The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention

Eric Corthay*

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I. INTRODUCTION

The Association of Southeast Asian Nations (hereinafter “ASEAN”) was founded during the Cold War in 1967 when Indonesia, Malaysia, the Philippines, Singapore and Thailand signed the ASEAN Declaration (Bangkok Declaration). Since that time, membership has expanded to include Brunei, Cambodia, Laos, Myanmar (Burma) and Vietnam.

Since its creation, ASEAN has faced many challenges to regional peace, stability, and prosperity. To cope with such obstacles, Member States have adopted and implemented a series of principles which guide

* Associate Professor at Bahrain Polytechnic. License, D.E.A., Ph.D. (Graduate Institute of International and Development Studies / University of Geneva). This article is a revised and updated version of a paper originally presented at the 6th CILS Conference on Regional Integration, Faculty of Law, Universitas Airlangga, Surabaya, Indonesia, Oct. 5-6, 2015.
their actions and govern their relations. The principles include the peaceful settlement of dispute, the renunciation of the use of force, non-interference, and consensus-based decision-making. These principles, which form a sort of *modus vivendi* between the ASEAN members, are laid down in many of the Association’s documents, including those relating to the more recent ASEAN Security Community which is designed to ensure that States in the region can live in peace with one another and with the world at large. The ASEAN Security Community is one of the three pillars of the ASEAN Community, the establishment of which has been stipulated in the Declaration of ASEAN Concord II (Bali Concord II). The principles mentioned above express the ideas of cooperation, consultation, and dialogue, which are essential to ASEAN members in order to meet challenges, and promote, maintain, or restore peace, stability, and prosperity. They also represent the cementing in a long and uncertain process of regional integration which is becoming a reality through the progressive construction of the ASEAN Community.

The present article focuses on one of the elements mentioned above, namely the principle or doctrine of non-interference. This has been qualified by Amitav Acharya, a prominent observer of ASEAN, as being “the single most important principle underpinning ASEAN regionalism.” However, it seems that a gap between rhetoric and reality exists. Although non-interference is often considered a cherished regional principle, this article will show that ASEAN members have sometimes interfered in the affairs of their regional neighbours or endorsed interference by fellow members or other States. The former ASEAN Secretary-General Rodolfo Severino asserted, for example, that “[e]ssentially arising from pragmatic considerations, ASEAN’s practice of non-interference has not been absolute.” This reality raises the question of the nature of the doctrine of non-interference: is it merely a political doctrine, or does it reflect the *opinio juris* of the ASEAN members?

Moreover, non-interference is not only an ASEAN doctrine; it is also a fundamental principle of international law, better known as the

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1 With regard to the notion of non-interference, authors use sometimes both expressions ‘principle of non-interference’ and ‘doctrine of non-interference’. The present article mainly uses the term ‘doctrine’ when referring to the ASEAN position regarding non-interference, and ‘principle’ when referring to the customary law of non-intervention.


3 Due to the primary focus of this article, this article does not address all cases of interference.

4 Rodolfo C. Severino, Southeast Asia in Search of an ASEAN Community: Insight from the Former ASEAN Secretary-General 94 (2006).
principle of non-intervention.\textsuperscript{5} This principle reflects the international customary law and as such is binding upon members of the international community, including ASEAN States. A large section of this article is dedicated to clarifying the content and scope of the principle as recognized by international law. This study will make it possible to determine whether and to what extent the ASEAN doctrine of non-interference is in line with the principle of non-intervention. In addition, the existence of discrepancies between actual ASEAN State practice and the principle will raise the question of the existence of a regional customary law of non-intervention.

This article will explain why the practice and policy of non-interference is so fundamental for ASEAN members, and then clarify the operational content of the doctrine (II). Thereafter, the content and scope of the fundamental principle of non-intervention will be analysed, and the compliance of the doctrine of non-interference and individual State conduct with the principle will be examined (III). Finally, the potential effects of ASEAN States’ practice on the international customary law of non-intervention will be considered (IV).

II. THE ASEAN DOCTRINE OF NON-INTERFERENCE

Since its inception, ASEAN has faced many challenges to peace, stability and prosperity in the entire region. For example, the threat of communist subversion was seen as a major challenge during the Cold War. After that era, and with increasing globalization, challenges have multiplied. Within the region, but also in the relations with their neighbours, ASEAN members had or still have to cope with territorial disputes, separatist tendencies, social unrest, the exodus of refugees, smuggling of people, human trafficking, international terrorism, piracy, drug trafficking, cyber criminality, epidemic outbreaks, as well as other environmental, food, and energy security issues.\textsuperscript{6} These issues of common concern have pushed the States in the region to take action. Communism, perceived as a common internal threat, “was an important triggering factor behind ASEAN,”\textsuperscript{7} alongside a strong desire for economic growth, social progress and cultural development. After the Cold War, old and new

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\\textsuperscript{5} ‘Non-interference’ and ‘non-intervention’ are often used interchangeably. However, as documents of the ASEAN mainly use the former term and the documents relating to international law the latter one, ‘non-interference’ will be used in this article when referring to the ASEAN doctrine, while ‘non-intervention’ will be used when referring to the international law.


\textsuperscript{7} ACHARYA, supra note 2, at 195.
challenges faced by the countries of the region were viewed as a driving force for the creation of an ASEAN Security Community.  

In 1997, in Kuala Lumpur, ASEAN leaders adopted the ASEAN Vision 2020 in which they agreed on a shared vision of “ASEAN as a concert of Southeast Asian nations, outward looking, living in peace, stability, and prosperity, bonded together in partnership in dynamic development and in a community of caring societies.” To concretize the ASEAN Vision 2020, at the 9th ASEAN Summit in Bali, in 2003, ASEAN leaders adopted the Declaration of ASEAN Concord II (Bali Concord II) in which they declared that

>a[ ]n ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region.

Acknowledging the principle of comprehensive security, the ASEAN Security Community is designed to enhance political and social

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8 The concept of security community has probably come into the literature in the 1950s. It seems that a first definition of it was given by Van Wagenen (see Richard W. Van Wagenen, Research in the International Organization Field: Some Notes and a Possible Focus 10-11 (1952)). The definition given by Karl Deutsch et al. has also often been cited as a reference point (see Karl W. Deutsch et al., Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience 5 (1957)). Then, the concept has been adapted and redefined. (See, e.g., Michael Haas, Comparing Regional Cooperation in Asia and the Pacific, in Toward a World of Peace, People Create Alternatives: Proceedings of the First International Conference on Conflict Resolution and Peace Studies in the United Nations Year of Peace 149-68 (J. Maas & R. Stewart eds., 1986)). Analysing all the variants of the concept is not the purpose of this article. Suffice to mention that for Amitav Acharya the features of a security community are as follows (Acharya, supra note 2, at 21):

- Strict and observed norms concerning non-use of force; no competitive arms acquisitions and contingency-planning against each other within the grouping.
- Institutions and processes (formal or informal) for the pacific settlement of disputes.
- Long-term prospects for war avoidance.
- Significant functional cooperation and integration.
- A sense of collective identity.


stability, as well as economic prosperity, to narrow development gaps, to alleviate poverty, and to reduce social disparity, in order to – as a final aim – “ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment.”

Realizing these objectives requires the implementation of a series of activities laid out in the Annex to the ASEAN Security Community Plan of Action which are related to at least six key areas: political development, shaping and sharing of norms, conflict prevention, conflict resolution, post-conflict peace building, and implementing mechanisms.

