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"A few words on Non-Intervention"- Understanding the development of the Principle of Non-Intervention through a Critical Constructivist Lens

Master's Thesis

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« Non-intervention, c'est un mot métaphysique, et politique, qui veut dire à peu près la même chose qu'intervention »[*]

- Talleyrand, 1830

*Quoted in Fœssel, Michaël. "L'intervention de l'État: Éclairages Métaphysiques." *Esprit (1940-)*, no. 370 (12), Editions Esprit, 2010, p.175

Περίληψη

Η Αρχή της Μη Επέμβασης θεωρείται ως ενα από τα πιο βασικά θέματα του Διεθνούς Δικαίου αλλά ταυτόχρονα και μια από τις πιο νεφελώδεις έννοιες αυτού. Επιπλέον, στην πρόσφατη ιστορία οι επεμβάσεις έχουν αυξηθεί σε αριθμό παγκοσμίως. Κάθε μια από αυτές τις επεμβάσεις έθεσε σε αμφισβήτηση την εγκυρότητα της γενικής απαγόρευσης χρησιμοποιώντας ως δικαιολογία νέες νομικές θεωρίες που την υπονόμευαν. Παρόλα αυτά η σωρευτική τους επίδραση απετέλεσε και μια αντίδραση σε αυτήν την προσπάθεια, έτσι ώστε πολλά κράτη να υπογραμμίζουν τη σημασία της Αρχής σε μια εποχή γεωπολιτικής ρευστότητας.

Ο στόχος της παρούσας διπλωματικής εργασίας δεν είναι μια τυπική νομική ανάλυση της Μη Επέμβασης, αλλά η δημιουργία μια νέας ερμηνείας της Αρχής κατανοώντας την ανάπτυξή της μέσω ενός κριτικού κοστρουκτιβιστικού πρίσματος (critical constructivism). Η άποψή μου είναι ότι η Αρχή της Μη Επέμβασης εξαρτάτο πάντα από την ύπαρξη μιας πολιτισμικής ιεραρχίας, όπως επισημαίνουν και οι πρόσφατες εξελίξεις. Αυτό το γεγονός διασαφηνίζεται ιχνηθετώντας τη Μη Επέμβαση όχι μέσω της Δια-Ευρωπαϊκής ιστορίας αλλά μέσω γεγονότων της αποικιοκρατίας την εποχή του ιμπεριαλισμού. Για το σκοπό αυτό, εφαρμόζω διαλογική ανάλυση (discourse analysis) σε κείμενα του 19ου αιώνα, συμπεριλαμβανομένου του "Λίγα λόγια για τη Μη Επέμβαση» του Mill, για να αποκαλύψω το διαϋποκειμενικό πλαίσιο στο οποίο γράφτηκαν.

Λέξεις- Κλειδιά: μη-επέμβαση, κοστρουκτιβισμός, κυριαρχία, αποικιοκρατία, ανθρωπιστική επέμβαση

Abstract

The Principle of Non-Intervention is regarded to be one of the most fundamental parts of International Law. Yet, it is widely considered as one of its most nebulous concepts. Moreover, in recent history interventions have proliferated around the world. Each of these interventions has called into question the validity of the general prohibition by justifying themselves through novel legal doctrines that undermine it. However, their cumulative effect has also been a reaction to this effort, many states re-iterating the importance of the Principle in an era of geopolitical flux.

This dissertation's purpose is not to be a formal legal analysis of Non-Intervention. Rather, by understanding the development of the Principle through a critical constructivist lens, I produce a novel interpretation of it. My argument is that the Non-Intervention Principle has always been contingent on the existence of a civilisational hierarchy and recent developments further highlight that. This fact is elucidated by tracing Non-intervention not through intra-European history but rather through the colonial encounter at the age of imperialism. To do so, I use discourse analysis on 19th century texts, including Mill's "a few words on non-intervention", to reveal the intersubjective context in which they were written.

Key-words: non-intervention, constructivism, sovereignty, colonialism, humanitarian intervention

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Introduction

The Principle of Non-Intervention has been part of International Law since its inception[1], yet despite this it is one of its most nebulous concepts. For Vaughan Lowe writing in 2007 it is "one of the most potent and elusive of all international principles" (ref), which does not deviate much from Percy Henry Winfield who wrote in 1922 that "the subject of intervention is one of the vaguest branches of international law"[2]. Yet despite it being regularly invoked as a fundamental principle by states, scholars and the International Court of Justice, intervention has remained a regular feature of international politics. During the last thirty years alone, which coincide with the end of the Cold War and the beginning of what President George HW Bush called a "New World Order"[3], we have seen interventions take place *inter alia* in Somalia, Bosnia, Kosovo, Afghanistan, Iraq, Syria, Libya, Georgia, Yemen and Ukraine. Each one presented a new challenge for the Principle of Non-Intervention, either by invoking established exceptions or attempting to forge novel legal doctrines[4]. Collectively, they question whether it could credibly be said that such a principle exists at all. Yet, rising powers such as China and India have made it a cornerstone of their foreign policy and their conceptualisation of the international system at large. One can therefore observe a geopolitical tug-of-war dynamic in the -ostensibly- legal debate over the Principle.

[1] See Zurbuchen, S. (2010). Vattel's Law of Nations and the Principle of Non-Intervention. *Grotiana*, 69-84. for its place in Vattel's system of International Law and Rubin, A. (1995). International Law in the Age of Columbus. *Netherlands International Review*, 5-35. for an even earlier account of the international norms of Europe during the transition to modernity.

[2] He goes on to say that " [intervention] could be considered anything from a speech in Parliament by Lord Palmerston to the partition of Poland" P. H. Winfield, 'The History of Intervention in International Law', *British Year Book of International Law*, 3 (1922–23), p. 130

[3] Quoted from George H.W. Bush's speech before a joint session of Congress on Sept. 11, 1990

[4] For example NATO's interventions in Kosovo and Bosnia caused a debate as to whether there should be a humanitarian exception to the principle. See Cassese, Antonio. "Ex iniuria ius oritur: Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?" *European Journal of International Law*, 1999: 23-30.

However, upon examination of the historical record, it becomes clear that this has *ab ovo* been the case. My aim is to elucidate why it has remained so vague and has historically been so unevenly applied. Thus, this essay is not yet another *lex lata* analysis of the Principle as that ground has already thoroughly been covered[5]. It is not a study from within International Law but rather it belongs in the emerging academic discipline that is at the intersection of International Relations and International Law. It examines questions of International Law from the perspective of International Relations, starting from the fundamental axiom that "a states 'motivations for creating and complying with IL are outside of the law"[6].

Examining the Principle of Non-Intervention from the perspective of International Relations leads to a new set of research problematics and tools to examine them. IR asks *why* did states create the Principle and *why* do they breach it when they do, not the narrow legal question of what it entails and whether it was breached. Yet, answering the first set of questions has important connotations for the latter. My claim is that employing a critical constructivist lens on the Principle yields novel and useful insights for its current function in International Law.

Conventional narratives of the history of International Law acknowledge that IL's initial domain was the nations of Europe and it gradually into encompassing a global "international society"[7]. However, in doing so they also place the origins of these rules in intra-European history . This approach obscures how it was the colonial encounter itself that had a crucial causal role in the formation of this, initially European, International Law. By tracing the historical trajectory of the Principle, as it has been discursively produced and reproduced by the authorities on International Law, a very clear pattern emerges. The Principle was never conceived as universal, but it was

[5] See Miltiadis Sarigiannidis. "Η αρχή της μη επέμβασης/μη ανάμιξης ανάμεσα στα κράτη [the principle of non-intervention/ non-interference between states]". Athens: Sakoulas 2020 and Wood, Michael, and Maziar Jamnejad. "The Principle of Non Intervention." *Leiden Journal of International Law*, 2009: 324-381.

6 Jannina Dill. (2014) Legitimate Targets? Social Construction, International Law and US Bombing . Cambridge: Cambridge University Press p.27

[7] See Bull, H., & Watson, A. (1984). The expansion of International society. Oxford: Oxford University Press. as the archetypical English School account of how the intra-European order of the 19th century evolved into a global international society.

contingent on a 'standard of civilisation' achieved by states. Such a standard can only exist in a dialectical relationship; the civilised 'Us' against the uncivilised, barbarian and savage 'Other'. Just as white is unintelligible without black, heat is unintelligible without cold, and positive is unintelligible without negative, civilised is unintelligible with uncivilised and a European "Law of Nations" is unintelligible without extra-european anarchy. The development of the Principle of Non-Intervention is intimately connected with the development of late 19th century European Imperialism. This connection and its implications for the contemporary international system is what I examine. My conclusion is that the Principle of Non-Intervention although ostensibly universal today, has in practice never been and continues to not be so. Its connotation is so intertwined with the 'standard of civilisation' discourse through which it emerged that one can see this reproduced in contemporary politics, leading to an unequal application of the Principle that maps into past colonial boundaries.

The essay is split into four main chapters. The first chapter is an outline of the current legal status of the Principle of Non-Intervention. It shows how it has been articulated in modern international law through the United Nations Charter and the jurisprudence of the International Court of Justice, as well as how these sources are interpreted in the IL literature. As such, provides the necessary context to set the stage for the historical analysis. The second chapter is dedicated to crafting the theoretical framework of the analysis. Based *inter alia* on the work of Kratochwil, Sinclair, Weldes and Wendt, as well as Gadamer's philosophical hermeneutics, I adopt a critical constructivist outlook focused on *understanding,* in the Webberian sense[8], the Principle of Non-Intervention by examining the intersubjective matrix in which its proponents articulated it. This framework emphasises the role of language as being ontologically constitutive of the world rather than simply a means of accessing it. The third chapter utilises this theoretical framework by examining the foundational treatises on International Law from the second half of the 19th century when IL was formally established as an independent academic discipline in the era's hegemon, the British Empire, while considering its pre-history in the works of Vitoria, Grotius and Vattel. In addition, it analyses the titular "A few words on Non-Intervention" by John Stewart Mill, which

[8] See Hollis, M., & Smith, S. (1990). Explaining and Understanding in International Relations. London: Clarendon Press. for the distinction between *Understanding* and *Explaining,* which is further elaborated on in Section 2.2

was crucial in discursively producing the meaning of “non-intervention”. Finally, the fourth chapter discusses the implications of this analysis for our contemporary understanding of non-intervention.

Chapter 1. The Law on the Principle of Non-Intervention

Before analysing the development of the Principle of Non-Intervention, it must first be clearly defined. The purpose of this chapter is to analyse the Principle *lex lata*, in order to firmly establish its content. This is a surprisingly difficult task, as Non-Intervention is unique in being both a widely accepted principle of international law and one that is hard to locate and precisely define. This is mainly for two reasons. Firstly, it is often treated indistinguishably from the Prohibition on the Use of Force, which is much more clearly regulated in the United Nations Charter. Secondly, the language of non-intervention is regularly invoked in a political rather than a legal context, obscuring the demarcation between what International Law prohibits as an unlawful intervention and what is merely an unwelcome, but ultimately legally permitted, act of interference[9].

The Chapter is split into three main sections. The first section establishes the autonomous existence of the Principle of Non-Intervention, as both ontologically and functionally separate from the Prohibition on the Use of Force. The second section defines the principle of non-intervention in terms of its two fundamental components; sovereignty and coercion. Finally, the third section briefly discusses humanitarian intervention as a possible derogation from it.

1.1 The autonomous existence of the Principle of Non-Intervention

1.1.1 The Origins of the Principle

The Principle of Non-Intervention is one of the oldest principles of international law, as it has existed already from the discipline's 'pre-history', before it became professionalised in the 19th century. It is commonly attributed to the system that emerged from the Treaties of Westphalia in 1648, which effectively ended the medieval

[9]Wood, M., & Jamnejad, M. (2009). The Principle of Non Intervention. *Leiden Journal of International Law*, 324-381 have many such examples, such as Chinese objections to the Dalai Lama's reception by the US Congress Canada's objection to De Gaulle's "Vive le Québec libre" speech in Montreal. Both objections were couched in the language of non-interference/ intervention in the nation's internal affairs.

concept of hierarchical sovereignty in favour of a horizontal system of independent states[10]. However, historians have argued that this interpretation of the Treaties is anachronistic, attributing this narrative as having emerged mainly in the 1960s and 1970s[11]. Instead, one can look at Vattel as the progenitor of the modern concept of an international law of sovereign states[12]. Moving away from conceptions of the world as a society governed by natural law, he instead saw an *international* system, where state authority is derived locally. He thus made sovereignty an *external* property of the state, one that is intelligible vis-a-vis the other states and the freedom that one enjoys from the others[13].

By having a concept of external sovereignty as the cornerstone of international law, a norm of non-interference between sovereigns logically follows, and thus is intertwined with the concept of sovereignty itself. Vattel was fully cognisant of that and wrote the first formulation of the Non-intervention Principle explicitly as an extension of sovereignty and logically deduced from political independence in the second book of *Le droit des gens*:

> "C'est une conséquence manifeste de la Liberté & de l'indépendance des Nations, que toutes sont en droit de se gouverner comme elles le jugent à propos, & qu'aucune n'a le moindre droit de se mêler du Gouvernement d'une autre. De tous les Droits qui peuvent appartenir à une Nation, la Souveraineté est sans-doute le plus précieux, & celui que les autres doivent respecter le plus scrupuleusement, si elles ne veulent pas lui faire injure."[14]

Non-Intervention and Sovereignty can be seen as two sides of the same coin. One presupposes the other. Non-Intervention is necessary to allow for the possibility of sovereignty, on the other hand sovereignty produces non-intervention in inter-state relations as its logical extension. This is the *essence* of the Principle, and the

[10] Σαρηγιαννίδης, Μ., , Κ. (2021). Η αρχή της μη-επέμβασης/ μη ανάμιξης ανάμεσα στα κράτη: Όρια και σύγχρονες προκλήσεις στην διεθνή έννομη τάξη. Θεσσαλονίκη: Σακκουλας. p.5

[11] Pitts, J. (2013). Intervention and sovereign equality: legacies of Vattel. In S. Recchia, & J. Welsh, *Just and Unjust MIlitary Intervention* (pp. 132-153). Cambridge: Cambridge University Press. p.136

[12] ibid p.137

[13] Zurbuchen, S. (2010). Vattel's Law of nations and the Principle of Non-Intervention. *Grotiana*, 69-84. p.80

[14] Vattell, E. (1757) *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains.* Paris: Bibliothèque nationale de France. Book 2, par. 57
accessible online at https://gallica.bnf.fr/ark:/12148/bpt6k865729/f5.item

International Court of Justice has repeatedly affirmed it is so. In the case of *Paramilitary Activities in and Against Nicaragua*, it found that

> "The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference ; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law."[15]

Previously, in the *Corfu Channel* case, the Court had found that the Principle of Non-Intervention is necessary to preserve the sovereignty of weaker states against the strongest, demonstrating again its role in safeguarding external sovereignty- ie sovereign equality. Dismissing Britain's defence that its intervention had been limited and lawful, as it was aimed at retrieving evidence for an investigation, it emphatically stated that:

> "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to 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, i*t would be reserved for the most powerful States*, and might easily lead to perverting the administration of international justice itself." (emphasis added)[16]

Non-intervention's position in international law is thus almost transcendental in the Kantian sense because it is an *a-priori* necessity to have an international system as commonly conceived. Not only is it "part and parcel of customary international law", but a as Robert Jennings opined in *Nicaragua*, it is much older than the UN system itself and all other multilateral treaties which the case was concerned with[17].

