The Principle of Non-Intervention 25 Years after the Nicaragua Judgment

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Abstract
This article focuses on the analysis by the International Court of Justice of the principle of non-intervention in domestic affairs in its judgment of 27 June 1986 in the case concerning Military and Paramilitary Activities in and against Nicaragua and contrasts it with the evolution of international law and practice in this field. It is proposed that the Court’s 1986 analysis not only remains of actuality today, but also constitutes a precursor to legal developments that have since taken place. This is particularly the case with regard to the relationship between the protection of human rights on the one hand and the safeguard of state sovereignty and the collective security regime on the other. The 1986 judgment helped to clarify the content of humanitarian assistance. It constituted the starting point for the development of this concept in a series of GA resolutions that were subsequently adopted. The controversial doctrine of ‘humanitarian intervention’, as well as state practice in violation of this principle, in no way led to modifying existing international law. Similarly, the new concept of ‘responsibility to protect’, which places emphasis on collective security and discounts unilateral action, has not led to the disappearance of the principle of non-intervention either.

Key words
human rights; humanitarian intervention; non-intervention; responsibility to protect

Not all judgments deserve to be celebrated at their 25th anniversary. The judgment of the International Court of Justice in the case concerning Military and Paramilitary Activities in and against Nicaragua,¹ however, constitutes a milestone in the case law of the Court, for many reasons. First of all, the Nicaragua judgment dealt with a number of fundamental principles of international law and rules relating to human rights and international humanitarian law. Second – and more importantly – the Court dealt with these principles in an objective and in-depth way in an analysis grounded on customary law, with due regard given to the evolution of these principles since the adoption of the UN Charter, particularly through the adoption of GA resolutions. Third, the Nicaragua judgment has symbolic value, in so far as it shows how the principle of sovereign equality concretely applies before the Court. Justice is blind and, before the Court, both a superpower and a small developing country have exactly the same weight.

This is not the only case in which the Court had the possibility to apply, and subsequently to explain, the scope of fundamental principles of international law. Before Nicaragua, self-determination had been the object of judicial examination in the Namibia and Western Sahara Advisory Opinions. Following Nicaragua, the advisory proceedings in Nuclear Weapons, Wall, and Kosovo as well as some contentious cases (such as East Timor, Oil Platforms, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Legality of Use of Force, Democratic Republic of the Congo v. Uganda, and Application of the International Convention on the Elimination of All Forms of Racial Discrimination), also gave the Court the opportunity to address a number of fundamental principles, including the prohibition of the use of force, non-intervention, self-determination, and the protection of human rights more generally. It is not the place here to analyse whether the Court took advantage of the opportunity on these occasions to clarify the scope of these principles, or simply to apply them correctly. My task is to examine whether the way in which the Court dealt with the principle of non-intervention in 1986 has resisted the passage of time and the major changes that the world has undergone over the course of the last 25 years. In other words, is non-intervention, as depicted in the Nicaragua judgment, still a valid legal tool in the era of so-called humanitarian intervention and the ‘responsibility to protect’? This question is particularly worth posing in view of those voices already clamouring to declare the principle of non-intervention dead and buried. My thesis is that not only is the Court’s analysis in 1986 of actuality today, but, to some extent, also the judgment constitutes a precursor to developments in the field concerning the relationship between the protection of human rights on the one hand and the safeguard of state sovereignty and the collective security regime on the other.

I. DEFINING THE PRINCIPLE OF NON-INTERVENTION

It is interesting to note the way in which the Court defined the principle of non-intervention. Certainly, it did not propose anything novel when it affirmed that ‘[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference’. However, in addition to this affirmation, the Court also clarified the scope of the principle by applying the Friendly Relations Declarations to make it clear that the principle of non-intervention relates to both

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the internal and the external affairs of other states. In general, stress had been laid on the internal aspect of the principle only. In other words, political alliances, diplomatic positions adopted at the international level, and foreign policy in general must be decided on an independent basis without external interference. Another important feature is the analogy that the Court drew with the principle of respect for the territorial integrity of states. After quoting the well-known passage in the Corfu Channel judgment, according to which ‘between independent States, respect for territorial sovereignty is an essential foundation of international relations’,\(^8\) the Court spoke about the principle of non-intervention as protecting the ‘political integrity’ of states.\(^9\) If one reflects upon the widely held view that support of secessionist movements by other states is illegal under international law,\(^10\) the close relationship between respect for the territorial as well as the political integrity of other states becomes apparent. However, the two principles remain separate and distinct, and their scope as well as the situations to which they apply do not always coincide.