According to the ASEAN Security Community Plan of Action, the ASEAN Security Community process is progressive and guided by well-established principles of non-interference, consensus based decision-making, national and regional resilience, respect for the national sovereignty, the renunciation of the threat or the use of force, and peaceful settlement of differences and disputes which have served as the foundation of ASEAN cooperation.

According to the Eminent Persons Group on the ASEAN Charter, these common principles “have safeguarded ASEAN’s common interests and formed the foundation upon which Member States have developed mutual trust and a modus vivendi which we all accept.”

The ‘principle’ of non-interference – and this is also the case of the other common principles mentioned above – is enshrined in ASEAN’s fundamental documents, and notably in legally binding instruments. For example, the founding Bangkok Declaration of 1967 states that Southeast Asian countries are “determined to ensure their stability and security from

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13 ASEAN Security Community Plan of Action, supra note 11.


15 ASEAN’s fundamental documents include the 1967 ASEAN Declaration, the 1971 Zone of Peace, Freedom and Neutrality Declaration (ZOPFAN Declaration), the 1976 Treaty of Amity and Cooperation in Southeast Asia, the 1995 Treaty on the Southeast Asia Nuclear-Weapon-Free Zone (SEANWFZ Treaty), the 1997 ASEAN Vision 2020, the 2003 Bali Concord II, and the 2007 ASEAN Charter. All are available either at http://cil.nus.edu.sg/ or at http://agreement.asean.org (last visited on May 18, 2015).
external interference in any form or manifestation.”\textsuperscript{16} Also, Article 2(c) of
the 1976 Treaty of Amity and Cooperation in Southeast Asia provides that
“[i]n their relations with one another, the High Contracting Parties shall be
guided by the following fundamental principles: […] Non-interference in
the internal affairs of one another.”\textsuperscript{17} In addition, Article 2(2)(e) of the
2007 ASEAN Charter calls upon the Association and its Member States to
act in accordance with the principle of “non-interference in the internal
affairs of” other Members.\textsuperscript{18} Foreign Ministers and chairmen of ASEAN
have also issued official statements on many occasions repeating the
importance of the ‘principle’ of non-interference.\textsuperscript{19}

Several explanations – some being very different – are given to
explain why the practice and policy of non-interference is so important for
ASEAN States. One reason is related to domestic security concerns.
Diversity among the Southeast Asian nations (e.g. race, religion, culture)
combined with the weak State structures and lack of stable regime
legitimacy are sources of threat to the national security of the States in the
region. Therefore, the policy of non-interference aims at preventing the
aggravation of domestic conflicts by foreign factors.\textsuperscript{20} Former ASEAN
Secretary-General Rodolfo Severino explained:

With such a complex mixture of races, tribes, religions and
cultures transcending national boundaries, and the
sensitivity of certain aspects of history, Southeast Asian
countries are extraordinarily wary of the very possibility of
interference by neighbours in one’s internal affairs, and the
possible use, deliberate or inadvertent, of the explosive
amalgam of race, religion and culture in their interaction
with their neighbours and in their internal politics. Indeed,
one of the reasons why Southeast Asian states value
ASEAN is precisely the mutual commitment of its
members to non-interference, which, to some extent,

\textsuperscript{16} ASEAN Declaration (Bangkok Declaration) preamble, Aug. 8, 1967, available

\textsuperscript{17} Treaty of Amity and Cooperation in Southeast Asia art. 2(c), Feb. 24, 1976,
1025 U.N.T.S. 316.

\textsuperscript{18} Charter of the Association of Southeast Asian Nations art. 2(2)(e), Nov. 20,
visited on May 22, 2015).

\textsuperscript{19} For examples of official statements issued during the Cold War, especially
with regard to the Vietnam War, Indochina’s refugee problem and the Kampuchean
independence, see Linjun Wu, East Asia and the Principle of Non-Intervention: Policies
and Practices, 5 MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES 1, 8-11 (2000).

\textsuperscript{20} ACHARYA, supra note 2, at 57-58.
assures them that the incendiary elements of race, religion and culture will not be used in the disputes between them and that no country will seek to promote its own value system to influence those of its neighbours. It is a mutual commitment that contributes a significant measure of stability to the relations among the Southeast Asian states and thus to that of the region as a whole, considerations that are at the heart of ASEAN’s core purposes.21

The second reason given by Rodolfo Severino to explain why non-interference is a central tenet of intra-regional relations relates to the Southeast Asian countries’ experience of interference from outside the region, primarily during the colonial and post-colonial era. The policy and practice of non-interference has been a way to keep major power rivalries, both during and after the Cold War, out of the ASEAN internal and regional affairs.22

However, Lee Jones provides a more critical explanation, somewhat different from the ASEAN official line. He argues that when ASEAN was founded, non-interference emerged as a ‘technology of power’ used to shore up domestic orders (social, political and economic) and defeat the threat of communist subversion:

‘Non-interference’ was [...] not a neutral principle designed to further some abstract desire for peace and international stability. It certainly sought to transcend intra-ASEAN conflicts, but this was to permit ruling elites to consolidate their own grip over society and achieve the economic growth necessary to undercut the appeal of communism, within an international context of waning Western guarantees to defend anti-communist regimes from opposition forces within their own societies.23

For the reasons mentioned above, ASEAN States are often seen as having a very broad understanding of the principle of non-interference, prohibiting even “public challenges, comments or criticisms of other regimes’ legitimacy, domestic systems, conduct, policies, or style.”24 From

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21 SEVERINO, supra note 4, at 92.

22 Id. at 93; see also Wu, supra note 19, at 15.

23 LEE JONES, ASEAN, SOVEREIGNTY AND INTERVENTION IN SOUTHEAST ASIA 39-40 (2012). For Amitav Acharya as well, see ACHARYA, supra note 2, at 58, “ASEAN’s doctrine of non-interference was, in important part, an expression of a collective commitment to the survival of its non-communist regimes against the threat of communist subversion.”

an operational point of view, Amitav Acharya asserts that the ASEAN doctrine of non-interference imposes the following conduct on its members:

1. Refraining from criticizing the actions of a member government towards its own people, including violations of human rights, and from making the domestic political systems of States and the political styles of governments a basis for deciding their membership in ASEAN;

2. Criticising the actions of States which were deemed to have breached the non-interference principle;

3. Denying recognition, sanctuary, or other forms of support to any rebel group seeking to destabilize or overthrow the government of a neighbouring State;

4. Providing political support and material assistance to member States in their campaign against subversive and destabilising activities.25

III. THE FUNDAMENTAL PRINCIPLE OF NON-INTERVENTION

This section will explain in some detail the content and scope of the fundamental principle of non-intervention as understood in international law, and compare the ASEAN doctrine of non-interference to the principle. Although the doctrine of non-interference is undoubtedly essential for ASEAN States which have made it “the central tenet of intra-regional relations,”26 interference in the internal affairs of others is not totally absent from the regional sphere. As the then Permanent Secretary of Singapore’s Foreign Ministry put it in 2008, “frankly, we have been interfering mercilessly in each other’s internal affairs for ages, from the very beginning.”27 The following analysis will make it possible to identify what aspects of the ASEAN doctrine of non-interference – aspects listed by Amitav Acharya above – are not totally in line with the principle of non-intervention. To a lesser degree, this study will also show multifarious regional practices which do not always comply with the principle and/or


26ACHARYA, supra note 2, at 57.