1.1.2 Non-Intervention and Prohibition of the Use of Force

As Buchan and Tsagourias argued, there is an *ontological distinction* between the Prohibition of the Use of Force and the Principle of Non-Intervention[18]. As we have seen above, the latter has from its inception to modern ICJ jurisprudence been a corollary of sovereignty. On the other hand, the Prohibition on the Use of Force is concerned with violence as such and its prohibition as a *method* in international politics. Violence is *suis generis* in its destructive effects and the UN Charter removes it as a lawful choice for states (barring exceptions of course). On the other hand non-intervention is particular to the structure of the international system. A prohibition of

[15] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Reports 14 par. 202 (**hitherto referenced simply as *Nicaragua*)**

[16] Corfu Channel (United Kingdom v Albania) (Merits) [1949] ICJ Reports 35 p.35

[17] *Nicaragua* (Dissenting opinion of Sir Robert Jennings) p.535

[18] Tsagourias, N., & Buchan, R. (2017). The Crisis in Crimea and the principle of non-intervention. *International community law review*, 165-193. p.173

violence could exist in a world without sovereign states. At the same time, intervention can take many forms, not necessarily physical violence. They are therefore autonomous principles.

However, in practice they often overlap. The use of force by one state against another is *a-priori* an intervention on its sovereignty. But not all interventions are severe enough to be considered violations of the Prohibition on the Use of Force. In *Armed Activities on the Territory of the Congo*, the Court ruled that it was due to the degree of intervention being severe enough that it could be characterised as a violation of the prohibition on the use of force. It found that

> "In relation to the first of the DRC's final submissions, the Court accordingly concludes that Uganda has violated the sovereignty and also the territorial integrity of the DRC. Uganda's actions equally constituted an interference in the internal affairs of the DRC and in the civil war there raging. The unlawful military intervention by Uganda was *of such a magnitude and duration* that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter"[19]

It is the "magnitude and duration" of the action that turn it from just a violation of non-intervention to a violation of Article 2.4 of the UN Charter. Similarly in *Nicaragua* the Court found that the United States committed an unlawful intervention by supporting the Contras, but nevertheless this particular action did not amount to the violation of the use of force because the US did not have *effective control* over them[20]. In both cases, there was a legal distinction between the two principles.

…

Overall, this section showed that the Principle of Non-Intervention is both autonomous and deeply intertwined with the concept of sovereignty, as they are both facets of the independence of states in the international system. Its overlap with the Prohibition of Force occurs in the *facts* of a case, not in *law* as their origins are philosophically distinct. In fact, as Nicaragua showed, intervention can take many forms beyond violence.

1.2 Defining Intervention

Establishing the independence of the Principle sketched the borders of the Principle *vis-a-vis* the rest of international law. However, what is contained within those borders is

[19] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)
(2005) ICJ Reports par.165

[20] ibid par. 242 & 115

still unclear. The purpose of this section is to do so by defining intervention in customary international law. For Oppenheim, intervention is " [a] dictatorial inference… in the affairs of another state for the purpose of maintaining or altering the condition of things" [21]. In *Nicaragua* one finds a more extensive definition that is nevertheless consistent with the above shorter formulation. The Court found that

> " 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 "22 (emphasis added)

This excerpt is key in understanding Intervention. The court lists a series of areas where intervention could take place; from the state's economic system to foreign policy. It also does not restrict the method by which it would be achieved, merely that use of force is a "particularly obvious" one. Instead, the criteria for what constitutes a prohibited intervention hinge on two concepts. Firstly it must be targeted on a domain where the intervened state should otherwise be able to decide freely, secondly the *intent* of the action by the intervening state must be to *coerce* the other on such choices. Following Tsagourias and Buchan, the latter describes the *type* of action that is required whereas the former the *domain* on which such action must take place if it is to

These two aspects will be addressed separately below.

1.2.1 Delineating the *domaine réservé*

The first pillar of the definition of intervention is the protected domain in which, following the formulation in *Nicaragua,* "a state is permitted by the principle of sovereignty to decide freely". This is often referred to as the *domaine réservé* of a State,

[21] Jennings, R., & Arthur, W. (2008). *Oppenheim's International Law.* Oxford: Oxford University Press. p. 305

[22] *Nicaragua* par.205

since it is a *domain* within which it *reserves* the right to make decisions[23]. In other words, the *domaine réservé* encompasses areas of state policy that are not covered by international obligations, whether customary or treaty-based. It is compatible with Vattel's conception of international law, and specifically his formulation on non-intervention quoted above, as it can be inferred with the "liberty and independence of nations". Because a nation's primordial property is their sovereignty, the only authority that international law has is the one that a state cedes to it[24]. It is therefore a corollary of the principle of *sovereign equality* as this account of sovereignty produces a horizontal system of states rather than a hierarchical international system. In the United Nations system, sovereign equality, and by inference *domaine réservé,* is found in Article 2§1 of the Charter, which simply states that "The Organization is based on the principle of the sovereign equality of all its Members"[25].

Since international organisations became a feature of the international system in the early 20th century, the term 'domestic jurisdiction' has also been used as synonymous with the *domaine réservé,* to indicate the area that is outside of the organisation's jurisdiction. In Article 15§8 of the League of Nations Covenant, the so-called domestic jurisdiction clause stated that:

> If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.[26]

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[23] Nowak, C. (2018). The changing law of non-intervention in civil wars- assessing the production of legality in state pracrice after 2011. *Journal on the Use of Force and International Law*, 40-77.
p.47

[24] Pitts, J. (2013). Intervention and sovereign equality: legacies of Vattel. In S. Recchia, & J. Welsh, *Just and Unjust MIlitary Intervention* (pp. 132-153). Cambridge: Cambridge University Press. p.140

[25] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: https://www.refworld.org/docid/3ae6b3930.html [accessed 8 November 2021]
(hitherto referenced as *UN Charter)*

[26] League of Nations, *Covenant of the League of Nations*, 28 April 1919, available at: https://www.refworld.org/docid/3dd8b9854.html [accessed 18 November 2021]

This clause was also included, albeit in an altered form that carved a security council exception, in the United Nations Charter. Article 2§7 postulates that

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[27]

Although both these Articles are *lex specialis* for the international organisations and not include inter-state relations, they nevertheless affirm the existence of a sphere that is solely reserved for sovereign states[28]. Having established that there is at least some domain that is completely within the jurisdiction of the sovereign nation state and that sovereignty itself is a horizontal concept that applies equality regardless of a state's power, the question becomes what precisely the limits of this domain are.

This question does not have a static legal answer. As international politics evolve, the international system itself changes. The state system of 2021 is unrecognisable in 1921 and the one in 1921 would have been even more alien to those living in 1821. This is not because geographical borders have so drastically changed, it is the very structure of the international system that has. In 1821 there were no proper international organisations, thus sovereignty was filtered solely through states, their complicated hereditary monarchical systems as well as colonial possessions and the diverse ways in which they were coded in international law[29]. By 1921 there were not only sovereign states and colonies but also League of Nations treaties on the rights of minorities as well as League of Nations mandates, whose sovereign status was itself divided in three different tiers, with differently sized *domaine réservés*[30]. In 2021 formal colonialism has ended, populating the globe with sovereign states, but they coexist with the

[27] *UN Charter*

[28] Kunig, P. (2008). Prohibition of Intervention. In A. Peters, *Max Planck Encyclopedia of Public International Law.* Oxford: Oxford University Press. par.11

[29] For an account of how each colonial Empire had a unique structure of sovereignty vis-a-vis their settler colonies see Pagden, A. (1998). Lords of all the World: Ideologis of Empire in Spain, Britain and France c.1500-c.1800. New Haven: Yale University Press.

[30] For an international law analysis of the mandate systems see Wrigth, Q. (1968). Mandates Under the League of Nations. New York: Greenwood Press.

international legal infrastructure of the United Nations as well as a multitude of regional organisations and multilateral human rights treaties and international trade treaties, all of which have an effect on a state's *domaine réservé.*

Simply put, there has never been a static conception of sovereignty or its corresponding *domaine réservé* in history. To define such a domain of sole domestic jurisdiction at a specific moment in time, one has to consider the contemporary international legal and political context. This conclusion was also reached by the Permanent Court of International Justice in the case of *Nationality Decrees Issued in Tunis and Morocco.* In a dispute between the United Kingdom and France over the treatment the former's citizens received in the colonial possessions of the latter, France refused arbitration under Article 15§8 of the League of Nations Covenant, citing that the matter fell solely within its domestic jurisdiction[31]. In its decision that the issue was not solely domestic, the Court argued that:

> The words 'solely within the domestic jurisdiction 'seem rather to contemplate matters which, though they may very closely concern the interests of more than one state, are not in principle matters regulated by international law. As regards such matters, each State is sole judge. The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; *it depends upon the development of international relations*"[32]. (emphasis added)

The Court explicitly used the term *international relations* and not *international law* in its decision, allowing the possibility that not only strictly legal but also political developments affect the scope of domestic jurisdiction. Therefore, the domain covered by the Principle of Non-Intervention is itself both temporally contingent and also essentially open to interpretation on the extent to which recent 'developments of international relations' have affected it.

1.2.2 Defining Coercion

As discussed above, the second pillar of the definition of intervention is *coercion*. Even if an action undoubtedly targets the *domaine réservé* of a state, it nevertheless does not necessarily constitute an unlawful intervention. To illustrate that, let us consider a

[31]Ahmed, K. (2006). The domestic jurisdicction clause in the United Nations Charter: A historical View. *Singapore Year Book of International Law*, 175-197. p.180

[32] *Nationality Decrees Issued in Tunis and Morocco case (United Kingdom v. France)* [1923] PCIJ Reports (ser. B.) No. 4.

recent example. During a high profile interview with the New York Times editorial board in December 2019, US presidential candidate Joe Biden was question on whether he feels comfortable with the United States still having nuclear weapons in Turkey. As part of his reply, after characterising president Erdogan as an "autocrat", he said "what I think we should be doing is taking a very different approach to him now, making it clear that *we support opposition leadership"*. He continued " I am still of the view that if we were to engage more directly [with the opposition], we can support those elements of Turkish leadership that still exist … and enable them to *take on and defeat Erdogan."*[33]

Was Joe Biden promising a policy of unlawful Intervention vis-a-vis Turkey should he be elected? If anything is at the core of a state's domestic jurisdiction, it is the free choice of its government, thus his purported support of the opposition definitely clears the first criterion for intervention by targeting Turkey's *domaine réservé.* Yet, it would not be a violation of the Non-Intervention principle because it lacks the second component; coercion.

In the ICJ's *Nicaragua* formulation, "Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones"[34]. In Oppenheim's words, as quoted above, coercion is replaced with "forcible and dictatorial means … with the purpose of maintaining or altering the condition of things". Both point in the same direction, namely that for an illegal intervention there must be an intent to alter a State's policies that is carried out coercively. The definition of the means of intervention becomes essentially functional. It is not the case that one can a-priori distinguish between forms of intervention and judge some legal and some not. Rather, it is whether they have a coercive effect on a state's free choices that determine their legality.

Thus, the legal battleground on intervention shifts. The nature of the means (economic, social, discursive, financial etc) is irrelevant. All could potentially be employed for an illegal intervention if they pass the coercion test. Equally all means of intervention could result in action that is not considered an illegal intervention if such action does

[33] Editorial Board (2020, January 17). The Choice: interview with Joe Biden, *New York Times.* available at https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html

[34] *Nicaragua* par.205

not pass the same test. In the case of Joe Biden, his statement does not constitute a threat of intervention. Not because political statements cannot *a-priori* be a means of intervention, but because in this *specific* instance they would not have a *coercive* effect on Turkey. Its freedom of choosing government would not be restricted, although such choice might have a negative effect on the country's relationship with a prospective Biden administration.

The fact that an unlawful intervention can take many forms has been widely acknowledged in the UN General Assembly. It passed several resolutions on Non-Intervention during the Cold War period as the newly decolonised states wished to preserve their sovereignty against their former masters and the two superpowers wanted to legally prevent each other from further expansion. The 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty is the first significant one as it passed with 109 votes in favour, none against and the abstention of the United Kingdom[35]. It recognised that intervention could take many forms and was very thorough in protecting all facets of a state's sovereignty. However, it was passed in the First committee of the Assembly rather than the legal Sixth Committee and consequently the Court considered it a statement of political intent and not evidence of customary international law in the *Nicaragua* decision[36].

Instead, the resolution that the Court drew from was the Friendly Declarations Act of 1970 [37]. It was intended to be the landmark text on the law of intervention and passed triumphantly. Its function as legal *opinion juris* is evident by Clause 3, which stated that

> The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided

[35] UN General Assembly, Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, 21 December 1965, A/RES/2131(XX),

[36] Wood, M., & Jamnejad, M. (2009). The Principle of Non Intervention. *Leiden Journal of International Law*, 324-381. p.353

[37] UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV),

It therefore deserves to be considered at length as an indicator of the customary law on non-Intervention. Upon such examination it is clear that intervention is once again defined through a multitude of means with coercion being their common factor. The Principle of Non-Intervention reads in full

> No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.
>
> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from It advantages of any kind, Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.
>
> The use of force to deprive peoples of their national identity constitutes a violation of their inalienable fights and of the principle of non-intervention.
>
> Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.