It is also worth noting that the 1986 judgment addressed the issue of non-intervention in the framework of the provision of foreign aid to a military faction fighting against the established government. But this is not the only possibility of breach of the principle of non-intervention. Another example is the provision of support to secessionist groups within another state. Nearly a quarter of a century after the 1986 Nicaragua judgment, the Court was faced with such an issue in the context of the request for an advisory opinion on a unilateral declaration of independence in Kosovo. The wording of the question submitted to the Court carefully avoided any need to address the question of whether recognition by third states of the purported creation of a new state through such a declaration would constitute a breach of international law, particularly the principle of non-intervention. However, the fact that some states lent support to the authors in the performance of the act of unilaterally declaring independence before the declaration was proclaimed could have constituted an element in the Court’s analysis of the accordance with international law of the declaration. When the General Assembly was discussing the request for an advisory opinion on the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo, the British representative to the United Nations, in a statement allowing no divergent interpretations, stated as follows: ‘in


\[^10\] There was remarkable unanimity on this point among states participating in the advisory proceedings on the Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, including those states that have not been consistent in their application of the principle to the case of Kosovo (see, e.g., the Written Statement of the United Kingdom (para. 5.34) and the Written Comments by France (para. 29), available on the website of the Court at www.icj-cij.org). In terms of legal scholarship on this point, see M. Wood, ‘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?’, Summary of the Chatham House International Law discussion group meeting of 28 February 2007, available online at www.chathamhouse.org.uk/research/international_law/papers, at 7; J. Crawford, The Creation of States in International Law (2006), 388–9; J. Crawford, State Practice and International Law in Relation to Unilateral Secession, Report for the Attorney General of Canada, 19 February 1997, reprinted in A. Bayefsky (ed.), Self-Determination in International Law: Quebec and Lessons Learned (2000) 31, at 36.
coordination with many of the countries most closely involved in stabilizing the Balkans, Kosovo’s Assembly declared Kosovo independent on 17 February 2008. The Court did not examine whether external support for the unilateral declaration of independence would give rise to its illegality, although at least one state raised the issue before the Court.

Another lesson to be learnt from the 1986 judgment with respect to the legal analysis of the principle of non-intervention includes the following. In 1986, the Court had to determine whether the United States had violated the principle of non-intervention vis-à-vis Nicaragua. In order to do so, it not only addressed this question, but it also considered whether a right of intervention in some circumstances existed. This notably contrasts with the methodology followed by the Court in 2010 with regard to the legality of the unilateral declaration of independence. In the latter case, the Court confined itself to the exclusive examination of whether such a unilateral declaration of independence would be illegal, refraining from any analysis of an existing right to unilaterally declare independence in the circumstances under scrutiny.

2. THE CONTENT OF THE PRINCIPLE OF NON-INTERVENTION

In the words of the 1986 judgment:

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

It is difficult to deny that these elements of the principle still form part of international law. As a matter of course, states are free to take their decisions in an independent way on matters essentially falling within the realm of their national concern. What has evolved since the Nicaragua judgment is the reaction of the international community with regard to matters that today are of international concern, hence stretching the domestic jurisdiction of states. The prohibition of intervention in matters still falling within the domestic sphere remains.

13 Nicaragua, supra note 1, at 108, para. 205.
14 This is not because of the application of a ‘principle of sovereignty’. Sovereignty is not a ‘principle’, but the essential characteristic of independent states. In order to speak about a principle in this area, this should be directed to the principle of equal sovereignty of states (see M. G. Kohen, ‘Article 2 Paragraph 1’, in J.-P. Cot, A. Pellet, and M. Forteau (eds.), La Charte des Nations Unies (2005), 399.
The Court dealt in the *Nicaragua* case with a situation of intervention involving the use of force. It was not difficult for it to find that the element of coercion – necessary for the intervention to be illegal – was present. This was also the situation in the case of *Armed Activities in the Congo (Democratic Republic of the Congo v. Uganda)*. The fact that it was not the intention of Uganda to overthrow the incumbent Congolese government was beside the point. The Court held that the armed activities of Uganda constituted a violation of the principle of non-intervention. It held as follows:

The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.\(^\text{15}\)

However, the Court clearly stated that military coercion is just one form of unlawful intervention, making this conduct illegal on two bases: as a breach of the prohibition of the use of force and as a breach of the principle of non-intervention. The 1986 judgment made it clear that other forms of coercion are also prohibited. Recent practice has provided a number of examples. Financial pressure and the subordination of negotiations concerning admission into regional integration institutions to the acceptance of certain policies concerning a secessionist attempt within a country are just two. This must be distinguished from the requirements imposed on a state to comply with its international obligations within its territory, in order to negotiate a given issue, such as the requirement for a state to make its best efforts to collaborate with international criminal tribunals as a condition for other states to alter their relations with the same state. Such a requirement does not fall within the principle of non-intervention. Similarly, the mere adoption by states of certain political positions with regard to domestic situations, although often unfriendly, is not illegal.

The fact is that there are many examples of intervention in domestic affairs in recent years. *Eadem, sed aliter*. The Court already referred to this practice in 1986:

There have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State. The Court is not here concerned with the process of decolonization; this question is not in issue in the present case. It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.\(^\text{16}\)

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15 *Congo*, *supra* note 6, at 227, para. 163.
16 *Nicaragua*, *supra* note 1, at 108, para. 206.
3. **Has a Right to Intervene Abroad Been Recognized Since 1986?**

In 1986, the Court came to the conclusion that this fundamental modification had not occurred. What has happened since that could change the Court’s position? I am thinking about the NATO intervention in Kosovo in 1999, the general discussion about so-called ‘humanitarian intervention’, the recent development of the concept of the ‘responsibility to protect’, and, finally, some cases of international intervention through collective security mechanisms in domestic conflicts. The latter are the less problematic to identify as not being in contradiction of the principle of non-intervention, since they were qualified as ‘threats to the peace’ by the Security Council and measures were taken on the basis of Chapter VII of the Charter accordingly. The recent adoption of Resolution 1973 (2011) by the Security Council constitutes a positive development in relation to the previous frustrating situation brought about by the Security Council’s attitude with regard to Burma (Myanmar) in 2007. I say so, independently of the criticism the further operations were attracting, given some deviations in their goals as decided by the Council. In fact, the NATO bombings clearly deviated from its original goal to protect the civilian population by actively supporting one side of the internal armed conflict between the National Transition Council and the Gaddafi dictatorship. While the toppling of this regime is not to be regretted, the means by which this occurs could heavily influence the future of Libya.

It is uncontested that the military interventions in Yugoslavia in 1999 and in Iraq in 2003 were illegal. There is no doubt that the so-called ‘humanitarian intervention’, in the sense of armed intervention by a state or a group of states without SC authorization to put an end to grave human rights violations, is not a recognized rule of international law. Of note in this respect, among many other examples, is the Ministerial Declaration produced by the Meeting of Foreign Ministers of the Group of 77 held in New York on 24 September 1999, in which the 132 represented states stated that ‘[t]hey rejected the so-called right of humanitarian intervention, which has no basis in the UN Charter or in international law’. Their position has not changed since. The concept has even been abandoned to the benefit of the notion of ‘responsibility to protect’. Before addressing the latter, it is worth mentioning that the *Nicaragua* judgment did not reject what amounts to ‘humanitarian assistance’ (not ‘humanitarian intervention’) – a concept that the General Assembly adopted and framed in further resolutions. According to the Court:

17 See Art. 2, para. 7 of the UN Charter.
18 For example, the SC failure to adopt a resolution on Myanmar due to the Chinese and Russian vetoes on 17 February 2007.
20 Para. 69; text available online at www.g77.org/doc/Decl1999.html.
[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.\textsuperscript{22}

The Court, however, immediately set out the characteristics that such aid should meet: it must be non-discriminatory and its purpose must be ‘to prevent and alleviate human suffering’ and ‘to protect life and health and to ensure respect for the human being’. The alleged American ‘humanitarian assistance’ was exclusively directed to the Contras, not to all those in need in Nicaragua. Consequently, this assistance was considered a breach of the principle of non-intervention.

