. Cf. Deeks, *supra* note 30, at 1045.

171. Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law*, 95 *TEX. L. REV.* 1579, 1590-92 (2017).

172. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

173. Cf. Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 *BOSTON UNIV. L. REV.* 1, 27 (2015).

174. Robert C. Post, *Subsidized Speech*, 106 *YALE L. J.* 151, 171 (1996); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 *UCLA L. REV.* 1713, 1777 (1987).

175. Cf. Christoph Schreuer, *The Waning of the Sovereign State; Toward a New Paradigm for International Law?*, 4 *EUR. J. INT'L L.* 447, 455 (1993).

of course meant only as examples, and surely there are other fruitful avenues of exploration in the domestic law of other states.

To be clear, this Article offers no brief for greater “intervention” around the world. The Article takes no sides on the question of whether particular interventions are or should be deemed lawful. Rather, it simply has sought to urge a rethink of how to structure that debate. Such a rethink might permit us to move past the tired debates about whether discussion of human rights is intervention<sup>176</sup> (it is not) toward an understanding of what kind of more limited constraints on state-to-state engagement should be deemed reasonable in today’s world.

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176. Compare U.N. SCOR, 7926<sup>th</sup> mtg. at 9, U.N. Doc. S/PV.7926, (Apr. 18, 2017) (describing human rights as a “back door for interfering in the internal affairs of States.”) (statement of Egypt), *with id.* (Uruguay asserting that they did “not accept the excuse of sovereignty or domestic jurisdiction in efforts to prevent the examination of the human rights situation in Member States.”).