The means of intervention include *inter alia* economic and political measures, assistance, finance and organisation of terrorists as well as taking a side in a civil war. However, all of these measures are in the service of *coercing* a state to either obtain an advantage or subordinate it. *Coercion* as such is defined cyclically through its effect on the receiving state. It therefore becomes a question of facts, not a question of law.

To demonstrate let us consider the *Nicaragua* case. One of the questions raised to the Court was whether the economic sanctions and other measures that the US imposed on Nicaragua constituted a violation of the non-intervention principle. It found that

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

as is here complained of as a breach of the customary-law principle of non-intervention.

So an economic embargo did not constitute an Intervention. It was not rejected because *a-priori* economic measures cannot be interventions, but because "such" actions did not pass the coercion test. The usage of the word "such" by the Court indicates that the assessment should be on a case-by-case basis. Given that a total embargo is the most severe economic action a state can take, the Court might as well had said that economic actions *in general* cannot be breaches of non-intervention. However, it did not because of intervention's functional definition.

1.3 Humanitarian Intervention

Since the end of the Cold War there have been many instances of manifest violations of the Non-Intervention Principle[38]. These were cases that force, which *a-priori* passes the coercion test. Most of them were justified by appealing to well-established exceptions to non-intervention. For example, the Iraq war's legal justification was a broad definition of self-defence[39], while Russias' intervention in Crimea was justified on the grounds of it being invited by the legitimate government of Ukraine, as well as assisting in self-determination [40]. Although these legal arguments are at a minimum dubious, they did not intend to forge entirely new categories of permissible intervention.

However, there were recent interventions that did precisely that. The so-called 'humanitarian interventions' since the end of the Cold War have been justified by their perpetrators by appealing to 'humanitarian intervention' as a legitimate exception to the non-intervention principle. This effort has been done both via the political and the legalistic route. Taking the political route, it has been argued that such interventions, while not being strictly legal under *lex lata* international law, are nevertheless legitimate

[38] It should be noted that humanitarian interventions did not start after the Cold War. There is a long history of humanitarian interventions, that dates back to at least the 19th century. Several such interventions also took place during the Cold War, with India's intervention in Bangladesh being a characteristic example. However, the end of the Cold War is selected as a cut-off to indicate our modern international world order, and thus discussions of contemporary humanitarian intervention begin from that point.
For a detailed list of humanitarian interventions in the 19th Century see Heraclides, A., & Dialla, A. (2015). *Humanitarian intervention in the long nineteenth century: setting the precedent.* Manchester: Manchester University Press.

[39] Anghie, A. (2004). Imperialism, Sovereignty and the Making of International Law. Cambradge: Cambridge University Press p.292;

[40] Tsagourias, N., & Buchan, R. (2017). The Crisis in Crimea and the principle of non-intervention. *International community law review*, 165-193. p.166

on moral grounds[41]. For example, Prime Minister Blair justified the Iraq war partly through humanitarian intervention; "it may be that under international law as presently constituted, a regime can systematically brutalise and oppress its people and there is nothing anyone can do about it […] this may be the law but should it ?"[42].

This political justification for undertaking something that is strictly-speaking illegal is, of course, a staple of international politics. One can find a similar dynamic in the contemporary debate on the US intervention in the Dominican Republic during the Lyndon B. Johnson administration[43]. Nonetheless, even the most powerful states are not willing to abandon any pretence of legality vis-a-vis their actions and thus these essentially political arguments inevitably also acquire a legalistic form[44].

As far as the United Kingdom is concerned, by 2013 it was already referring to an established "humanitarian intervention" doctrine in international law in a document outlining the government's *legal* position vis-a-vis its intervention in Syria. In this explicitly legal argument, the criteria outlined for a lawful, humanitarian intervention despite the lack of a Chapter VII Resolution where: "convincing, generally accepted evidence of a humanitarian catastrophe […] objectively clear that there is no alternative

[41] O'Hanlon, M. (2002). Winning ugly: Nato's war to save Kosovo. Washington, DC: Brookings Institution.

Blair, Tony (2004, March 4). Speech on the threat of Global Terrorism in Sedgefield , *The Guardian*

accessible at https://www.theguardian.com/politics/2004/mar/05/iraq.iraq

[43] This was another case where those in favour of the intervention knew that it was illegal under *lex lata* international law, but argued that it is nevertheless necessary due to 'higher' extra-legal considerations such as anti-communism and national interest.

See Chapter 6 of Koskenniemi, M. (2004). Gentle Civiliser of Nations: the rise and fall of international law, 1870–1960. Cambridge : Cambridge University Press.

[44] The question of why states always seek legal justification for their actions is a fascinating and complex one but beyond the scope of this essay. A great starting point for that debate is

Krasner, S. D. (1999). *Sovereignty: Organised Hypocrisy.* Princeton: Princeton University Press.

to use of force if lives are to be saved […] [and] the use of force must be necessary and proportional"[45],[46].

This position is despite there being no sufficient *opinion juris* to justify such a doctrine in customary international law. This is evident by the rejection of the legality of airstrikes on humanitarian grounds against Syria by nations as geographically and culturally diverse as China, Russia, Brazil, India, Rwanda, Ecuador, Venezuela and others[47]. Following the Kosovo intervention fourteen years prior, which was also justified explicitly on humanitarian grounds, there was a similar *opinio juris* of non-NATO states rejecting a humanitarian exception to non-Intervention[48].

Reframed as a 'responsibility to protect' , the United Nations have recognised humanitarian justifications for an intervention, but still under the already established exception of Security Council Resolutions, thereby excluding unilateral actions[49]. Thus, from a formalist *lex lata* perspective there is no humanitarian exception to the Non-Intervention Principle. However, there have been arguments by legal scholars in favour of it. These arguments are either strictly normative*ly* or are appeal to fundamental principles of International Law that, they argue, make sovereignty, and thus protection from intervention, contingent rather than absolute. These arguments will be assessed in Chapter 4, in light of the theoretical framework developed in chapter 2.

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[45]UK Prime Minister's Office, (2013, August 13) 'Chemical Weapon Use by Syrian Regime: UK Government Legal Position 'Policy Paper
available at www.gov.uk/government/publications/chemical-weapon-use-by-syrian- regime-uk-government-legal-position/chemical-weapon-use-by-syrian-regime-uk-government-legal-position-html-version.

[46] The United States holds the same legal position,
See The White House, (2013, August 31)' Statement by the President on Syria '
available at https://obamawhitehouse. archives.gov/the-press-office/2013/08/31/statement-president-syria

[47] Nowak, C. (2018). The Changing law of non-intervention in civil wars- assessing the production of legality in state practice after 2011. *Journal on the Use of Force in International Law*, 40-77 p.55

[48] Steinke, R. R. (2015). A look Back at NATO's 1999 Kosovo Campaign: A questionably "Legal" but justifiable exception? *Connections, 14*(4), 43-56. p.48

[49] UN Doc. A/RES/60/1 (2005 World Summit Outcome), paras. 138–139 reaffirmed by the Security Council in UN Doc. S/RES/1674 (2006)

…

This chapter has outlined a strictly formalist *lex lata* account of the Principle of Non-Intervention to serve as a foundation for the proceeding constructivist analysis to follow. The next Chapter will develop the theoretical framework on which the analysis will be done.

Chapter 2. Theory

The task of analysing principles of International Law through critical constructivism is an ambitious one. Although there is a growing number of critical IR constructivists looking into International Law, it still not a mainstream approach[50]. The purpose of this chapter is to construct a theoretical framework

that is able to analyse international relations from a critical constructivist perspective, by considering International Law (IL) through International Relations (IR) Theory. This is achieved by conceptualising IL as a special set of norms, thus allowing IR theories that focus on norm-production to be applicable to it. To do so, one must answer how should International Law be conceptualised from an IR perspective in general, and through critical constructivism specifically.

2.1 International Law in mainstream International Relations

There is no is no one theory of International Relations, but several largely incommensurable ones. They can be grouped into three broad categories; realism, liberalism and constructivism. Each category is unique in its fundamental assumptions of why states act the way they do. Realism in both its classical and neo-realist variants postulate that states act based on a rational calculation of their self-interest[51]. Liberalism is named so because in addition to rational self-interest, it also subscribes to a liberal teleology[52]. Constructivism bypasses the liberal-realist debate on whether cooperation is preferable to rational self-interest in an essentially anarchical system. Instead, it

[50] See Brunnee, J., & Toope, S. J. (2013). Legitimacy and Legality in International Law. Cambridge : Cambridge University Press. & Sinclair, A. (2010). International Relations Theory and International Law. Cambridge: Cambridge University Press.

[51]See, *inter* alia, Mearsheimer, J. (2001). The Tragedy of Great Power Politics. New York: Norton. & Waltz, K. (2010). Theory of international politics. Long Grove: Waveland Press.

[52] Although Neo-Liberals reject this idealism of traditional Liberalism. Instead they ground typically liberal values in international politics, such as co-operation and trust in international institutions, in rational self-interest as the realists.
See Keohane, R & Nye, J (1977). *Power and Interdependence: World Politics in Transition.* Boston: Little Brown and Company

problematises *anarchy* itself [53], as well as all other assumptions of international relations as socially constructed. As such, the perceptions of a state's interests, are also shaped by these social constructions.[54]

However, what all three theories hold in common is that states will act according to their perceived interests. International Law is thus seen as a product of states acting in their interests. In the words of Jannina Dill:

> "the main strands of IR theory, notwithstanding major differences, share the assumption that states 'motivations for creating and complying with IL *are outside of the law*" (emphasis added)[55]

Moreover, this asymmetric relationship between the political, and the legal, which is was established by one of IR's founding fathers, Hans Morgenthau. International Relations as a discipline was institutionally established in Western universities much later than International Law and its founding was precisely based on the primacy of the political[56]. This turn was seen as necessary to explain cause of the First World War and the "Twenty Year Crisis"[57]. Morgenthau demonstrated that their difference was not a matter of distinction but a matter of degree. Any issue would become a political one

[53] See Wendt, A. (1992). Anarchy is what States Make of it: The Social Construction of Power Politics. *International Organization*, *46*(2), 391–425 for a detailed analysis on the socially constructed nature of the anarchy assumption.

[54] Mainstream constructivism still maintains that states act according to interest and focus on interest formation. This holds in the more positivist end of constructivism such as Klotz, A. (1995). Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa. *International Organization*, *49*(3), 451–478 , where the USA reversed its policy on South Africa because it perceived adherence to the norm of racial equality to be in its interest. It is also the case in critical constructivism such as Weldes, J. (1996). Constructing National Interests. *European Journal of International Relations*, *2*(3), 275–318 , where she shows how the national interest itself is discursively constructed by elites.

[55] Quoted in Brunnee, J. (2015, September 23). A Constructivist Theory of International Law? Retrieved December 3, 2021, from https://www.ejiltalk.org/a-constructivist-theory-of-international-law/.

[56] Consider, for example, that the Chichelle Chair of International Law in Oxford University was established in 1852. While the Woodrow Chair of International Politics in Aberystwyth, the first IR department in the UK, was established only in 1919.

[57] Carr, E.H.(1964) *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations.* London: Harper

for a state if that state felt strongly enough about it; if it was it considered it a *vital interest*[58]. Thus, there is a role for International Law in regulating state behaviour and settling disputes, but the *political* looms large above this space, ready to be invoked if needed.

This is the angle through which International Law will be considered in this essay. Not *from within* its walls of legal analysis but *from without;* as a manifestation of state practice. This is particularly appropriate for the Principle of Non-Intervention, as we have seen it is a legal norm fundamentally entwined with state-sovereignty and therefore its interpretation often involves a state's vital interests.

2.2 International Law in Critical Constructivism

As discussed above, IR as a discipline considers the creation of and adherence to international law to be a product of the state's interests. In fact, it acquires its epistemological independence based on that premise. Constructivist IR in particular conceptualises International Law principles as a special kind of 'legal' norm amongst the more general set of norms that can be used to explain or interpret state behaviour. In his 1989 classic *Rules, Norms and Decisions,* Kratowtchil writes that "legal norms are not different from other norms by some intrinsic characteristic (such as sanctions, etc.) but become so only through the process of application"[59]. It is not the letter of the law *as such* in treaties, status or court decisions that distinguish it from non-legal norms but rather "the performance of rule-application to a controversy and the appraisal of the reasons offered in defence of a decision"[60]. For him a particular norm becomes a legal norm in international politics when it is employed as part of a legal justification for an action. Principles of International Law such as Non-Intervention would therefore be

[58] For an extended account of Morgenthau's views on the subject see Koskenniemi, M. (2000). Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations. In M. Byers, *The role of Law in International Politics* (pp. 17-34). Oxford: Oxford University Press. and chapter 6 of Koskenniemi. M. (2004) *The Gentle Civiliser of Nations: 1870-1960.* Cambridge: Cambridge University Press

[59] Kratochwil, F. (1989). *Rules, Norms and Decisions: on the conditions of practical and legal reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press p.251

[60] ibid p.18

considered *law* because we have collectively decided that such a norm can be used in particular kind of *practical reasonin*g[61].

The term *practical reasoning* is crucial in this analysis because it links Kratowchil's conception of International Law with the Gadamerian framework of philosophical hermeneutics. In *Truth and Method* Gadamer distinguishes between *practical* and *theoretical* knowledge through the Aristotelean distinction of *phronesis* and *episteme* in the Nicomechean Ethics[62]. Aristotelean *episteme,* or Theoretical knowledge is a knowledge that is independent of the subject, in other words it is objective. On the other hand *phronesis,* or practical knowledge exists intersubjectively and emerges through interpretation.[63] As established in Section 2.1, in accordance with Gadamer, human affairs are mediated through the intersubjective layer of language, which is where understanding takes place. An objective or 'scientific' inquiry is therefore not appropriate for the analysis of law, because it is essentially a human construct that is subject to interpretation. It belongs to the domain of hermeneutic analysis. In the words of Gadamer:

> " [the distinction between *episteme* and *phronesis*] is a simple one, especially when we remember that science for the Greeks is represented by the model of mathematics, a knowledge of what is unchangeable, a knowledge that depends on proof that can therefore be learned by anybody. A hermeneutic of the human sciences has certainly *nothing to learn from* from mathematical as distinguished from moral knowledge. The human sciences stand closer to *moral knowledge* than to that kind of "theoretical knowledge. They are "*moral sciences"*.[64] (emphasis added)

So, by considering *legal* reasoning as *practical* reasoning, we are already under the hermeneutical umbrella. Principles of international law should therefore be interpreted in light of the intersubjective context in which they were formulated, because the meaning of language *tout court* is not objective, but contingent on these pre-theoretical prejudices of the interpreter and the interpreted. To not acknowledge this and proceed

[61] ibid p.18 continued

[62] Gadamer, H.G. (2019 [1960]). *Truth and Method.* London: Bloomsbury p.324

[63] For a detailed analysis of Gadamer's theory of understanding in secondary literature see Dostal, R. (2002). *The Cambridge Companion to Gadamer.* Cambridge: Cambridge University Press. pp.36-52

[64] *Supra note 83* p.325

with an 'objective' theoretical analysis of the text is to effective obscure one's own prejudices, by elevating themselves beyond the linguistic, intersubjective framework in which they are embedded.