Today, the concept of the ‘responsibility to protect’ (R2P) forms part of international discourse. Indeed, it could be said that it has replaced, both terminologically and conceptually, the doctrine of humanitarian intervention. It is outside the scope of this presentation to analyse whether R2P has reshaped the parameters of an existing and controversial doctrine, or whether it has ushered into existence a new international rule or set of rules. Paragraphs 138 and 139 of the World Summit Outcome of 2005,\textsuperscript{23} reaffirmed by the Security Council in its Resolution 1674 (2006),\textsuperscript{24} stress the primary responsibility of states to protect, followed by the subsidiary role of collective security mechanisms, particularly the Security Council acting under Chapter VII of the Charter, but also calling to attention the role that the General Assembly could play. The specific report of the UN Secretary-General also goes in the same direction.\textsuperscript{25} There is nothing in the concept of R2P allowing for a reversal of the principle of non-intervention or otherwise allowing states to intervene without SC authorization.

The emphasis placed by R2P on collective action was indeed pre-empted by the Court in its 1986 judgment. Faced with a human rights argument developed by the United States to justify its action, the Court recalled the international treaties relating to human rights mechanisms at the universal and regional levels, as well as the action within the framework of the Organization of American States. The conclusion of the Court in 1986 can easily be transposed to other situations that occurred after the end of the Cold War:

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect. With regard to the steps actually taken, the protection of human rights, a strictly humanitarian objective, cannot be compatible with the mining of ports, the destruction of oil installations, or again with the training, arming and equipping of the contras. The Court concludes that the argument derived from the preservation of human rights in Nicaragua cannot afford a legal justification

\textsuperscript{22} Nicaragua, supra note 1, at 124, para. 242.
\textsuperscript{23} UNGA Res. 60/1, 24 October 2005.
\textsuperscript{25} UN Secretary-General, Implementing the Responsibility to Protect, report of the Secretary-General, 12 January 2009, UN Doc. A/63/677; see also UNGA Res. 63/308; see G. Abi-Saab, ‘Some Prefatory Thoughts on “Humanitarian Intervention”, in M. Kohen, R. Kolb, and D. L. Tehindrazanarivelo (eds.), Perspectives of International Law in the 21st Century: Liber Amicorum Christian Dominice in Honour of His 80th Birthday (2012), 365.
for the conduct of the United States, and cannot in any event be reconciled with the legal strategy of the respondent State, which is based on the right of collective self-defence.\textsuperscript{26}

4. CONCLUDING REMARKS

What has happened over the course of the last 25 years has not altered the conclusions reached by the Court with regard to the principle of non-intervention. A Security Council-authorized military intervention or administration and security presence on the territory of a state on the basis of grave violations of human rights and humanitarian law do not fall within the prohibition of intervention in the internal or external affairs of states. On the contrary, unilateral military interventions or the provision of support to secessionist movements without any SC backing that occurred during these years are simply, to use the words of the Court in its first judgment, also remembered in its 1986 judgment, the expression of:

the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself.\textsuperscript{27}

Certainly, the recent case of some states going beyond the scope of the authorization provided by SC Resolution 1973 (2011) by using force and actively supporting the rebels fighting against the Gaddafi dictatorship in Libya raises a new challenge to the principle of non-intervention. The fact that this use of force goes further than the objective of protecting the civilian population has met with criticism by some states, including China, Germany, and Russia. This practice does not allow an extension of the concept of R2P and consequently a narrowing of the principle of non-intervention to be drawn. What is certain is that the warning of the celebrated French politician and thinker Jean Jaurès, issued at the beginning of the twentieth century, remains unheeded nearly 100 years later: ‘Donner la liberté au monde par la force est une étrange entreprise pleine de chances mauvaises. En la donnant, on la retire. Et les peuples gardent rancune du don brutal qui les humilie.’\textsuperscript{28}

\textsuperscript{26} Nicaragua, supra note 1, at 134–5, para. 268.
\textsuperscript{28} J. Jaurès, L’Armée nouvelle (1910), reprinted in 1992, Vol. 1, at 125 (author’s translation: ‘To free people by force is a strange undertaking full of hazards. By setting them free, their freedom is taken away. And people begrudge the brutal gift that humiliates them’).