27JONES, supra note 23, at 5. The Permanent Secretary Bilahari Kausikan had been interviewed by Lee Jones in 2008.
the doctrine. After discussing the emergence of the principle of non-intervention (A), this section will clarify the content of the principle (B), and finally explain the exception to it (C).

A. *The Emergence of the Principle of Non-Intervention*

The doctrine of non-intervention in which States refrain from interfering in one another's internal affairs emerged long ago. Indeed, this doctrine was the underpinning of the new world order ushered in by the 1648 Treaty of Westphalia. Even though the first formulations of the principle came about in the eighteenth century, the definition of intervention – and therefore the content and scope of the principle – is still a subject of controversy. In other words, the definitions suggested by some writers are very often perceived as too narrow or too broad by other scholars.

The principle of non-intervention has found expression (both implicit and explicit) in many bilateral, regional, and multilateral treaties. The 1933 Montevideo Convention on the Rights and Duties of

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28 See, e.g., CHRISTIAN Wolff, Jus Gentium Methodo Scientifica Pertractatum ¶¶ 255-57 (1749); EMER de VATTel, Droit des Gens ou Principes De la Loi Naturelle, Book I, ¶ 37 (1758).

29 WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 267 (1964). With regard to the notion of intervention, Wolfgang Friedmann wrote that “almost the only agreement among writers is that this term covers an area of great confusion.”

30 See, e.g., HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 167 (1950); for Sir Hersch Lauterpacht, intervention “signifies dictatorial interference in the sense of action amounting to a denial of the independence of the State.” Lori F. Damrosch, Politics across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs, 83 Am. J. Int. Law 1, 5 (1989); for Lori Fisler Damrosch the notion of intervention does not only cover ‘dictatorial interference’ in the affairs of another State, notably because “some subtle techniques of political influence may be as effective as cruder forms of domination.” D. R. Gilmour, The Meaning of ‘intervene’ within Article 2(7) of the United Nations Charter – An Historical Perspective, 16 Int’l & Comp. L.Q. 330, 331-34 (1967); Lawrence Preuss, Article 2, paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction, 74 Recueil Des Cours 547, 605-611 (1949); for these two authors, recommendations or fact-finding missions, for example, would constitute an intervention.


32 In addition to the 1933 Montevideo Convention, we can mention, inter alia, the Pact of the League of Arab States art. 8, Mar. 22, 1945, 70 U.N.T.S. 237; the Charter of the Organization of American States art. 3, art. 19, Apr. 30, 1948, 119 U.N.T.S. 48; the Constitutive Act of the African Union art. 4 Jul. 11, 2000, 2158 U.N.T.S. 3 (as amended by the Protocol on Amendment to the Constitutive Act of the African Union, Feb. 3, 2003/Jul. 11, 2003); the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community art. 1a, art. 2, art. 3a, art. 3b, Dec. 31, 2007, O.J. C 306.
States is often cited as a starting point. Article 8 provides: “No State has the right to intervene in the internal or external affairs of another.”\textsuperscript{34} For its part, the UN Charter does not expressly stipulate an obligation of the Members to refrain from intervening in the affairs of other States, but “several key principles of the Charter reflect implicit rights of states to be free from intervention on the part of other states and correlative duties to refrain from intervention.”\textsuperscript{35} Nonetheless, all these treaties shed little light on the content of the principle.

The UN General Assembly has also adopted many resolutions that address the principle of non-intervention.\textsuperscript{36} Although, \textit{a priori}, the content of these resolutions could serve as evidence of \textit{opinio juris} and reflect the international customary law on the subject, an \textit{a posteriori} examination of these resolutions shows that many of them represent a political act, rather than a legal one. As underscored by Maziar Jamnejad and Michael Wood (Jamnejad and Wood), “very few” of these resolutions “are authoritative, and many were adopted by a heavily divided vote.”\textsuperscript{37} A strong attempt to clarify the content of the principle of non-intervention was made when the General Assembly adopted by consensus the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (hereinafter “the Friendly Relations Declaration” or “Declaration”).\textsuperscript{38} The Declaration reflects the international law; it represents what the Members of the United Nations agree to be the law of the Charter on the principles addressed in the Declaration in 1970.\textsuperscript{39} Indeed, in Section 3, the Declaration provides that

\begin{itemize}
\item \textsuperscript{33} See, e.g., U.N. Charter art. 2(7) (as an exception to the principle); the Vienna Convention on Diplomatic Relations art. 41(1), Apr. 18, 1961, 500 U.N.T.S. 96; the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) art. 3, Jun. 8, 1977, 1125 U.N.T.S. 610.
\end{itemize}

\begin{itemize}
\item \textsuperscript{34} Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, Dec. 26, 1933, 165 L.N.T.S. 19.
\end{itemize}

\begin{itemize}
\item \textsuperscript{35} Damrosch, \textit{supra} note 30, at 8. See U.N. Charter arts. 1(2), 2(1), 2(4), and 55.
\end{itemize}

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\item \textsuperscript{36} For a non-exhaustive list of resolutions that address intervention or interference, see Maziar Jamnejad & Michael Wood, \textit{The Principle of Non-Intervention}, 22 \textit{Leiden J. Int’l L.} 345, 350, footnote 20 (2009).
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\item \textsuperscript{37} \textit{Id.} at 351.
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\item \textsuperscript{39} Robert Rosenstock, \textit{The Declaration of Principles of International Law Concerning Friendly Relations: A Survey}, 65 \textit{Am. J. Int’l L.} 713, 713-14 (1971). For a critical analysis on the Friendly Relations Declaration, see e.g., Gaetano Arangio-
[t]he 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 by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.\textsuperscript{40}

The third principle of the Declaration – out of the seven principles addressed – is devoted to non-intervention. The first two paragraphs read as follows:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. 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.\textsuperscript{41}

B. \textit{The Content of the Principle of Non-Intervention}

A decisive step in the clarification of the content and scope of the principle of non-intervention has been reached by the International Court of Justice (hereinafter “the Court”), which is the principal judicial organ of the United Nations and whose task is mainly to explain the state of international law on particular points at a specific moment. Indeed, in \textit{Nicaragua v. United States of America}, after having considered that the principle “is part and parcel of customary international law,”\textsuperscript{42} the Court explained:

\textsc{Ruliz, \textit{The United Nations Declaration on Friendly Relations and the System of the Sources of International Law} 117 ff. (1979).}

\textsuperscript{40} Friendly Relations Declaration, \textit{supra} note 38.

\textsuperscript{41} \textit{Id}.

\textsuperscript{42} Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶202 (June 27) [hereinafter \textit{Nicaragua}].
[...] in view of the generally accepted formulation, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.\(^{43}\)

The words of the 1986 judgment are very similar to the wording used in the third principle of the Friendly Relations Declaration. The constitutive elements of the principle of non-intervention as quoted above still form part of international law today and therefore require further examination. The following paragraphs aim to (1) clarify the notions of internal and external affairs, (2) analyse the lawfulness or not of some inter-state interactions in light of the element of coercion, and (3) provide ASEAN-related examples of economic, political and forcible measures that constitute violations of the principle.