2.2. Between Habermas and Foucault : a third way of discourse analysis

Most constructivists who emphasise the malleability of norms precisely due to their constructed nature. Constructivism flourished in the period between the end of the Cold War and 9/11 because it was a theoretical framework that accommodated for change. IR theorists and policymakers believed that at that time of liberal hegemony, new norms of international politics based on human rights and inter-state cooperation could be established.[65] However, under Gadamer's framework although norms are socially constructed, they are grounded in great historical depth. Similarly to geological transformations, changes of norms occur in *deep time.* Individuals cannot escape the hermeneutical cycle and 'rationally' construct norms. Attempts to do so fall precisely into the trap of obscuring one's own prejudices. The norms produced are not as stable as the ones emerging through the organic development of language and meaning that occurs when humans of different traditions interact.

This stance of Gadamer's was the source of great disagreement with Habermas. In Habermas' speech act theory (which is also operative in Kratotwchil), individuals are consciously aware of the normative context in which they operate and are able to rationality choose between different norms[66]. Habermas saw Gadamer's theory as deleterious, because it denied the possibility of moral progress, as it stipulates that rationality cannot break the hermeneutic cycle. Gadamer's reply was that the impenetrability of the cycle by a supposed transcendental rationality does not preclude moral progress. However, such progress happens *from-within* a tradition through interactions with other traditions and cannot be imposed rationally or otherwise.[67] In

[65] Sinclair, A. (2010). International Relations Theory and International Law. Cambridge: Cambridge University Press. p.22

[66] ibid p.35

[67] See Mendelson, J. (1979). The Habermas-Gadamer Debate. *New German Critique*, 44-73 & Gall, R. (1981). Between Tradition and Critique: The Gadamer-Habermas Debate. *Auslegung: a journal of philosophy*, 5-18.

other words, there is always a trace of the past in the present. Investigating that 'past', elucidates the present.

Contrary to Foucauldean techniques of genealogy[68], Gadamer's understanding is not so much a product of power as much as it emerges as a product of dialogue. Foucault is central in most critical constructivist theories of IR which utilise discourse analysis. They typically focus on how elites manipulate language to serve the ends of power. Such an account sees human relations as characterised by domination and subjugation. In doing so, it ignores the extent to which elites themselves are also 'trapped' in intersubjectivity and cannot escape the hermeneutic circle[69]. For Gadamer, authority in general does not indicate coercion, but the accumulated consent over meaning[70]. Power relations still play a role, but it is not ontologically fundamental. Rather, power can distort meaning, but similarly to rationality, is not central in producing it. Thus, although the next section will demonstrate how the 19th century environment of imperialism and social-darwinian racism was central to the development of legal notions of intervention and sovereignty, these effects are much harder to displace. This is because rather than being applications of power by the elites, they were present *within* the consensual development of these legal norms in the Western world.

The practical consequence of adopting this framework is that the very meaning of *sovereignty* and *intervention* in the Principle of Non-Intervention will be analysed *from-within* the intersubjective world of those who formulated it. By taking into account the historical context of the period when the Principle was established, the next section will produce such an interpretation of the Non-Intervention Principle.

[68] Foucault, M. (1995). *Discipline and Punish:* the birth of prison. London: Vintage

[69] Weldes, J. (1999). *Cultures of insecurity: states, communities and the production of danger*. Minneapolis: University of Minnesota Press is a very good example of a classic volume of critical constructivism, which is fundamentally based in Foucauldian geneaology.

[70] *supra note 84* Chapter 5 is a detailed account of Gadamer's concept of authority.

Chapter 3. The development of Non-Intervention

Building from the theoretical framework of Chapter 2, this chapter will explore the development of the development of the Non-Intervention Principle though the lens of critical constructivism. As was explained above, legal norms do not differ from other norms of human society except in their enforcement. Therefore, they may be analysed discursively like all other norms in International Relations. By examining the language in which they are expressed, not simply as the medium but as the message itself, a more contextual understanding of the Principle emerges.

My argument is that the Non-Intervention Principle and sovereignty as its corollary, were not designed neither to be primary nor universal in International Law. Rather, they are derivative from a more fundamental notion; the distinction between civilised and uncivilised. Conventional histories of International Law which consider it to be a European creation that was gradually expanded to encompass the globe. In their narrative, colonial relations or relations between 'civilised' Europe and the 'uncivilised' Rest of the world are a peripheral question of Law. However, following Anghie[71], I take the position that it was precisely that civilisational distinction which is fundamental to international law, and from which both sovereignty and non-intervention are derived.

There are two distinct but related ways which Non-Intervention is irreducibly linked to imperialism. Firstly, it is articulated as a logical outgrowth of an international *society* of European nations. This society does not emerge internally but rather through a dialectical relationship with the peoples excluded from it. As it will be shown, Non-Intervention is thus not a potentially universal principle that was restricted in Europe due to political contingencies, but rather a privilege afforded to the civilised precisely because they are contrasted with the uncivilised. Secondly, the development of Non-Intervention can also be attributed to the colonial encounter as a 'realist'[72] consequence of imperial expansion. As the theatre of competition between European states shifted

[71] Anghie, A. (2004). Imperialism, Sovereignty and the Making of International Law. Cambradge: Cambridge University Press. (**hitherto referenced as Anghie (2004)**

[72] 'Realist' is placed in quotation marks because realism is still circumscribed by the contours of the intersubjective framework, as explained in Chapter 2.

from the core to the periphery in the latter half of the 19th century, the emergence of a Norm of Non-Intervention between them in the Continent was a natural development.

This chapter is split into three main sections. The first section is a concise account of the evolution of international law in relation to developments of the international system. It starts with the naturalist jurisprudence that characterised the first colonial encounter. Then we skip to the 19th century, when international law became formalised. The period of informal empire that lasted until the middle of that century is concisely described, in order to highlight the transition to the late 19th century imperialism, which coincided with the formation of international law as we know it today. Departing from historical developments, the third section focuses instead on the philosophical foundations of international law, specifically the shift to positivist jurisprudence and its 'scientific' structure, which still characterises the discipline today. It argues that a hierarchy of civilisations is essential for the coherence of positivism and therefore it is *ab ovo* embedded in the Non-Intervention Principle. Finally, to demonstrate that, the third section analyses contemporary texts on the Non-Intervention Principle by Mill, Montague and Westlake.

3.1. European expansion and the beginning of international law

Chapter 1 mentioned that Vattel is the progenitor of the so-called "Westphalian System" in International. This was because he introduced an international system comprised of sovereign states, with the task of international law being to regulate their relations. At a time, it was a major departure from the dominant strain of international legal thinking, which was Naturalism, as expounded by Francisco de Vitoria and Hugo Grotius[73]. Naturalism in international legal thinking is the theoretical disposition that by presupposing a pre-historic 'state of nature', one can rationally infer universal rules of conduct that can 'plug the gaps' in international law where no positive rules exist[74]. When International Law became professionalised in the late nineteenth century, the overwhelming majority of scholars followed Vattel in rejecting natural law as the basis

[73] Grotius, H. (2012 [1625]). *On the Laws of War and Peace*. Cambridge: Cambridge University Press. ; Victoria, Franciscus de, De Indis et De Jure Belli (Ernest Nys ed., John Pawley Bate trans. (1917 [1532]), Washington, DC: Carnegie Institution of Washington

[74] Anghie (2004) p. 21

of the international system[75]. Instead, they subscribed to positivist jurisprudence which "is based on the notion of the primacy of the state. States are the principle actors of international law and they are solely bound by what they have consented to"[76].

Core principles of international law such as sovereignty and non-intervention have entirely different philosophical foundations depending on whether we are operating within a positivist or a naturalist paradigm. Therefore, before analysing sovereignty within the positivist context of the 19th century, it is important to mention its naturalist ancestor. In doing so, the importance of the shift to positivism will be highlighted.

3.1.1 International Law and the first colonial encounter

Written in 1532, Vitoria's *De Indis et de Jure Belli* is one of if not the first modern text of international law. Its subject matter, as inferred from its title "the Indians and the laws of war" was the laws regulating the relations between the Spanish and the 'Indian' natives of the newly-discovered Americas. It was a breakthrough at the time because prior to him all encounters of Europeans with non-Europeans, such as the Muslims in the East, had been regulate by Divine Law. In the middle ages, Europe was from a legal perspective a singular 'christian realm', defined as such in contrast to its non-christian neighbours. Therefore, sovereignty was legitimate only through religious authority, with the Pope enjoying universal jurisdiction within Christendom. The fact that territorial sovereignty was contingent on the Pope's divine approval is evident in the Treaty of Torsedillas where the Americas were divided between Portugal and Spain[77].

Vitoria broke new ground in wanting to replace divine law with natural law in international relations[78]. For Vitoria, the essence of the 'international' is that gap of jurisdiction[79]. As all of Christian European was within the Papal jurisdiction, it was the

[75] Koskenniemi, M. (2004). Gentle Civiliser of Nations: the rise and fall of international law, 1870–1960. Cambridge : Cambridge University Press.

[76] Kennedy, D. (1996). International Law and the Nineteenth Century: history of an illusion. *Nordic Journal of International Law, 65*, 385-420 p.398

[77] See Pagden, A. (1998). Lords of all the World: Ideologis of Empire in Spain, Britain and France c.1500-c.1800. New Haven: Yale University Press. Ch.2 for a more detailed account

[78] The term 'international relations' here is somewhat anachronistic, as there were no nations as-such to speak of.

[79] Anghie (2004) p. 19

encounter with the Indian 'Other' that posed the fundamental question of international law, namely how to regulate relations between different peoples, or in other words, between different civilisations. Vitoria bridged this gap by presupposing a 'state of nature' of *tabula rasa* free individuals. This intellectually bridges the cultural gap between the Spanish and the Indian by dismissing it altogether. Both of them are regulated by the same rules and so the relationship between them should be one of equals.

By *prima facie* rejecting civilisational difference as the basis of law, Vitoria has throughout history been equally condemned and praised for the protections his system afforded the Indians. However, although not explicitly there, civilisational difference is still functionally the ordering principle under Vitoria's naturalism. Consider Gadamer's dictum "the prejudice of the enlightenment was against prejudice itself"[80]. Naturalism assumes a universal perspective that is derived through *reason.* However, as pointed out in Chapter 2, rationality is not universal but rather it is contingent on the *tradition* in which one operates. By assuming a universal rational framework, one obfuscates how their own tradition[81] affects this framework. Therefore, the ostensibly 'universal' naturalist frameworks, are in fact particularly Western.

In Vitoria's case, the 'natural' laws of international law he devised were perfectly in harmony with Spanish cultural practices, precisely because they operate within the same tradition. Because they have assumed universal status, the Indians are expected to adhere to them, and in failing to do so, are transgressing international law. As Anghie points out the Indian is ontologically Universal, but socially and culturally Particular. At the same time "Spanish Identity is both externalised, in that it acts as the basis for the norms of *jus gentium* and internalised in that it represents the authentic identity of the Indian"[82].

Through this framework, the Spanish were justifying in subjugating the Indians because the later were transgressors of natural law and the former could effectively 'civilise

[80] Gadamer, H.-G. (1975). *Truth and Method.* (G. Barden, Trans.) London: Sheed & Ward. p.372

[81] 'tradition' here is the set of one's gadamerian prejudices as developed in Chapter 2.

[82] Anghie (2004) p.23

them', by enforcing a universal law that was in practice fully European. Therefore, the Spanish became de-facto sovereign while the Indians have to endure their intervention.

This would be the case even if the violations of universal norms were in a purely domestic domain. For example, Vitoria saw the practice of human sacrifice as a transgression against the universal law. Therefore, the Spanish had a right to intervene to seize the practice. He noted that "it is immaterial that all the Indians assent to the rules and sacrifices of this kind and do not wish the Spaniards to champion them"[83].

Thus, for naturalists the international-as-such is not a thin space in which different civilisations interact but rather it is a thick normative concept that is culture-independent and universally applicable. The consequence for sovereignty is that it is contingent on obeying natural law. In modern terminology, sovereignty is considered continent on universal human rights. Intervention is therefore sanctioned to the extend that it is aimed at enforcing natural law and systematic subjugation is permissible as long as the occupier brings the occupied closer to enjoying universal rights.

In ignoring the hermeneutic particularity of any rationally-derived universal system, a hierarchy of civilisations is produced, even if it is under the guise of a rights-based equality. In this hierarchy, the Europeans are at the apex.

3.1.2 Informal Empire: Preceding International Law

In the early nineteenth century Europe had largely turned inward compared to the Age of Exploration that had established the first colonial empires in the Western Hemisphere. If anything, European imperial expansion was in reverse as the United States, Haiti and then the Latin American Republics gained their independence. Instead, the Great Powers were focused on continental politics with the French Revolution being followed by the Napoleonic Wars and the establishment of the Concert of Europe to regulate intra-European affairs. It was only the so-called 'Eastern Question' of the Ottoman Empire that was an exception to this[84]. Europes engagement with the 'international' beyond itself was characterised by two distinct types of colonialism. Firstly, there was the 'humanitarian' colonial projects such as the establishment of

[83] *De Indis* par.159

[84] Koskenniemi, M. (2004). Gentle Civiliser of Nations: the rise and fall of international law, 1870–1960. Cambridge : Cambridge University Press. p.110

Sierra Leone in 1808 and Liberia in 1848, who were of little economic interest[85]. Secondly, there was the commercial colonisation that was lead by private charted companies, such as the East Indian Trading Company, the Royal Company of the Philippines and the Russian-American Company. These companies were given the power to operate as de-facto governments in the trading posts that they established throughout Asia and Africa. Their operations were commercial, focusing on trading with the natives rather than ruling them. Nevertheless, their activities were characterised by exceptional brutality, as they wielded private violence as a sovereign would[86]. This was the period known as *informal empire*, which could be summarised by the slogan "trade, not rule" which the British had adopted vis-a-vis their overseas policy[87].

During the period of informal empire there was no formal international law. The closest approximation to it was what Von Martens and Klüber, two prominent diplomats of that time, called *Droit public de l'Europe.* The system of rules of this 'European Public Law' that they outlined was specifically intended to be applicable solely to intra-European relations, while interactions with the Natives were still governed by the vague and uncodified principles of natural law as had been during the time of Columbus[88]. The lands outside of Europe were intended primarily for exploration and commerce on the one hand and proselytisation and private humanitarianism on the other. They were conceptually *a-priori* excluded from the 'public' realm of law[89]. Therefore, not only were the local rulers not considered sovereign due to failing in some aspect of their political organisation but the very concept of sovereignty by definition did not extend

[85] Baumgart, W. (1992). Imperialism: the idea and reality of british and french colonial expansion 1880-1914. Oxford: Oxford Universtiy Press. p.11

[86] For a detailed account of a Charted Company's jurisdiction as well as examples of how their rule was applied see: Smith, E. (2018). Reporting and Interpreting Legal Violence in Asia: the East India Company's accounts of torture, 1603-24. *The Journal of Imperial and Commonwealth History*, *46*(4), 603-626

[87] Robinson, R., & Gallagher, J. (1981). Africa and the Victorians: the Official Mind of Imperialism. London: MacMillan.

[88]Koskenniemi, M. (2004). Gentle Civiliser of Nations: the rise and fall of international law, 1870–1960. Cambridge : Cambridge University Press. p.114

[89] In the European nations that compromised the domain of public law, the Republics of the Western Hemisphere were also included as they were European settler nations. (ref)

beyond Europe's borders. As such, intervention was not prohibited or even permitted. It was simply non-applicable, as it is a public law concept.

3.1.3 The international system at the coming of age of International Law

The formalisation of international law in the second half of the 19th century was concurrent with the end of informal empire. However, this was no mere coincidence. Rather, the two are necessarily linked and this connection is essential to understand the development of sovereignty, and therefore, non-Intervention.

The debate over the reasons of why informal empire ended is ongoing amongst historians and beyond the purview of this essay. However, what is important is that this drastic change of international system occurred and had massive ripple effects in the legal sphere. Emblematic of this shift was the formation of the British Raj in 1858. Following the Indian Rebellion of the previous year, the East Indian Company was formally dissolved and the Indian subcontinent came under the direct control of the crown through the "Government of India Act[90]. Similarly, France established formal protectorates in Vietnam in 1876 and Tunisia in 1881. In sub-Saharan Africa, colonisation by private companies continued to be the primary mode of expansion for Britain as well as the newly independent Germany, while France expanded through formal military campaigns that were directly organised by the State. However, in both cases the endeavours were not limited to isolated coastal settlements of the previous era. Instead, they were claiming sweeping territories in the name of their state[91]. As Koskenniemi develops in detail, in one way or another it proved impossible to maintain the 'light touch' model of commercial imperialism in the vast African possessions[92].

[90] Judd, D. (2005), The Lion and the Tiger: The Rise and Fall of the British Raj, 1600–1947, Oxford University Press

[91] Lewis, D. L. (1987). The Race to Fashoda. Colonialism and African Resistance. New York: Holt.

[92] For the most part this was due to the resistance of Africans against European exploitation, in combination with increasingly difficult logistics, gross mismanagement as well as humanitarian concern within emergent European civil societies about the conduct of these companies.
See Koskenniemi, M. (2004). Gentle Civiliser of Nations: the rise and fall of international law, 1870–1960. Cambridge : Cambridge University Press. pp.116-121

One by one, all overseas territories became formal parts of the realms of the European states. In other words, sovereignty and public law had, for the first time, become global.

As the world was now partitioned through sovereignty, the field of international law became critical to conceptualise and organise this new international system. Having a solely European public Law of Nations was simply not sufficient to regulate the competition between European powers outside the Continent itself. At the same time, these vast newly incorporated territories were already populated. Thus, the two fundamental legal problems of sovereignty were how to deal with conflicts of jurisdiction between European empires as well as formalising the relations between colonisers and the colonised[93]. Recall that in Section 1.2 it was shown that the Non-Intervention principle is defined through the domaine réservé, which defines the boundaries of sovereignty. In turn, these boundaries are not static but evolve in accordance with international relations. The expansion of sovereignty to be the primary ordering principle of the globe is therefore the point when Non-Intervention itself is even theoretically possible.

The legal problem of jurisdiction between these new empires was inextricably linked to the extend to which their claims were 'lawful' vis-a-vis the native populations and their political structures. In the history of the so-called 'scramble for Africa' there are abundant examples of disputes between colonial empires over territorial claims. A doctrine of *terra nullius* was often invoked in conjunction with Articles 34 and 35 of the Berlin Conference. That landmark treaty *inter alia* laid some general ground rules on the conditions of 'effective control', through which an African territory could be attributed to one of the signatories[94].

The implicit, but direct, consequence of this Act was that "Colonial title was always original and never derivative; it followed from European law's qualification of the acts of European powers, not from native cession"[95]. From the African perspective, Intervention was not the exception but the norm, because sovereignty could only ever be European. At the same time, in the same geographical territories, Non-Intervention

[93] ibid p.121

[94] *General Act of the Berlin Conference on West Africa,* 26 February 1885 available at: https://loveman.sdsu.edu/docs/1885GeneralActBerlinConference.pdf

[95] *Supra note 23* p.128

would in-theory be applicable between European powers if one of them had successfully claimed the territory under the conditions of the Berlin Act[96]. Similar rules of expansion applied in colonial competition across the globe, wherever there were 'gaps' of jurisdiction such as the Islands of the Indian and the Pacific oceans.

Therefore, European colonisation in the late 19th century was legally reliant on ignoring any conception of native sovereignty. At the time this was problematic both from an empirical and a jurisprudential point of view. From an empirical point of view, it disregarded all the treaties that had been signed between African leaders and Europeans throughout history, of which there were hundreds[97].

3. 2. Sovereignty, Society and the Other

The previous section showed how developments in international relations had the effect of expanding European sovereignty and therefore the reach of European public law across the globe. International law is often conceptualised as regulating the affairs between sovereign states. However, as we saw above, sovereignty was not the norm in global affairs. Rather, it was the exception; an exception reserved for European nations. Other political organisations were both *de jure* and *de facto* not granted such sovereignty. Sovereignty being, at least *de jure,* the primary ordering principle of the world is only a recent development. Therefore, a more accurate understanding of International Law, which encompasses all of its functions would be that it is the body of law that regulates the relations amongst *peoples.*

This section discusses the philosophical foundations of positivist international law from that perspective. How could a theory of international law that pre-supposes sovereignty as the ordering principle from which law derives maintain its coherence when faced with the fact that sovereignty itself is not a universal but rather a derivative concept?

[96] Despite the Berlin Act, differences between European nations were not completely settled. If anything their disputes in the 'scramble' were intensified following its signing, spectacularly culminating in the *Fashoda* episode as recounted in Lewis, D. L. (1987). The Race to Fashoda. Colonialism and African Resistance. New York: Holt.

[97] Alexandrowicz wrote extensively on the the legal relations between Africa and Europe prior to the 'scramble'. In his work it becomes evident how much the doctrine of *terra nullius* imposed in Berlin was a legal fiction, not resembling at all the empirical reality of centuries of African-European interactions as more-or-less equal interlocutors.
For a collection of his work see (ref)

To answer that question, the section is split into three sub-sections. The first subsection describes the positivist project of establishing international law for the first time as a formal academic, and therefore scientific, discipline. The second sub-section discusses how this account necessarily makes sovereignty derivative from society rather than it being primordial. Finally, the third section argues that the consequences of the above place the civilised/uncivilised distinction at the heart of international law at-large, and in the Non-Intervention principle specifically.

3.2.1 The Science of International Law

As has been said above, it was the latter half of the 19th century during which International Law formally became an independent scientific discipline. This coincided with a wider expansion of science in general. The ideas of the Enlighenment that had taken place in the previous century were bearing fruit in the form of rapid technological advancement, the Industrial Revolution and, above all, the elevation of rationality and the 'scientific method' as the primary means of interpreting reality (ref).

Naturalist jurisprudence, as seen in 3.1.1 was out of step with the epistemological zeitgeist of the era. As it was based in thinly-secularised religious principles about morality and inferences from a hypothetical state of nature, it resisted analysis through the empirical lens of science. Hence, Naturalism was a completely inadequate foundation on which to base a professionalised, scientific discipline of International Law that could be studied alongside all other established subjects in a formal academic setting. The proponents of international law had to face this problem head-on and prove that their discipline can be based on demonstrable positivist principles.

Positivism here can first be understood in its philosophical sense. As an epistemological disposition, positivism requires each claim about reality to be either independently verifiable through observable facts, or to be logically derivable from observable facts . In the context of law, positivism requires legal norms to be directly derivable from a source of authority. This is necessary to have a 'science' of law that is categorically distinct from the realm of morality, whereas naturalism often blended the two.

In the words of famed legal philosopher and father of legal positivism John Austin, 'Laws properly so called are a species of commands. But, being a command, every law properly so called flows from a determinate source'[98].

The fifth lecture in his classic *The Province of Jurisprudence Determined* was a sustained attack on the colloquial definition of law at the time, as something derivate from widely held opinion. He maintained that law is completely ontologically independent from moral sentiment. In other word, a law could be moral or immoral but it is not the morality of a rule that determines its legal status, rather it i the source of its derivation. Austin writes:

> Before I close my analysis of those laws improperly so called which are closely analogous to laws in the proper acceptation of the term, I must advert to a seeming caprice of current or established language. […]
> Law set by general opinion, or opinions or sentiments of indeterminate bodies, are the only opinions or sentiments that have gotten the name of laws.[99]

In domestic law it is simple enough to derive law from the authority of the sovereign government, either through its legislative branch or through the Court system. However, it is clear that the shift to positivism poses a challenge to the very foundation of International Law, where there is no supreme authority authoring commands. This is especially the case in the 19th century where there were neither neither international courts or international organisations as they exist today. Austin was cognisant of the consequences of his theory for International Law. As expected, he regarded customary international law as nothing more than pseudo-legal expressions of moral sentiment. He wrote:

> there are laws which regard the conduct of sovereigns or supreme governments in their various relations to one another. And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law.
> Now a law set or imposed by general opinion is a law improperly so called. It is styled a *law* or *rule* by an analogical extension of the term.[100]

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[98] Austin, J. (1995). Lecture V. In W. Rumble (Ed.), *Austin: The Province of Jurisprudence Determined* (Cambridge Texts in the History of Political Thought, pp. 106-163) p. 131

[99] ibid p.134

[100] ibid p. 123

Austin's objection was one that the first professors of international law had to seriously contend with in order to scientifically establish their discipline. This is because Austin's writings are not simply the expressions of one man's ideas, but through the perspective of the intersubjective framework developed in Section 2, they represented a wider Englightement-based position of how knowledge should be categorised and acquired. In other words, Austin's critique was internalised by international lawyers, because it is directly inferred from how they themselves understood knowledge to be derived, through rational and objective inferences. This is evident in the key textbooks of International Law at the time. Professor TJ Lawrence [101] begins his landmark *Principles of International Law*[102] by distinguishing his *scientific* work on the subject from previous attempts who placed it in the domain of morality rather than strict science. He writes that:

> [this book] regards International Law, not as an instrument for the discovery and interpretation of a transcendental rule of right binding upon states as moral beings whether they observe it or not in practice, but as a science the chief business of which is to find out by observation the rules actually followed by states in their mutual intercourse, and to classify and arrange these rules by referring them to certain fundamental principles on which they are based. [103]

Directly continuing from above he states the need to defeat the Austian objection if International Law is to be regarded as law proper:

> It will be seen that in the definition we have given, no mention is made of rights and obligations of states. These terms have been carefully excluded in order to avoid the controverted question whether International Law is, strictly speaking, law or not. If it be law proper, then it confers rights and creates obligations; but if the term *law* is improperly applied to it, we cannot with propriety speak of rights and obligations as flowing from it. [104]

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[101] He was one of the first scholars of International Law at Cambridge before becoming Assistant Professor there and then professor of International Law at the University of Chicago. His book 'Principles of International Law' was considered a highly reputable general textbook on the subject, as is evident by his obituary in the *British Yearbook of International Law 231* (1920-21) available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/byrint1&div=17&id=&page=

[102] Lawrence, T. J. (1884). *The Principles of International Law*. Chicago: D.C. Heath & Co (hitherto referenced as Lawrence, *Principles)*

[103] Lawrence, *Principles* §1

[104] ibid §2, emphasis in the original

The next sub-section will discuss how the positivists replied to Austin's challenge.

3.2.2 Grounding Customary International Law through Society

As discussed above, because customary international law lacked traceability to an authoritative source, it raised the question of whether it could be considered law-proper within the positivist framework. International legal scholars of the time were in a very difficult spot. They had to establish an alternative to Austin's account of how law-proper is created; one that would also include customary international law.

A simple recourse to 'custom' as evidence of law, by drawing an analogy to common law is not enough. Austin easily dismisses this by pointing out that under common law, customs become law only insofar as a judge has opined so. Before the matter is brought to the Court, it is nothing more than a norm:

> At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts and clothed with the legal sanction, it is merely a rule of positive morality.[105]

Subsequently, International Law scholars turned to the concept of *society* as the foundation from which international law derives. Here, it merits quoting Lawrence at length, because he eloquently explains how International Law emerges as a consequence of the existence of a "civilised" society of nations in contrast to a lawless barbarism.