1. Intervention in the Internal or External Affairs of Another State

In the Nicaragua case, when analysing the principle in question, the Court begins by giving a broad and general definition of it, writing that “[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference.”\(^ {44}\) The principle of non-intervention can therefore be presented “as a corollary of the principle of the sovereign equality of States”\(^ {45}\) – a principle enshrined in Article 2(1) of the UN Charter\(^ {46}\) – or, as asserted by some scholars, “a corollary of every state’s right to sovereignty, territorial integrity and political independence.”\(^ {47}\) Being sovereign means that “States are free to take their

\(^{43}\) Id. at ¶ 205.

\(^{44}\) Id. at ¶ 202.

\(^{45}\) Id.

\(^{46}\) U.N. Charter art. 2, para. 4; For a study on that Article, see Marcelo Kohen, Article 2, paragraphe 1, IN LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 399-416 (J.-P. Cot, A. Pellet, M. Forteau, 3rd ed., 2005).

\(^{47}\) ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM’S INTERNATIONAL LAW,
decisions in an independent way on matters essentially falling within the realm of their national concern.\textsuperscript{48}

In the Nicaragua judgement, the Court insists that the principle forbids “all States or groups of States”\textsuperscript{49} to intervene. Here, the notion of ‘groups of States’ can be understood to mean international organizations, such as ASEAN, the Organization of American States, the African Union or the European Union. Also, the principle prohibits intervention in both “internal or external affairs”\textsuperscript{50} of other States. As explained by the Court, ‘internal affairs’ includes matters relating to “the choice of a political, economic, social and cultural system.”\textsuperscript{51} In contrast, ‘external affairs’ relates to, \textit{inter alia}, the formulation of a foreign policy, the conclusion of political alliances, or the adoption of diplomatic positions.\textsuperscript{52} It is not always easy to determine what falls essentially within the domestic jurisdiction of a State. In 1923, the Permanent Court of International Justice observed in the case of \textit{Nationality Decrees Issued in Tunis and Morocco} that “[t]he 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.”\textsuperscript{53} Nowadays, as more and more matters are regulated by international law, the scope of domestic jurisdiction is eroded.\textsuperscript{54} For example, the application against State A of the terms of an international treaty by which State A is bound – for instance the provisions of the Chapter VII of the UN Charter (see \textit{infra}) – does not constitute a violation of the principle against the said State.

2. \textit{Coercion as the Essence of any Prohibited Intervention}

It is important to emphasize that the principle of non-intervention does not


\textsuperscript{49} Nicaragua, supra note 42, at ¶ 205.

\textsuperscript{50} Id.

\textsuperscript{51} See id. Also, the third principle of the Friendly Relations Declaration, supra note 38, provides: “Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”

\textsuperscript{52} Kohen, supra note 48, at 159.

\textsuperscript{53} Nationality Decrees Issued in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7).

\textsuperscript{54} \textsc{Ian Brownlie}, \textsc{Principles of Public International Law} 295 (7\textsuperscript{th} ed. 2008).
preclude all inter-state interactions. The third principle of the Friendly Relations Declaration provides that

[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.55

In other words, and as asserted by the Court, coercion is “the very essence”56 of any prohibited intervention. The absence of coercion precludes the violation of the principle of non-intervention. An intervention is coercive when the intervening State compels the target State to do or to abstain from doing a certain act in order to subdue the free exercise of the target State’s sovereign rights. Acts of coercion are of a certain magnitude. As Jamnejad and Wood wrote: “If the target state wishes to impress the intervening state and complies freely, or the pressure is such that it could reasonably be resisted, the sovereign will of the target state has not been subordinated.”57

a. A right to criticize, comment or advise?

As asserted by Amitav Acharya, “refraining from criticizing the actions of a member government towards its own people, including violations of human rights”58 is entirely part of the ASEAN doctrine of non-interference. In practice, it is true that very often ASEAN Member States refrain from openly criticizing harsh neighbours’ actions towards their people. John Funston observed, for example, that there were “no open criticisms of military coups in Thailand, martial law in the Philippines, […] or the use of detention without trial in Malaysia and Singapore.”59 Sometimes, however, – and this seems to be the exception rather than the rule – criticisms are openly made. When that is the case, those criticisms are also vigorously condemned by the target State.60 For instance, when the former Malaysian Deputy Prime Minister, Anwar Ibrahim, was arrested on September 20, 1998, then held for a long period

55 Friendly Relations Declaration, supra note 38.
56 Nicaragua, supra note 42, at ¶ 205.
57 Jamnejad & Wood, supra note 36, at 348.
58 ACHARYA, supra note 2, at 58.
60 See ANTOLIK, supra note 24, at 43. For example, Singapore denounced the protests in Malaysia and Indonesia against a 1986 Israeli presidential visit in the country as interference in Singapore’s domestic affairs.
without charge under Malaysia’s Internal Security Act, and eventually sentenced in April 1999 to six years in prison, Lee Kuan Yew, the former Singapore Prime Minister, qualified the handling of the case by Malaysia as “an unmitigated disaster.”61 According to Wu, Malaysia apparently perceived Lee’s statement as a violation of “the principle of non-intervention.”62 In the author’s opinion, however, it is difficult to consider such inter-state interaction – i.e. simple criticisms, and notably with regard to the human rights situation in other countries – as constituting a violation of the principle of non-intervention as recognized by the international law, for the very reason that such behaviours, even if they are unfriendly, are not coercive per se.63 Therefore, there seems to be a discrepancy between a particular aspect of the ASEAN doctrine of non-interference and the fundamental principle of non-intervention.

Another question concerns the right or not to comment on, or to advise, the domestic policies of fellow members when their policies have regional implications. Since the creation of ASEAN such involvements by some members in the affairs of others have been observed. In February 1986, for instance, five foreign ministers called for a peaceful resolution of the conflict that opposed pro and anti-Marcos forces in the Philippines.64 They declared:

A critical situation has emerged which portends bloodshed and civil war. The crisis can be resolved without widespread carnage and political turmoil. We call on all parties to restore national unity and solidarity so as to maintain national resilience.65

ASEAN members have also had occasion to firmly advise Southeast Asian States that were not members of the Association at that time. For example, in 1992, when 170,000 Rohingyas – the members of Burma’s Muslim minority – were displaced into Bangladesh, the Malaysian Foreign Ministry summoned the Burmese ambassador and


62 Wu, supra note 19, at 25.

63 For similar conclusion, see Kohen, supra note 48, at 161; Jamnejad & Wood, supra note 36, at 376.

64 Funston, supra note 25, at 7.

65 Id.; for other examples of advices provided by ASEAN members, see at 7-8. At least two examples are given by Funston. With regard to the fact that some ASEAN foreign ministers strongly advised the Burmese authorities to dialogue with Aung San Suu Kyi, Funston referred to THE NATION, Jul. 4, 1997. With regard to the fact that Lee Kuan Yew called President Ramos in 1992 and firmly advised him to fix power shortage issues in the Philippines, Funston referred to THE NATION, Jul. 23, 1998.
required Burma “to immediately cease the oppression […] and be prepared to accept them back.”  

In fact, a certain divergence of opinion has been noted within ASEAN over the right to either comment on or advise fellow members’ domestic policies when they have regional implications. This can be illustrated by the reception given to the idea of ‘flexible engagement’ proposed in 1998 by the then Thai Foreign Minister, Surin Pitsuwan, after the Asian economic crisis. Surin declared that “it is time that ASEAN’s [sic] cherished principle of non-intervention is modified to allow it to play a constructive role in preventing or resolving domestic issues with regional implications.”

Thailand thought that speaking frankly and openly, rather than speaking sweetly, would be the best way to solve problems. For Surin, “when a matter of domestic concern poses a threat to regional stability, a dose of peer pressure or friendly advice at the right time can be helpful.” The ‘flexible engagement’ concept was intended to help ASEAN prevent, mitigate or solve intra-regional problems, like an economic crisis, and transnational sources of instability, like human rights, refugees and environmental issues.

Few regional States supported the idea of the Thai Foreign Minister. The Philippines was apparently the only one to openly endorse his view. On the contrary, many countries, such as Malaysia, Singapore, Brunei, Vietnam, Myanmar and Laos, firmly contested the Thai concept. They thought that commenting on how governments deal with sensitive issues would be detrimental to their own internal stability and regime survival, exacerbate bilateral tensions, and transform bilateral problems into an ASEAN issue.

Here also, it should be noted that non-intervention does not mean non-involvement in the internal affairs of others. Open comments, advice, and even peer pressure – if the pressure is such that it could reasonably be resisted – cannot be considered as behaviours constituting a

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66 Malaysia Demands Myanmar Stop Oppressing Muslim Minority, KYODO NEWS, Mar. 10, 1992, quoted in JONES, supra note 23, at 188. Burma was not an ASEAN Member State at that time.

67 Id.; see also JONES, supra note 23, at 188.


69 ACHARYA, supra note 2, at 153. Amitav Acharya noted that Thailand needed to put pressure on Myanmar because of the influx of a very large number of refugees into Thai territory.


71 Funston, supra note 25, at 5.
violation of the principle of non-intervention, because of the lack of the very essence of prohibited intervention, namely the element of coercion.

A similar issue concerns extraterritorial broadcasting through different platforms such as radio, television or the Internet. Authors have observed that in Southeast Asia critical commentary made in the national media is often followed by government apologies to the offended State; the purpose being to reduce tensions between States. The example frequently cited is the apology made in 1991 by the then Malaysian Information Minister to Jakarta after Malaysian TV showed a CNN report on a massacre in Dili, East Timor. However, the answer to the question of whether a broadcast constitutes a violation of the principle of non-intervention varies in relation to the circumstances. For instance, if the broadcast is intentionally biased and is part of a campaign of propaganda, subversion, and defamation towards a foreign government for the purpose of producing dissent or galvanizing insurgents, with a view to destabilizing the said government, the principle in that case is likely breached. For that to be the case, however, the broadcasting media must be a de jure or de facto organ of the State; if not, the State is not in breach of the principle of non-intervention, even though it might violate its obligations of due diligence. A contrario, as stated by Jamnejad and Wood, “[i]f factual and neutral, it is doubtful that the broadcast will constitute intervention, regardless of the effect it may in fact have.”

b. Intervention by Invitation

Another important form of intervention that does not constitute a violation of the principle of non-intervention is the military intervention by invitation. Indeed, when interventions are carried out at the request or

72 See e.g., Wu, supra note 19, at 13; Funston, supra note 59, at 8.
73 Funston, supra note 59, at 8.
75 Jamnejad & Wood, supra note 36, at 374.
with the consent of the host State, the element of coercion is absent.\textsuperscript{77} The international community does not appear to contest the fact that consent may justify a military operation.\textsuperscript{78} However, it should be underlined that the lawfulness of an intervention depends upon the validity of the consent granted as well as the objective pursued by the intervention. The International Law Commission has identified several criteria that consent must fulfill to be valid. First, consent must be internationally attributable to a State, \textit{i.e.} “it must emanate from an organ whose will is deemed, at the international level, to be the will of the State.”\textsuperscript{79} To know who is in a position to validly invite an outside intervention becomes a complex question in cases of competition between different authorities – this is what often happens in situations of international or non-international

\textsuperscript{77} The host State might also consent to an (non-military) intervention carried out by an international organization. For instance, S.C. Res. 745 (1992) established the United Nations Transitional Authority in Cambodia (UNTAC), whose mission was to ensure the implementation of the Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, signed in Paris on October 23, 1991. Resolution 745 contains no statement that the Security Council is acting under Chapter VII. It is said that the Security Council based the establishment of UNTAC on the consent of the Parties to the Paris Peace Agreements (see Part. 1, sec. 1, art. 2 of the Comprehensive Settlement Agreement). As UNTAC was notably tasked to control all Cambodian administrative agencies, bodies and offices, if the UNTAC’s mission had not been authorized by Cambodian Parties to the Agreements, the mission could have been considered as an interference in matters which are essentially within the domestic jurisdiction of Cambodia. See Lucy Keller, \textit{UNTAC in Cambodia – from Occupation, Civil War and Genocide to Peace}, 9 MAX PLANCK UNYB 127, 156-57 (2005).

\textsuperscript{78} See, \textit{e.g.}, S.C. Res. 387, U.N. Doc. S/RES/387 (Mar. 31, 1976). In this Resolution the Security Council recalled “the inherent and lawful right of every State, in the exercise of its sovereignty, to request assistance from any other State or group of States.”

armed conflict. After having analysed scholarly doctrine and States’ practice, Olivier Corten concluded:

In such instances, it seems that an appeal for outside intervention presupposes, for it to be justified, that it comes from a government that is both internationally recognized and that has a certain effective power. In the event of doubt about legitimacy or effective power, practice seems to profess a duty to abstain and refer matters to a Security Council decision.80

Second, consent must be given by the territorial State prior to the commission of the act.81 Third, consent must be given freely; i.e. “consent must not be vitiated by ‘defects’ such as error, fraud, corruption or coercion.”82 Fourth, consent must be clearly established and not presumed.83 In addition, it should be noted that a particular act, which otherwise would have been considered as a breach of an international obligation, is lawful only if conducted “within the limits which the State expressing the consent intends with respect to its scope and duration.”84

Moreover, it is important to mention that the lawfulness of an intervention by invitation also depends on the objective pursued by the intervention. Amitav Acharya wrote that the ASEAN doctrine of non-interference authorizes the members of the Association to “provide political support and material assistance to member States in their campaign against subversive and destabilising activities.”85 In fact, the alignment of the doctrine with the principle of non-intervention and the institution of intervention by invitation depends on the circumstances and in particular on what the ASEAN members consider as being ‘subversive and destabilising activities.’ Most of the scholars who have analysed international State practice since 1945 have reached the conclusion that the international community has the legal conviction that foreign countries are not allowed to arbitrate or influence the course of an internal conflict and must, on the contrary, comply with a duty of neutrality.86 Not only are


81 ILC-1979, supra note 76, at 113, ¶ 16.

82 Id. at 112, ¶ 12.

83 Id. at 112-13, ¶ 14.

84 Id. at 113, ¶ 17.

85 ACHARYA, supra note 2, at 58.

foreign States prohibited from providing military support to rebels who fight against and aim at overthrowing the government of their country (see *infra*). They are also obligated to refrain from interfering in an internal armed conflict, in favour of the national authorities, against opposition forces that fight for their right to self-determination. Indeed, the third principle of the Friendly Resolution Declaration provides: “The use of force to deprive people of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.”