> On this proposition [that there is no such thing as International Law] they found the advice that the state need not subject itself to any restraints which it is strong enough to disregard. A sort of perverted pride is taken in this assertion, which, if it were correct, would mean that mankind is still anti-social and barbarous in a most important sphere of its activity. But fortunately it is not correct. *Civilization spells restrain*t. A society of nations involves a law of nations. And this law is not reduced to nullity by being sometimes broken, any more than the law of the land becomes a mere dream because many habitual criminals disregard it with impunity every day. T*he rule of force and force alone is a sign of barbarism all the world over.* [106]

[105] *Supra Note 28* p. 35

[106] Lawrence, *Principles* §9

Similarly, Westlake poses the concept of society to battle Austin, as he dedicates a a section of his magnum opus *Chapters on the Principles of International Law* to it, which he titles "Austin's limitation of the term law" [107]. Westlake begins his classic textbook by explicitly inferring law from the existence of society, by reference to the Latin saying *ubi societas ibi jus est (*where there is society, there is law)[108]. He explains how society and law are mutually dependent, as they must have been so from the beginning of human history. One could not have preceded the other. He writes:

> Without society no law, without law no society. When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognise that there is a society of states, we recognise that there is international law.[109]

As Anghie[110] develops at length and the texts above demonstrate, international law was founded with international *society* as *the* transcendental fact, rather than state *sovereignty.* Instead, sovereignty in international politics is a facet of international law. States are sovereign under international law by virtue of being equal members of the society of nations. In turn, as we saw in the Lawrence excerpt, being a member of the society of nations is a mark of civilisation. Society means law and order and barbarism means lawlessness. International law's existence is demonstrable through its opposite, a state of anarchy. The former denotes civilisation, the latter its absence. According to Anghie "the distinction between the civilized and uncivilized was a fundamental tenet of positivist epistemology"[111].

Consequently, the criteria of International Society had to be articulated. If all political formations of the globe are *ipso facto* members of the Society of Nations, then the positive (in the technical sense) characteristics that *society* in-itself contains become irrelevant. Doing so would make the whole endeavour of positivist international law collapse into a tautology. Therefore it is logically *necessary* to develop such criteria of

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[107] Westlake, H. (1884). Chapters on the Principles of International Law. Cambridge: Cambridge University Press, hitherto referenced as Westlake, *Chapters* p.14
Westlake was the second occupant of the Whewell Chair of International Law at Cambridge and later Great Britain's member in the International Court of Arbitration in the Hague.

[108] Westlake, *Chapters* p. 2

[109] ibid

[110] Anghie (2004) pp.40-56

[111] ibid p.56

induction to the Society of Nations. Moreover, such criteria would have to be relational to the other members that comprise the society; they cannot simply be international to a polity. Hence, the distinction between members and non-members of the society of nations, the *civilised* and the *uncivilised* respectively, is fundamental to international law. In other words, without the extra-European '*other'* to contrast with , the society of the '*us'* is not intelligible.

Connecting to our theoretical framework in Chapter 2, what this effectively shows is that hermeneutically, society and sovereignty are interconnected. In addition, society itself is a term that can only be intersubjectively understood, by looking at the language employed by those who invoked it. The Non-Intervention Principle itself, being a corollary of sovereignty can therefore be understood in terms of admission or not to the society of nations. Before directly considering the texts on On-Intervention, what remains to be developed is precisely these criteria of admission to the *society.*

3.2.3 The Hierarchy of civilisation

As developed above, the consequence of basing international law on international society is that international society itself must have positive characteristics, rather than being a purely descriptive term such as 'international system' is. International scholars of the time of course clearly understood that and wrote extensively on it.

Positivist international scholars assailed their naturalist predecessors, such as Vitoria, for granting theoretically equivalent legal status to Europeans and non-Europeans. For example, Westlake on Chapter 9 in a section entitled "The position of uncivilised natives with regard to International Law' begins by writing that:

> no theorist on law who is pleased to imagine a state of nature independent of human institutions can introduce not his picture a difference between civilised man, because it is just in the presence or absence of certain institutions, for in their greater or lesser perfection, that the difference exists for the lawyer.[112]

[112] Westlake, *Chapters* p.137

The above quote demonstrates the, perhaps trivial, fact that civilisation is not inherent in being human, but rather depends on the institution one adopts. The chapter continues to justify on these grounds why the Conference of Berlin was right in disregarding native claims or treaties with natives, when adjudicating colonial boundaries in Africa. He argued that the authority of "chiefs, elders and fighting men" was simply not valid in international law. They had no power to make legally valid treaties[113].

For him, the the international test of civilisation was government. He argues that civilisation is not a racial question, because the "asiatic empires" have been shown to have effective governments[114]. With the caveat of allowing consular jurisdiction for European residents, they could be admitted to international society. However, where the test of government fails, then:

> international law has to treat such natives as uncivilised. It regulates, for the mutual benefit of civilised states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of the state to which the sovereignty is awarded.[115]

Westlake's empirical test for civilisation is the wider consensus of international lawyers, where 'civilisation' itself is not so much positively defined as it is used as a shorthand for what these scholars valued as 'civilised' from their own societies[116]. In other words, the 'government' test was the extent to which non-European societies resembled European societies. This is what bestowed them entry into the society of nations and consequently sovereignty.

Lawrence also writes extensively on the question of civilisation. He says that although a tribe, or even a group of pirates might have characteristics of sovereignty in so far as they obey a leader and are externally independent, they nevertheless fail the civilisation criterion to be subjects of international law"

[113] ibid p.139

[114] ibid p.142

[115] ibid p.143

[116] Koskenniemi, M. (2004). Gentle Civiliser of Nations: the rise and fall of international law, 1870–1960. Cambridge : Cambridge University Press. p.103

> […] because they would want various characteristics, which though not essential to sovereignty are essential to membership in the family of nations. In the first place, the *necessary degree of civilisation would be lacking*.
> No attempt has ever been made to define the exact amount of affinity in modes of life and standards of thought which might be regarded as essential. Each case is settled on its merits.

In other words, there is no set criteria for civilisation, but there certainly is a standard. The phrase "each case is settled on its merits" shows how international legal personality is always a matter of comparison with European subjectivity rather than any clearing any set bar. Even if a no-European entity is objectively sovereign, it is nevertheless not legally sovereign if its level of civilisation is not European enough. To the extend that non-European states could enter international law, such as Siam, Japan or the Ottoman Empire, they did so by assimilating into European civilisation.

For example, consider the case of the Ottoman Empire. It was only admitted in 'international society' through the 1856 Treaty of Paris. This admittance was linked with the progress of the Tanzimat reforms, particularly the Imperial Reform Edict of the same year, which *inter alia* ended religious discrimination in education, the civil service and the justice system, thus bringing the Empire closer to European standards of government[117].

Similarly with Japan, it was not its industrialisation that won it entry to the 'family of nations', but rather its governmental restructuring in line with European nation states, as well as it acquiring colonies as European nations did[118] .

> In the days when Japan was engaging in peaceful arts, the Westerners used to think of it as an uncivilised country. Since Japan started massacring thousands of people in the battlefields of Manchuria, the Westerners have called it a civilised country. [119]

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[117] The Ottoman Empire's admission was not without controversy in international legal circles. In particular, Lorimer, a Scottish professor and member of the *Institut du Droit International* objected on racial grounds as he did not consider Turks to belong to the 'progressive races'. See Lorimer, J. (1884). La Doctrine de la reconnaisance. Fondement du droit international. *Revenue de droit international et de législation comparée,* 333-359

[118] Suzuki S (2005) *Japan's socialization into Janus-faced European international society*. European
Journal of International Relations 11(1): 137–164

[119]Okakura Tenshin, *Cha no hon* [The Book of Tea] , cf in ibid p.137

Suzuki shows how Japan, having been inducted into international society, used International Law dualistically as the European states did. In its relations with the West it would employ the language of Non-Intervention and Sovereignty. In its relations with its 'uncivilised' Eastern neighbours it used the powers that international law bestows it to justify aggression, such as invading Taiwan in 1895 on the grounds that China was not effectively governing it [120]. Such imperialist behaviour was what bestowed Japan 'civilised' status.

To put it very succinctly; the civilised enjoy legal sovereignty, the uncivilised are targets of 'intervention' that is not unlawful because they are outside the law. It is civilisation which marks legality. Intervention against the uncivilised is permissible , even necessary, to enforce this legal order. In the words of 19th century French diplomat, to enforce the "une loi générale et absolue établie par le consensus gentium"[121].

3.3 Non-Intervention in 19th century texts

Given the necessary context above, this section considers two texts on Non-Intervention from the same period, in light of the theoretical framework developed in Chapter 2. John Stuart Mill's famous "A Few Words on Non-Intervention" as well as a lecture on the same topic given by Montague Bernard in Oxford University. By combining the analysis of the previous section with the theoretical framework of Chapter 2 these texts are elucidated in a new light. In so doing, the pervasive presence of civilisational discourse, even in ostensibly universal statements becomes apparent.

3.3.1 A few words on Non-Intervention …

John Stuart Mill's titular essay on Non-Intervention first appeared on Fraser's Magazine in December 1859[122]. JS Mill, of course, was not a international lawyer, neither did he write this essay as an analysis of the *lex lata* International Law. Had he

[120] ibid pp.155-156

[121] Engelhardt, E. (1880). Le droit d'intervention et la Turquie. *REvenue de droit international et de législation comparée* , 363-388 p.365

[122] Mill, J. S. (2006 [1859]). A Few Words on Non Intervention. *New England Review, 27*(3), 252-264.
Hitherto referenced as Mill, *A few Words on Non-Intervention*

done so, it would not have been as influential as it was. As a philosopher and public intellectual of his time almost needs no introduction, as his most famous essay *On Liberty* (1859) embodied the liberalism of the British progressive intelligensia of his time and is a standard reading for all undergraduate political philosophy students. Similarly, his essay *On the subjection of Women* is widely known as a radical, for his time application of the principles of liberalism on the issues of gender.

In *A Few Words on Non-Intervention,* Mill applies his liberal political philosophy to international politics. The classical liberalism that Mill espouses is rooted in the same philosophical ground as the endeavour of positivism *in toto*. Namely, the ontological centrality of the rational individual[123]. Mill's classical liberalism could be seen as the political expression of transcendental rationality whereas positivism is its epistemological one. In the first half Mill is not writing about Non-Intervention as a general principle, but rather as a policy that the United Kingdom should pursue. Nevertheless, the moral and political justifications are crucial in understanding the nature of the Principle and the role it held in 19th century thinking, as it fits within the wider intersubjective framework through which Intervention and Non-Intervention are interpreted.

He begins by lauding what he regards as the noble policy of Non-Intervention as practiced by the United Kingdom at that time. Such policy is portrayed not merely as morally just but also as necessarily altruistic.

> […] Not only does this nation desire no benefit to itself at the expense of others, it desires none in which all others do not as freely participate. It makes no treaties stipulating for separate commercial advantages. *If at the aggression of barbarians* force it to a successful war, and its victorious arms put it in a position command liberty of trade, whatever it demands for itself it demands for all mankind. The cost of war is its own, the fruits it shares in fraternal equality with the whole human race.[124]

Non-Intervention is framed not as a policy of national interest but rather as a universal moral stance. Critically, it is only due to the "aggression of barbarians" that intervention becomes permissible. In other words, a model nation would adhere to Non-Intervention

[123] For a critical analysis of the political implications of Enlightenment philosophy see Chapter 2 of Gray, J. (2008). Black Mass: apocalyptic religion and the Death of Utopia. London: Penguin.

[124] Mill, *A Few Words on Non-Intervention* p.252 (emphasis added)

except in provocation of barbarians. By the implication of "the position to command the liberty of trade", it is clear that this aggression by barbarians was not in British soil but rather an aggression on commercial interests, which is then rectified by intervention not in favour of Britain but in universal benefit.

The essay continues in criticising continental politicians as well as domestic actors (the protectionist writers and the mouthpieces of the despots and the Papacy)[125] because they think in zero-sum realpolitik terms. Instead, Non-Intervention is again framed not as self-interest but as a universal good. Realpolitik is renounced as short-sighted in favour of *laisse faire* trade which is a positive sum[126].

This becomes clear in his discussion of the politics of the Suez Canal. As extensively described in *Africa and the Victorians*[127] French and British interests at the time were clashing in Egypt with the French wanting to construct the Canal and the British seeking to prevent it. Mill argues that even if the Palmerston government is correct and it is in the narrow British interest to prevent the construction of the Canal, it should nevertheless not intervene to stop it. That is because for him foreign policy should be conducted in a universal way for the benefit of all mankind rather than narrow national interest, Non-Intervention becomes the practical manifestation of that.

> Let us assume, however, that the success of the project would do more harm to England in some separate capacity […] Let us grant this: and now ask what then? Is there any morality, Christian or secular, which bears out a nation in keeping all the rest of mankind out of some rest advantage because of the consequences of their obtaining it may be to itself, in some imaginable contingency a cause of inconvenience? Is a nation at liberty to adopt as a practical maxim that what is good for the human race is bad for itself and to withstand it accordingly? […] So wicked a principle, avowed and acted by a nation, would entitle the rest of the world to unite in league against it.[128]

So the first half of the essay concludes by stipulating that as a matter of *policy* Non-Intervention is an enlightened alternative to the zero-sum game of foreign policy in the name of national interest, and one that inevitable creates enemies.

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[125] ibid p.253

[126] ibid pp.254-256

[127] Robinson, R., & Gallagher, J. (1981). Africa and the Victorians: the Official Mind of Imperialism. London: MacMillan.