However, some objectives pursued by outside interventions pose no particular problems. For example, the lawfulness of interventions by invitation designed to restore or maintain law, domestic order and peace does not appear to be contested by the international community, as long as the intervention does not infringe on the right to self-determination. Outside support for such purposes takes different forms. A foreign government may provide financial assistance, logistical support, military equipment and training for the local armed forces or police. Foreign troops may also take part in the protection of key installations and buildings, joint border patrols, or even large scale joint military operations. Interventions by invitation that are carried out in order to maintain or restore law, order and peace take place in diverse contexts such as the repression of local protests and army mutinies, the fight against drug trafficking, or the fight against terrorism. The repression of local protests is not considered as a violation of the right of people to self-determination as long as the protesters do not represent either a colonial people, a people subject to an occupying or racist regime willing to accede to independence, nor the people of an already formed State fighting to maintain its political independence. Indonesia’s dispatch of military transport airplanes to the

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88 Friendly Resolution Declaration, *supra* note 38, at 123. Specifically, refer the fifth principle of the Friendly Relations Declaration which is related to equal rights and self-determination of peoples. There is however an exception to that prohibition. As outlined by Christine Gray, “if there has been outside subversion against the government, then help to the government becomes permissible”. *See* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 68 (2nd ed. 2004).


Philippines in 1986 in order to help the Marcos regime fight against communist insurgents could be considered as a lawful form of intervention, as long as the communist insurgents did not constitute in law a people fighting for their right to self-determination, and if the purpose of the counter-insurgency operation was to restore internal peace and order.\(^9\)\(^2\)\(^\)\(^3\) Moreover, beside a strictly intra-ASEAN Member States context, military intervention with consent of the host State can be illustrated by the deployment of US Joint Special Operations Task Force in the Philippines under Exercise Balikatan 02-1 with the aim of supporting the Philippine armed forces in their fight against Islamists terrorist organizations apparently linked to Al Qaeda, namely the Abu Sayyaf Group and Jemaah Islamiyah.\(^9\)\(^3\)

3. **Measures that Lead to Unlawful Interventions**

As mentioned in the third principle of the Friendly Relations Declaration, unlawful interventions are implemented through the use of any type of coercive measures, the most frequent ones being economic, political, or forcible measures.\(^9\)\(^4\) For example, it is unlawful to intervene militarily on the territory of a ‘rogue State’ in order to impose a democratic system overnight. Even though the implementation of democracy would certainly guarantee a better respect for human rights than any other system of government could do, international law does not yet recognize democracy as an absolute right or a strict obligation. Instead, the emerging right to democratic governance merely obliges States to develop towards democracy, a process that is part of the appreciation of each State.\(^9\)\(^5\)

\(^9\)\(^2\) See, e.g., DEWI F. ANWAR, INDONESIA IN ASEAN: FOREIGN POLICY AND REGIONALISM 148 (1994) (on Indonesia’s military support).


\(^9\)\(^4\) Friendly Relations Doctrine, supra note 38.

\(^9\)\(^5\) Niels Petersen, The Principle of Democratic Teleology in International Law, 34 BROOK. J. INTL L. 33, 83-84 (2008). Niels Petersen summarizes the position of the doctrine on that matter as follows:

In the legal debate of the 1990s, even those authors favourable of the democratic entitlement did not claim the unconditional establishment of a right to democratic governance. Instead, most of them have identified a democratic trend or, most famously, an emerging right to democratic governance. The preceding analysis suggests reformulating this thesis: international law contains a teleological democracy principle, a right to the emergence of democratic governance. (footnotes omitted).
a. Economic Measures

Individual States and regional organisations sometimes impose unilateral economic measures – e.g. sanctions imposed outside of the UN system of collective security – against other States in order to force a change in domestic or foreign policy. The answer to the question of whether the imposition of economic measures (other than counter-measures) is contrary to the principle of non-intervention seems to depend upon the impact of the measures on the target State. As can be read in the Friendly Resolution Declaration, the purpose of the principle of non-intervention is to prevent “the use 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.” Therefore, the imposition of unilateral economic measures are to be considered as a breach of the principle if the target State is forced or coerced by them to do or to abstain from doing any action that falls essentially within its domestic jurisdiction. In the Nicaragua case, the Court said that “the cessation of economic aid in April 1981; the 90 percent reduction in the sugar quota for United States imports from Nicaragua in April 1981; and the trade embargo adopted on 1 May 1985” cannot be seen in casu “as a breach of the customary-law principle of non-intervention.” The conclusion reached by the Court with regard to US economic measures against Nicaragua may have been different if the US had applied the same measures towards another country more dependent on the aid by and trade with the United States. Indeed, as stated by Jamnejad and Wood, “States that are dependent on aid from one state or conduct their trade almost exclusively with that state may find it easier to argue that the imposition of economic measures against them was coercive and thus illegal.”

Now, the right to impose sanctions to force a State to comply with human rights standards – in cases other than the implementation of conventional obligations or Security Council resolutions authorising the application of such sanctions – is an idea that seems to be gaining some acceptance at the international level. In 1989, for example, the Institute of International Law, whose work is to, among other tasks, highlight the characteristics of the lex lata and also make determinations de lege ferenda, adopted a resolution in which Article 2 provides that

States, acting individually or collectively, are entitled to

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97 Jamnejad & Wood, supra note 36, at 370.

98 Friendly Resolution Declaration, supra note 38.

99 Nicaragua, supra note 42, at ¶¶ 244-45.

100 Jamnejad & Wood, supra note 36, at 371.
take diplomatic, economic and other measures towards any other State which has violated the obligation [to ensure the observance of human rights], provided such measures are permitted under international law and do not involve the use of force in violation of the Charter of the United Nations. These measures cannot be considered an unlawful interference in the internal affairs of States.101

The reason why States are entitled to take the measures mentioned in Article 2 is explained in Article 1 of the Institute’s resolution as follows:

This international obligation [of States to ensure the observance of the human rights], as expressed by the International Court of Justice, is *erga omnes*; it is incumbent upon every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. The obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.102

For Jamnejad and Wood, however, the problem lies in the determination of the appropriate extent of the measure applied towards the State in violation of human rights. To mitigate that problem, they propose the implementation of certain concepts: “[…] applying the concepts of the margin of appreciation and proportionality would prevent states using minor human rights breaches to justify major interventions.”103

At the regional level, on the contrary, many ASEAN members are reluctant to impose sanctions on States who violate human rights. In 1992, for example, following forcible displacement of almost two hundred thousand Rohingyas – a Burma’s Muslim minority – into Bangladesh, very few ASEAN members pushed for or applied sanctions against the country.104 Furthermore, ASEAN human rights mechanisms do not include strict monitoring or enforcement functions. Although, Article 14 of the ASEAN Charter adopted in 2007 has provided for the creation of a human rights body that “shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting[,]”105 that organ does not seem to be empowered to impose sanctions. The reasoning was,

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102 *Id.*, art. 1.