[128] ibid p.257

The second half of the essay is more interesting as it considers the practice of Non-Intervention in general. He begins by morally condemning interventionist policy on moral grounds. For him it is self explanatory that war for material gain is *a-priori* morally condemnable so he focuses instead on the more debatable issue of fighting for an idea. Still in that case, he advocates Non-Intervention:

> To go to war for an idea, if the war is aggressive, is as criminal as to go to war for a territory or revenue, for it is as little justifiable to force our ideas on other people, to compel them to submit to our will in any other respect.[129]

However, he offers a substantial exception to this rule, which deserves to be seen at length to be understood. It is in this exception that the Gadamerian prejudices of Mill, as a writer of his time, are evident as an exception for the the 'uncivilised' is carved out of the general rule above of the inadmissibility of intervention, especially one to compel a change of societal ideas. In discussing exceptions, he writes that:

> There is a great difference between the case in which the nations concerned are of the same, for something like the same, *degree of civilisation* […]T o suppose that the same international customs, and the same rules of international morality, can obtain between one civilised nation and another, and between civilised nations and barbarians, is a grave error […]
> Among many reasons why the same rules cannot be applicable to situations so different, the two following are among the most important. In the first place, the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules. Their minds are not capable of so great an effort, nor their will sufficiently under the influence of distant motives [130]

Mill continues by not only allowing intervention but actively endorsing it as a necessary prerequisite for the barbarians to ever be included within the proper purview of humanity, rather than its exception:

> In the next place, nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners. Independence and nationality, so essential to the due growth and development of a people further advanced in improvement, are generally impediments to theirs. The sacred duties which civilised nations owe to the independence and nationality of each other, are not binding towards those to whom nationality and independence are either a certain evil, or at best a questionable good.[131]

[129] ibid p. 258

[130] ibid p. 259

[131] ibid continued

This quote, without employing the legalist language later to be seen in Westlake and Lawrence, expresses the exact same connection between society, sovereignty and civilisation. Sovereignty, expressed here as "independence and nationality" should not be primordial, but rather contingent on achieving a level of civilisation required to be part of the family of 'civilised nations'. Moreover, the civilised nations have a duty to intervene on the uncivilised. Mill further elaborates on that by arguing that it is the duty of the British in Asia to remove tyrannic 'asiatic despots' in favour of supposedly restrained British administration[132]. Yet this account is entirely consistent in Mills mind with a sweeping Principle of Non-Intervention. That is because it is already implicit that Non-Intervention, as with all norms of international law, apply only to civilised states.

The intersubjective framework in which Mill operates allows the prohibited 'Intervention' to only denote an action against civilised nations. When it comes to the uncivilised it is not an 'intervention', but a moral responsibility. In this essay, written for a magazine, rather than dry legal textbooks, the intersubjective assumptions behind notions such as 'intervention' and 'sovereignty' are laid bare.

The contrast is further demonstrated when the argument shifts again to Non-Intervention in 'civilised' countries. Here Liberty reigns supreme as the overarching moral framework through which international politics should operate. Non-Intervention is presented as the logical consequence of a liberty- based international system, *provided* that a certain level of civilisation has been reached:

> But amongst civilised peoples, members of an equal community of nations, like Christian Europe, the question assumes another aspect, and must are decided on totally different principles. It would be an affront to the reader to discuss the immorality of wars of conquest, or of conquest even as the consequence of lawful war. the annexation of any civilised people to the dominion of another, unless by their own spontaneous election. [133]

This prohibition of intervention is also extended even when such an action would promote the cause of liberty. He discusses in depth why intervention should still be prohibited even in the cases of protracted civil war or people suffering under 'tyranny',

[132] ibid p.260

[133] ibid continued

because it is the responsibility of the people of that nation to liberate themselves.. Intervening for a humanitarian cause deprives the oppressed from the opportunity to win their freedom. Moreover, it is only through that process that the freedom can be lasting in that country, it cannot be imposed by foreigners even if well intentioned:

> Men become attached to that which they have long fought for and made sacrifices for; they learned to appreciate that on which their thought have been much engaged; and a contest in which many have been called on to devote themselves for their country, is a school in which they learn to value their country's interests above their own.[134]

Finally, the essay finishes by attaching a liberal teleology to Non-Intervention. The Principle is seen as instrumental and necessary for constructing an international system that would further the cause of Liberty:

> The first nation which, being powerful enough to make its voice effectual, has the spirit and courage to say that not a gun shall be fired in Europe by the soldiers of one Power against the revolted subjects of another, will be the idol of the friends of freedom throughout Europe. That declaration alone will ensure the almost immediate emancipation of every people which desires liberty sufficiently to be capable of maintaining it[135].

In summary, Non-Intervention is a means of emancipation, because if civilised people are left to their own devices, with no foreign interference, they will tend towards liberty. However, this may explicitly only apply to civilised peoples, their civilisation is seen as a necessary pre-requisite for Non-Intervention to apply. On the contrary, intervention against the uncivilised is not just permitted but is a moral prerogative, that serves the same teleology; to advance the cause of freedom.

3.3.2 Bernard: On the Principle of Non-Intervention

Bernard's December 1860 lecture in All Soul's College at Oxford is the best self-contained text on the Principle of Non-Intervention of the time[136]. He references Mill's essay as bringing public attention to the issue, alongside the interventions that had occurred in Belgium, France, Naples, Piedmont, Spain, Portugal Greece, Hungary and

[134] ibid p.262

[135] ibid pp.263-264

[136] Bernard, M. (1860). *On the Principle of Non Intervention: A lecture in the Halls of All Soul's College.* London: J. H & Jas. Parker

Syria since the Napoleonenic wars. However, unlike Mill, his lecture is one explicitly of international law on the issue.

The degree to which his definitions hold up today is striking. It is a reminder that the the content of Non-Intervention Principle has remained largely unchanged since the start of formal international law. The continuity between Bernard's position and the definition provided in Section 1 shows that we are fundamentally discussing the same issue. Hence, how it was originally articulated is important for how we understand it today, because it highlights the implicit assumptions behind the language of Non-Intervention, that are more laid bare in the 19th century text.

He begins by defining Intervention, along similar lines that the ICJ did more than a century later in the *Nicaragua* case[137] :

> By intervention I mean the interference, forcible or supported by force, of one independent State in the internal affairs of another; and, by the principle of non-intervention, the rule which forbids such interference. And by the internal affairs of a state I mean its legislation and government, so far as they concern itself and its subjects and do not directly concern other States and their subjects.

He argues that even if there is a lack of specific mention to non-intervention in *opinio juris*, it can nevertheless be inferred from general principles of international law, and therefore should be counted amongst them. In other words, as was shown in Section 1, Non-Intervention is a logically necessary corollary of sovereignty because one presupposes the other. He rhetorically asks whether Non-Intervention is simply a policy or it may be regarded as a legal obligation and replies with:

> […] I answer that it may. If it is a legitimate deduction from the cardinal principles of the system, and there is nothing else in the system by which the inference is negatived (sic) or controlled, it has as good a right to a place on the system as those principles themselves.[138]

Following on Mill's footsteps, Non-Intervention is discursively connected to liberty, in this case 'national liberty'. He combats the position that intervention is necessary to achieve the emancipation of people abroad by pointing out that words such as 'freedom' and 'order' have multiple definitions according to one's perspective. Thus, intervening

[137] Especially if one replaces the word 'forcible' with 'coercive', which is more aligned with modern terminology but nevertheless essentially synonymous with Bernard's language.

[138] ibid p.4

to promote ostensibly universal values would result in imposing one's own values on another people. Recognising that the dichotomy between freedom and tyranny is in the eye of the beholder, he argues that permitting intervention for the purposes of emancipation risks becoming a slippery slope:

> the general adoption of [intervention to promote freedom] would be fatal, in the first place, to the peace of the world, and, in the second, to the independence of nations […] As long as nations are not agreed about the brest form of government, and the words 'order' and 'liberty' have almost as many meanings as there are languages in Europe […] it is plain that occasions of dispute would never be wanting […]
> We are in error when we divide mankind to despots and peoples. He who does not know that what we call the despot's cause is by many honestly believed the best […] has conversed little with men of various countries and various minds. Observe, also that the evil has a natural tendency to propagate itself. One intervention begets and excuses another. [139]

Non-Intervention is then re-introduced as necessary for the integrity of the whole system of international law. Therefore Non-Intervention precedes other consideration such as the national interest, humanitarianism or commercial benefit.

> [by intervening] perishes the principle of national independence, with which a great right of interference is plainly incompatible […]
> The whole fabric of international law is built on two assumptions, or first principles- the assumption that States are severally sovereign or independent (the terms here are convertible), and the assumption that they are also members of a community united by a social tie. An analysis of the law, as it actually exists, leads us back to these principles and n them only is it possible to construct a rational and connected system. Destroy them and you destroy the system; impair them and you impair the system.[140]
> […]
> The doctrine of non-intervention is therefore a corollary form a cardinal and substantial principle of international law, and as such, has a prima facie claim to a place in the system.[141]

The lecture continues by giving various examples in which one might think that intervention should be permissible, such as when it is desired by the people of the target nation, when it is invited by the sovereign or when there is a protracted civil war. One by one he demolishes the arguments for them. In each case, the argumentation he

[139] ibid p.6

[140] ibid p.7

[141] ibid p.9

employs is a deduction from the two key principles of international law; the sovereignty of each state and theses states forming a society. Therefore, once again, Non-Intervention is portrayed as the necessary and interconnected with sovereignty.

However, what is more interesting to observe is how sovereignty is *constructed* behind the veil of universalist language. Once again, sovereignty is not a description of attributes possessed by a state that controls a territory. Rather, it has its own positive meaning that is inextricably linked with Christian, European civilisation. Sovereignty and Non-Intervention might be fundamental for International Law, *but International Law itself is contingent on civilisation.* International law does not operate in the in-between of civilisations, regulating their affairs. Rather, it requires a common civilisation to operate, it requires the *society.*

> That form of association which we call a state is, as it seems to me, a natural growth of European and Christian civilisation; a divinely ordered instrument […] The history of the rise of states- i might almost say, the history of modern civilisation- is a history of the birth and development of the principle of sovereignty.[142]

By implication, those outside of that common civilisation are by-default outside the law. this assumption is laid bare when we consider the one case where he admits that independent is permissible; namely, when it is targeted against those who lack sovereignty.

> But though not all States are not actually sovereign, nor all men actually free, it is only as much, and so far as they are so, that they are respectively able to play their true parts in the world and are proper subjects of legal rights and obligations. A slave has none, if the law which makes him one is consistently carried out; a State can only be regarded s a moral agent as long as it is recognised as free. Do you require of it integrity, a read for the right of others? […] these are but partial expressions of the principle of sovereignty, sides or facets, as it were, of this central and substantial attribute. Take this away and the whole family of kindred and closely allied rights, the whole train of attendant duties melt and disappear.[143]

[142] ibid p.9

[143] ibid p.8

Because non-sovereign peoples cannot reciprocate in the rights and duties of states, they are outside the society of international law. An otherwise universal prohibition of intervention, in his words, “melts and disappears”.

….

This chapter showed how the meanings of intervention and its corollary, sovereignty, are contingent on and intelligible through an international *society*. That society is predicated on a state possessing a standard of civilisation necessary for admittance to the society. Consequently, intervention is prohibited between members of the society but that does not hold when it is directed against the uncivilised. Intervention against the uncivilised is not even discursively articulated as intervention-as-such, because one cannot intervene against those who lack sovereignty. In their case, intervention by the civilised is necessary and emancipatory, to raise them to the level of inclusion to the international society.

Chapter 4. Consequences for interpreting modern interventions

The above analysis begs the question of the extend to which these observations on how Non-Intervention was originally articulated bear any consequences for the international politics of today, and if so in what manner. This chapter provides answers to that question by showing how the interventions that have taken place since the end of the Cold War have been justified in language that, despite employing universalist language, implicitly utilise the ‘standards of civilisation’ discourse on which the principle was founded.

The chapter is split into two sections. The first discusses the role that the standards of civilisation discourse still plays in the modern international system and in modern international law. The second subsection looks at the justifications of modern humanitarian interventions from the perspective of the standards of civilisation, as well as at the writings of liberal internationalist legal scholars at large.

4.1 A world civilisation

Although it is not often discursively invoked because of its colonial connotations, *civilisation* never disappeared from International Law or international politics. It is frequently indirectly invoked in terms of the components that compromise it. International Law never had a paradigm shift away from the concept of international society. Instead, it was international society itself that gradually expanded to include all the peoples of the world.

The English School of International Relations is dedicated to narrating how this expansion occurred, with *The expansion of International Society* by Hedley Bull and Adam Watson being the most authoritative account of this transformation[144]. Whether through military force or norm dissemination, a society of nations that began in Europe eventually spread throughout the globe. This society, as we have seen, is the theoretical prerequisite for international law , in the words of Martin Wight:

> International society […] is manifest in the diplomatic system; in the conscious maintenance of the balance of power to preserve the independence of the member-communities; in the regular operations of international law, whose binding force is accepted over a wide though politically unimportant range of subjects. […] These presuppose an international social consciousness, a world-wide community-sentiment.[145]

Although the modern international system is characterised by the sovereign equality of states (as per the UN Charter), that does not imply the equal existence of a plurality of civilisations. Rather, the sovereign equality of all states is predicated on presupposing a universal civilisation. In other words, the standard of civilisations has not technically disappeared, rather, it is legally assumed that all states meet that standard. The existence of the civilisational standard is evident in the Statute of the International Court of Justice, where Article 38c states that:

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[144] Bull, H., & Watson, A. (1984). The expansion of International society. Oxford: Oxford University Press.

[145] Wight, Martin (1966) 'Western Values in International Relations', in Herbert Butterfield and Martin Wight (eds) *Diplomatic Investigations: Essays in the Theory of International Politics*, pp. 89–131. London: George Allen & Unwin. pp.96-97

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply […] the general principles of law recognised by *civilised nations;*[146]

In interpreting said article, the International Law Commission considered it an anachronism from the perspective of modern international law, as "in today's world, all nations must be considered to be civilised"[147]. Therefore, it is not the case that there are different civilisations that were considered unequal in the past but are now equal. Rather the standard of civilisation is still singular, it is just the case that all states meet that standard. This point might appear trivial but it is crucial. There is an ontological difference between a system of a plurality of civilisations, with an inter-civilisational international law and the existing system of a singular universal civilisation , in which all states belong. In the former all states are civilised *a-priori,* because even a civilisation with completely antithetical values to our current international society is still *some* civilisation. In the latter all states are civilised *a-posteriori.*

An emergent school of International Relations alternatively named Civilisational IR or Global IR is dedicated to problematising this distinction. Scholars such as Acharya, Buzan, Petito and Patrick Jackson have shown how the ostensibly neutral principles of our universal civilisation which underpin international law, are in reality heavily reliant on Western normative and epistemological assumptions[148]. In doing so, they reframe the 'international' in the broad sense to not be not inter-state but rather inter-

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[146] United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: https://www.refworld.org/docid/3deb4b9c0.html (emphasis in the original)

[147] International Law Commission, *General Principles of International Law,* A/CN.4/741 .Second report of the *Special Rapporteur,* Mr. Marcelo Vázquez-Bermúdez. par. 2d

[148] See *inter alia* Acharya, A. (2014). Global International Relations and Regional Worlds. *International Studies Quarterly, 58,* 647-659. ; Acharya, A., & Buzan, B. (2019). The making of Global International Relations. Cambridge: Cambridge University Press. ; Buzan, B. (2004). From International to World Society? English School Theory and the Social Structure of Globalisation. Cambridge: Cambridge University Press. ; Jackson, P. T. (2007), *Civilisational Identity: The production and Reproduction of "civilisations" in International Relations* New Yok: Palgrave McMillan. ; Petito, F. (2016). Dialogue of Civilisations in a multipolar World: Toward a multicivilisational multiplex world order. *International Studies Review, 00,* 1-14. ; Petito, F., & Michalis, M. (2009). Civilisational Dialogue and World Order. New York: Palgrave McMillan.

civilisational, highlighting potential alternative organising structures from non-Western history, as well as how multiple systems could co-exist in a 'dialogue of civilisations'. Hence, the international society which underpins international law is more richly portrayed as a normatively 'thick' system rather than a default 'thin' surface on which free states operate.

The above demonstrates that it is at least *in principle* possible for a polity[149] to be lawful targets of intervention, should they be deemed outside the universal 'society of civilised nations'. Although currently all states, by virtue of their statehood, are considered civilised, this does not preclude the possibility that in the future political entities could emerge that states will consider 'uncivilised' and thus place them outside the prohibition of intervention. This is especially the case because the normative 'thickness' of international society is constantly expanding, as modern customary international law includes human rights, international criminal law and various other features that transverse the boundaries of state sovereignty. It is important to mention, as per Section 1, that in *lex lata* terms the ostracisation of a state outside of civilisation has not occurred. However, as we will see in the next section, this argument has nevertheless been implicitly invoked by supporters of humanitarian intervention.

4.2 Humanitarian intervention revisited

In Section 1.3 I already discussed that in recent years there has been a revival of the doctrine of humanitarian intervention as a legitimate legal exception to the Non-Intervention Principle. In addition, the section outlined that despite precedent in state practice, there is no sufficient *opinion juris* to establish a custom of humanitarian intervention that would be able to override Article 2.4 of the UN Charter or the custom of Non-Intervention. In this section I will look at how proponents of humanitarian intervention sought to legally support it. What this analysis reveals is that rather than establishing an exception within international society, and therefore within the law, the implication of those arguments is to cast the offending state outside of international society. In other words, to deem them as 'uncivilised' in 19th century terminology, and therefore be able to intervene on them with impunity.

[149] I use this word rather than 'state' because statehood itself is defined through international law.

The debate around the legality of the so-called humanitarian intervention of NATO in Kosovo was somewhat predicted by Vaughan Lowe who wrote a seminal article on it already in 1994[150]. Although it has been more than twenty five years since it was published, it remains a uniquely robust and widely cited defence of Humanitarian Intervention, whose argument became stronger rather than weaker since it was written. In it Lowe starts by observing that despite international law clearly forbidding intervention, it is nevertheless very frequent in state practice[151]. Moreover, when it occurs it is frequently justified by the perpetrators as being for the benefit of the people of the state they intervene in. This benefit is either the immediate alleviation of a humanitarian catastrophe, which I will call a strictly humanitarian intervention, or it is to depose a tyrannical regime, which, which correspondingly I will refer to as a broadly humanitarian intervention.

4.2.1 A return to popular sovereignty? Lowe on humanitarian intervention

Lowe attacks positivism itself as an insufficient account of how international law actually works. For him a rule of international law is only created at the point it is invoked as an already-existing norm and systematised as such. Therefore, law in the international realm will always follow practice. His position on International Law is aanalogous to a classic monologue in Rober Penn Warren's *All the King's Men:*

> *"*Hell, the law is like the pants you bought last year for a growing boy, but it is always *this* year and the seams are popped […] The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time that law gets on the books you would have done something different".[152]

He argues that the Principle of Non-Intervention has been distorted into being a strict customary rule due to UNGA Resolutions such as Resolution 2625 on the Friendly Relations amongst states that was quoted in length in Chapter 1. Those Resolutions, in

[150] Lowe, V. (1994). The Principle of non-intervention: Use of Force. In V. Lowe, & C. Warbrick, *The United Nations and Principles of International Law* (pp. 66-84). London: Routledge. hitherto referenced as Lowe (1994)

[151] ibid p.72

[152] Warren, R.P (2007 [1946]). *All the King's Men.* London: Penguin p.467

his view, veered significantly from actual state practice and created their own pseudo legal echo-chamber by drafting texts that were to sweeping to be practically applicable and continually quoting previous General Assembly texts rather using than the development of International Relations as a guide in their resolutions[153].

Attempting a return to more fundamental Principles, he argues that International Law is derived from sovereignty and sovereignty in-return is derived from internal consent. To justify this turn, he considers the preamble of the United Nations Charter, which rather than referring to states, refers to "We the peoples"[154]. He argues that this phrase in conjunction with Vattel's account of internally emerging sovereignty, as outlined in Section 1, shows that the source of sovereignty in international law is popular legitimacy, hence if popular legitimacy is lost then the State seizes to be sovereign and intervention is permissible[155].

Characterising himself as a 'closet natural lawyer', he believes that international law on intervention should be judged on moral grounds.

> Many closet natural lawyers (myself included) have yearned for the day when the international community becomes capable of distinguishing between justifiable and unjustifiable intervention, and of modifying the prescription of international law accordingly. [156]

Where Lowe's account fails is by painting a picture of the international community emerging through the externalisation of an internally achieved sovereignty. However, as we have seen, such a picture is a Eurocentric distortion of the historical record. Sovereignty did not organically develop as a unitary concept, but rather it was from the beginning contrasted to the non-sovereign, uncivilised Other. It is not domestic actions which determine the sovereignty or lack thereof of a state, but rather it is the extend to which this state is regarded as part of a wider society. Therefore, should his framework be adopted and the international community be able to lawfully intervene in cases where it considers that a state has lost popular legitimacy, it would effectively be casting that state out of the community of nations.

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[153] Lowe (1994) p. 75

[154] United Nations, Charter of the United Nations, 24 October 1945, 1

[155] Lowe (1994) p.79

[156] ibid p.80

In allowing the international community to be the arbiter of morality, the 'standard of civilisation' test returns through the backdoor. As I showed in Section 4.1, as International Law stands right now, the universalism of the international society is established *a-posteriori*, not *a-priori.* Therefore, this universalism is always liable to be lost if the 'bar' for a civilised state is shifted. By carving an exception to non-intervention in cases of lost popular legitimacy Lowe does precisely that. Structurally it would lead to a return of the time of Westlake and Mill where sovereignty was the prerogative of the civilised and the morally lacking were outside the protections of the law.

4.2.2 Intervention, liberal peace and the Responsibility to Protect

Lowe's article was considered at length because I consider it to be the strongest philosophical argument for diluting the Principle of Non-Intervention. However, in recent years there has been a wider re-emergence of the naturalist tradition in International Law, often cloaked under the veil of liberal teleology. The most high profile such project has been Anne Marie Slaughter's project of an international society of liberal states.

In her famous article International Law in a world of Liberal States[157], she points out that current international law does not accommodate for the difference between liberal and non-liberal states. A difference that according to the liberal IR theory that the article espouses, has great normative significance[158]. Drawing from Kantian accounts of democratic peace[159], the article argues in favour of a hypothetical international order of democratic states, where sovereignty becomes diffused through civil society and international networks and the state itself loses its unitary status as its different branches assert a measure of autonomy in the international. As she writes:

> The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States based on their domestic political structure and ideology[160]

[157] Slaughter, A.-M. (1995). International Law in a world of Liberal States. *European Journal of International Law,* 503-538. hitherto referenced as Slaughter (1995)

[158] ibid p.509

[159] Kant, E. (1991). Perpetual Peace. In R. Hains, *Kant: Political Writtings* (pp. 93-130). Cambridge: Cambridge University Press.

[160] Slaughter (1995) p.504

Under the liberal internationalist framework, a liberal state is normatively preferable to the non-liberal state, not just as a matter of political philosophy but as a matter of international law. The characteristics of a liberal state such as democracy, respect for human rights (and a host of constantly expanding attributes) should be the basis for a new *international society*, which consequently would entails that some parts of the world who fail this normative test would be excluded from it. In practical terms, Slaughter suggests that the Security Council adopt a blanket resolution which would enable intervention against those excluded states, writing:

> [The UNSC should] adopt a resolution recognizing that the following set of conditions would constitute a threat to the peace sufficient to justify the use of force: 1) possession of weapons of mass destruction or clear and convincing evidence of attempts to gain such weapons; 2) grave and systematic human rights abuses sufficient to demonstrate the absence of any internal constraints on government behaviour; and 3) evidence of aggressive intent with regard to other nations[161]

Here once again a civilisational hierarchy is reintroduced in international law. Democratic, human rights respecting states are at the top and form an international society. Those who fail to meet that standard are formally not members of that society, therefore intervention is permitted against them. The 'democratic, human rights respecting state' in this instance is not ontologically different from Mill's liberty loving state. The underlying assumption is the same, that only states that share common values can form a society which is capable of producing law. Hence, those outside of that society are also outside of the law.

In recent years, a step closer to Slaughter's vision has been achieved with the Responsibility to Protect doctrine being adopted by the United Nations General Assembly, stating that

> Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate,

[161] Anne-Marie Slaughter, 'A Chance to Reshape the UN ' quoted in Anghie (2004) p.297

> encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. [162]

However, in the next paragraph the necessity of a resolution from the UN Security Council for any intervention is reiterated:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity[…] [163]

In this landmark document, the UN General Assembly recognises that normatively speaking there are extreme actions states can take that would effectively place them outside of international society, hence a responsibility to protect arises in international society proper vis-a-vis the population of the delinquent state. In terms of positive law the document does not change the law on Non-Intervention, because the UN Security Council is still the only legal avenue for such a humanitarian intervention. However, at the discursive level which this thesis operates in, it marks a significant departure from the principle of non-intervention, as it has been considered since the arrival of the universalisation of sovereignty. More accurately, it marks a return to the original definition of non-intervention as developed in Chapter 3. Namely, that Non-Intervention is applicable so long as a certain standard of civilisation is attained. Moreover, that standard, as in Chapter 3, is articulated as a universal one that precedes sovereignty itself, rather than a preference informed by considerations of power or realpolitik.

…

[162] UN General Assembly, *2005 World Summit Outcome : resolution / adopted by the General Assembly*, 24 October 2005, A/RES/60/1, available at: https://www.refworld.org/docid/44168a910.htm par.138

[163] ibid par.139

Here I should that my argument should not be misconstrued as a defence of human rights abuses or even a defence of the permissibility of such abuses. The argument I present is not an ethical one. I do not pass judgement on whether explicitly introducing conditionality to sovereignty is deleterious or not. In fact, on a personal level I consider the Responsibility to Protect to be a positive development. However, to make a moral case would require it to be firmly grounded on a theoretical framework of ethical philosophy. Bypassing that requirement, as sometimes IR scholars tend to do, to make self-evident moral arguments is also not acceptable because the very 'self-evidentnness' of moral facts would have to be epistemologically (or phenomenologically) established.

However, it should also be noted that those who argue in favour of an international system of a multitude of civilisation are not opposed to human rights in substance. Rather, they are opposed to them being articulated through a universality that is based in transcendental rationality, rather than them emerging through the merging of horizons of various global traditions[164].

Instead, of being normative my argument throughout has been to reconstruct the intersubjective framework in which Non-Intervention was developed, to show that it contained and still contains the implication of civilisational hierarchy.

[164] Petito, F. (2016). Dialogue of Civilisations in a multpolar World: Toward a multicivilisational multiplex world order. *International Studies Review, 00,* 1-14.

Conclusion

This essay does not tell the whole story about sovereignty in our contemporary world, it merely scratches the surface. It presented a specific and narrow argument on how the ostensibly universal principle of Non-Intervention is in fact discursively contingent on a standard of civilisation. For a small period between the success of the self-determination movement and the end of the Cold War there was a consistent effort by new states to ground non-intervention in truly universal terms, as shown by the Resolutions presented in Chapter 1. However, such an endeavour is not possible as long as international law is predicated on a singular international society rather than the interaction of different civilisations and traditions as Section 4.1 showed. In fact, Section 4.2 discussed how the laden civilisational hierarchy behind non-intervention has been re-emerging in liberal IR as well as in state practice.

There are many avenues through which this analysis of Non-Intervention could continue. Cyberspace offers novel challenges to the law of Intervention by transcending geographical borders. Similarly the effects of climate change cannot be contained within one jurisdiction and its acceleration is bound to pose huge challenges to our fundamental international norms. Combining the two factors above begs the question whether the Principle of Non-Intervention and its corollary sovereignty is even fit for purpose in the modern world. My immediate answer would be that my analysis here shows that because Non-Intervention has always relied on the concept of society, should the concept of international society change by both technological and literal earthquakes, non-intervention would change with it. In that sense, it is a much more flexible principle than both its proponents and its detractors consider it to be. Nevertheless, this question deserves its own thesis to be properly developed.

Another aspect of the question is how the tectonic geopolitical shifts of the next decades will affect the international order and consequently the international legal system. The balance of power has always brought with it changes in international law[165]. The humanitarian impulse in the last thirty years could to some extend be attributed to American hegemony. However, more and more IR scholars are arguing that we are transitioning from a period of a liberal international order underpinned by the United

[165] For a detailed analysis of the relationship between international norms and power, see Gilpin, R. (1981). *War and Change in World Politics.* London: Cambridge University Press.

States to a period of great power competition[166;] a multi-polar world where China, Russia and India will have their own, and separate, normative influence in the international system. Should the scholars of Civilisational IR be believed, this period will be very different from the period of European Great Power competition, because in this case different civilisational traditions would be represented.

As ever, and maybe even more so, the international system is in flux and where there is change in politics, the law follows. This also demonstrates the value of critical constructivist analyses of legal norms, rather than a more formalist approach. Because it is able to articulate both change and continuity , by tracing the language itself vis-a-vis the context it emerges. That is not to say that other approaches are not valid. In fact they are necessary. However, an approach of *understanding* can plug gaps left by rationalist research, whether in International Law or IR. This is what this essay attempted to do in the case of Non-Intervention.

[166] Layne, C. (2018). The US-Chinese power shift and the end of the Pax Americana. *International Affairs*, *94*(1), 89-111.

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