104 JONES, *supra* note 23, at 188.

105 ASEAN Charter art. 14(2).
and still is, that the views between progressive ASEAN members and traditionalist ones were divergent on what kind of regional body should be created. Although some countries, like Indonesia, Malaysia, the Philippines, and Thailand, wanted to establish a regional body having a monitoring and an enforcement capacity, other countries, such as Cambodia, Laos, Myanmar, and Vietnam, preferred to give the human rights body an advisory function with a focus limited to the promotion of human rights. The human rights body finally created was the ASEAN Intergovernmental Commission on Human Rights (AICHR). To some extent, its 2010 Terms of Reference (ToR) synthesizes the positions of the progressives and the traditionalists. While Article 1(1) of the ToR stipulates that one of the purposes of the AICHR is “to promote and protect human rights and fundamental freedom of the peoples of ASEAN,” Article 2(1)(b) of the ToR lays down that the Commission shall be committed to respecting the principle of “non-interference in the internal affairs of ASEAN Member States.” Given the extensive interpretation of the doctrine of non-interference made by ASEAN members for whom even criticism is hardly tolerated, it is difficult to think that in the near future the AICHR would ask for the application of sanctions against a Member that does not protect the human rights of its people.

b. Political Measures

Political measures considered as unlawful interventions could be illustrated by the practice of making the admission of a State into a regional or international organization dependent upon certain conditions that fall essentially within the competence of the State and which are not stated in the constitutive act of the organization as entry criteria. Thus, it seems that the element of the ASEAN doctrine of non-interference, according to which State Members must “refrain from […] making the domestic political systems of States and the political styles of governments a basis for deciding their membership in ASEAN,” does not contradict the fundamental principle of non-intervention. For example, the 1967

106 Noel M. Morada, The ASEAN Charter and the Promotion of R2P in Southeast Asia: Challenges and Constraints, 1 GLOBAL RESPONSIBILITY TO PROTECT 185, 200, 205-06 (2009).

107 See Mathew Davies, The ASEAN Synthesis: Human Rights, Non-Intervention, and the ASEAN Human Rights Declaration, 14 GEO. J. INT’L AFF. 51, 56 (2013). For Mathew Davies, “The ASEAN Human Rights Declaration is not so much a compromise between progressives and traditionalists as representative of the synthesis of their positions.” Similar observation can be made about the ASEAN Human Rights Declaration drafted by the AICHR and adopted in 2012.


109 ACHARYA, supra note 2, at 58.
Bangkok Declaration provides that “the Association is open for participation to all States in the South-East Asian Region subscribing to the [...] aims, principles and purposes” listed in the Declaration, among which can be mentioned, *inter alia*, the acceleration of economic growth, social progress, cultural development in the region, and the promotion of regional peace and stability, as well as the promotion of active collaboration and mutual assistance on matters of common interest.\(^{110}\) None of the Declaration’s aims, principles or purposes make reference to the obligation for a candidate to adopt a certain domestic political system or political style of government, which are matters that fall within the realm of the candidate’s national concern.\(^{111}\)

Besides the rhetoric of non-interference, ASEAN history shows a marginal practice of unlawful intervention with regard to the issue of a new Member’s admission to the Association. For example, Lee Jones asserts that after the breakdown of Cambodia’s ruling coalition in 1997, ASEAN decided “to postpone the country’s admission to the Association and impose a creeping set of conditions to be met before it would be admitted.”\(^{112}\) Some of these conditions are purely interference in the internal affairs of Cambodia: a power-sharing agreement between Ranariddh and Hun Sen, the holding and postponement of elections, and the formation of a new government that fulfils the desire of the countries in the region.\(^{113}\) These conditions also coerced Cambodia. As Lee Jones observed, “since the restoration of his government’s international legitimacy and foreign aid depended on cooperating with ASEAN, he [Hun Sen] had little choice but to suffer continued intervention.”\(^{114}\)

c. Forcible Measures

Finally, unlawful forcible measures used by the intervening State can be direct or indirect. It is noteworthy that such a use of force – direct or indirect – by the intervening State constitutes not only a breach of the


\(^{111}\) Entry criteria laid down in the ASEAN Charter seem however more stringent. Although admission to ASEAN is still not contingent on the requirement of democratic governance, the admission of new members is notably based on the agreement to be bound and to abide by the Charter (art. 6(2)(c)), which provides, *inter alia*, that Member States shall act in accordance with certain principles among which are the adherence to the rule of law, good governance, the principles of democracy and constitutional government (art. 2(2)(h)). *See*, e.g., Daniel Seah, *The ASEAN Charter*, 58 INT’L & COMP. L.Q. 197-212 (2009), for an analysis of the ASEAN Charter.

\(^{112}\) JONES, supra note 23, at 140.

\(^{113}\) Id. at 140-47.

\(^{114}\) Id. at 146.
principle of non-intervention, but also a violation of the principle
prohibiting the use of force enshrined in Article 2(4) of the UN Charter.\footnote{The overlap existing sometimes between the two principles can be seen by comparing the first and third principles of the Friendly Relations Declaration. For a critique of this overlap, see Arangio-Ruiz, supra note 39, at 119-24.}

This has been confirmed by the Court who stated in 1986 that “acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.”\footnote{Nicaragua, supra note 42, at ¶ 209. It is important to note that for the Court the mere supply of founds to opposition groups does not in itself amount to a use of force (\textit{id. at} ¶ 228).}

Examples of wrongful intervention which use direct force are the sending of troops in or the bombardment of the territory of the target State, without the consent of the host State, or the authorization of the UN Security Council. In the South-East Asian region, a case of direct use of force was the intervention of Indonesia in Portuguese/East Timor in 1975.\footnote{The Security Council and the General Assembly deplored the military intervention of the armed forces of Indonesia in Portuguese/East Timor in 1975 and the violation of its territorial integrity. The General Assembly rejected the claim that East Timor had been integrated into Indonesia; the Security Council called upon the withdrawal of Indonesian forces. \textit{See, e.g.,} G.A. Res. 3485(XXX), U.N. Doc. A/10426 (Dec. 12, 1975); G.A. Res. 31/53, U.N. Doc. A/RES/31/53 (Dec. 1, 1976); S.C. Res. 384, U.N. Doc. S/RES/384 (Dec. 22, 1975); S.C. Res. 389, U.N. Doc. S/RES/389 (Apr. 22, 1976).}

It is nevertheless important to bear in mind that East Timor was at that time a non-self-governing territory and not, \textit{stricto sensu}, a State. The military intervention of Vietnamese troops in Cambodia in late 1978 is another example.\footnote{JONES, supra note 23, at 77.}

Scholars have noted the ASEAN States’ selective responses to foreign interventions. While Member States of ASEAN “strongly deplored the armed intervention and interference in the internal affairs of Kampuchea”\footnote{U.N. GAOR, 34th Sess., 62nd plen. Mtg. at 1193, ¶ 4, U.N. Doc. A/34/PV/62 (Nov. 12, 1979). \textit{See also} Statement issued in Jakarta on Jan. 9, 1979, by the Minister for Foreign Affairs of Indonesia as Chairman of the ASEAN Standing Committee, concerning the escalation of the Viet Nam-Kampuchea conflict, on behalf of the five ASEAN Foreign Ministers, U.N. Doc. S/13014.} by communist Vietnam, they seem to have “supported Indonesian intervention in East Timor”\footnote{JONES, supra note 23, at 71.} and, outside the ASEAN sphere, did not hesitate in accepting the Tanzanian intervention in Uganda in 1979 as legitimate.\footnote{GRANT EVANS & KELVIN ROWLEY, RED BROTHERHOOD AT WAR: VIETNAM, CAMBODIA AND LAOS SINCE 1975 191 (2nd ed. 1990).}

Examples of wrongful interventions which demonstrate indirect use of force are manifold. The Court in 1986 mentioned the “support for
subversive or terrorist armed activities within another State,”\textsuperscript{122} before concluding “that no such general right of [direct or indirect, with or without armed force] intervention, in support of an opposition within another State, exists in contemporary international law.”\textsuperscript{123} More details are offered by two provisions of the Friendly Relations Declaration, two provisions which are “declaratory of customary law.”\textsuperscript{124} The first provision, which is related to the principle of non-intervention, provides that

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.\textsuperscript{125}

And the second provision, related to the prohibition of the use of force, stipulates that

[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.\textsuperscript{126}

It follows from these two provisions that support offered to groups opposed to the government of another State is unlawful, not only when it is provided to those groups within the territory of the other State, but also when it is given to them within the territory of the intervening State. Therefore, the aspect of the ASEAN doctrine of non-interference according to which Member States must “deny recognition, sanctuary, or other forms of support to any rebel group seeking to destabilize or overthrow the government of a neighbouring State”\textsuperscript{127} is mainly in line with the fundamental principle of non-intervention. The analysis of ASEAN Member States’ practice shows, however, the use of forcible measures in favour of opposition groups. In the 1960s, for example, Malaysia is said to have sent arms to the Moro National Liberation Front in the Southern Philippines.\textsuperscript{128} Also, several sources indicate that in the

\textsuperscript{122} Nicaragua, supra note 42, at ¶ 205.

\textsuperscript{123} Id. at ¶¶ 209, 206.

\textsuperscript{124} Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. ¶ 162 (Dec. 19) [hereinafter Congo].

\textsuperscript{125} Friendly Relations Declaration, supra note 38.

\textsuperscript{126} Id.

\textsuperscript{127} Acharya, supra note 2, at 58.

\textsuperscript{128} JONES, supra note 23, at 49.
1970s and until the 1990s, Thailand supported the Khmer Rouge against the Cambodian government, by hosting the Khmer Rouge and supplying them with weapons.\textsuperscript{129}

It should be noted, finally, that a forcible intervention is not only prohibited when its purpose is to destabilize or overthrow a foreign government, or simply support those engaged in civil strife, but also when it aims at protecting perceived security interests. Indeed, in the case concerning \textit{Armed Activities in the Congo} – with regard to the presence of Uganda’s Defense Forces in the Democratic Republic of the Congo and the military support provided by Uganda to the \textit{Mouvement de libération du Congo} (MLC) rebel group – the Court considered that

the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs [...].\textsuperscript{130}

Forcible actions “directed to securing towns and airports for reasons of its perceived security needs”\textsuperscript{131} are a reference to the outdated right or doctrine of ‘self-protection’ (also called ‘self-help’). In the nineteenth century, the content and scope of self-protection were very broad. For Alfonse Rivier, that right authorized a State to use force against another in cases where its very existence, its territory, its population, its economic and social situations, or its power were affected.\textsuperscript{132} Later, in the twentieth century, with the progressive outlawry of war and the emergence of the principle prohibiting the use of force enshrined in Article 2(4) of the UN Charter, the content and scope of self-protection have been dramatically narrowed, to the point that since 1945 “self-defence should be regarded as the only form of ‘armed self-protection’ or ‘self-help’ still open to a State under modern international law.”\textsuperscript{133} Yet, the purpose of an action in self-defence is only to stop and/or repel an ongoing armed attack.\textsuperscript{134} Therefore, since 1945, any unilateral forcible action conducted


\textsuperscript{130} Congo, supra note 121, at ¶ 163.

\textsuperscript{131} Id.

\textsuperscript{132} ALFONSE RIVIER, PRINCIPES DU DROIT DES GENS 256 (1896).


\textsuperscript{134} For a study on the doctrine and jurisprudence on the purpose of an action in
to protect perceived security interest is unlawful, unless it is authorized by the host State or it complies with the restrictive criteria of the right of self-defence.135

An application of the doctrine of (regional) self-help is illustrated by the Indonesian intervention in Portuguese/East Timor in December 1975. As a result of the fighting in the Territory, Indonesia was confronted with extremely serious difficulties, such as the burden placed on the country by the influx of refugees, the strong reaction created by the practice of the Frente Revolucionária de Timor-Leste Independente (FRETILIN) of terrorizing people who opted for integration with Indonesia, and some incursions by armed bands into Indonesian territory.136 Thus, the representative of Indonesia at the Security Council declared that his country was “vitaly concerned about peace and stability in East Timor, first of all in the interest of the local population, but also in Indonesia’s national interest, as well as in the interest of the entire region of South-East Asia.”137 The majority of ASEAN countries seemed to have raised no objection to the Indonesian intervention,138 while other non-aligned countries condemned Indonesia.139

C. The Exception to the Principle of Non-Intervention

Like many other principles, the principle of non-intervention has its own exception. The third principle of the Friendly Relations Declaration provides that “[n]othing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the


135 Congo, supra note 121, at ¶ 148.


137 Id. ¶ 69.


139 For example, the representative of Tanzania at the Security Council stated that “[t]he Charter of the United Nations does not give any one of us the role of a policeman in the neighbouring Territories”, and “[o]ur worries are even further reinforced when we are made to believe that, because the nature of the regime in Timor as represented by FRETILIN […] was perceived as being against Indonesia’s interests, intervention was considered justifiable.” See U.N. SCOR, 30th Sess., 1867th Mtg. at 2 ¶¶ 13, 15 (Tanzania), U.N. Doc. S/PV.1867 (Dec. 18, 1975).
maintenance of international peace and security.\textsuperscript{140} As well, Article 2(7) of the UN Charter provides that

\begin{quote}
[n]othing 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.\textsuperscript{141}
\end{quote}

Therefore, measures of coercion implemented by States, after having been decided and authorized by the UN Security Council, do not constitute a breach of the principle of non-intervention, even though consent to the intervention has not been given by the State in whose territory the intervention is carried out.

This section starts by explaining the system of collective security as enshrined in Chapter VII of the UN Charter, as well as the widely recognized and accepted practice implemented by the UN Security Council since the end of the Cold War, a practice in accordance to which this UN organ authorizes States to use force in order to maintain or restore international peace and security (1). Then, a brief focus is given to the controversial doctrine of humanitarian intervention which intends to recognise as lawful armed interventions in foreign countries that are conducted without UN Security Council authorization and done in order to put an end to the perpetration of atrocities; a doctrine not only rejected by ASEAN States but also by a large majority of the rest of the international community (2).

1. The Mechanism of Collective Security

Chapter VII of the UN Charter is the very heart of the system of collective security.\textsuperscript{142} It starts with Article 39 which provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to

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\textsuperscript{140} Friendly Resolution Declaration, \textit{supra} note 38.
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\textsuperscript{142} In the author's opinion, collective security could be defined as a system in which, when peace and security of a State are undermined or about to be affected, and this breach has or leads to a risk of repercussions at the regional or international level, so other Members of the UN Organization unite and join forces against the peace-breaker in order to maintain or restore peace and security. \textit{Corthay, supra} note 130, at 341.
\end{flushright}
maintain or restore international peace and security.\textsuperscript{143}

This provision, which is sometimes defined as the “single most important provision of the Charter,”\textsuperscript{144} may be considered as the cornerstone of the system of collective security in the sense that it contains a summary of the powers which are given to the Security Council and which are necessary for the implementation of the mechanism of collective security: to determine the existence of a specific situation first, and then to decide what measures to take – i.e. non-military (Art. 41) or military (Art. 42) enforcement measures – in order to maintain or restore international peace and security.

Article 41 of the UN Charter deals with the implementation of non-military enforcement measures. It states that

\begin{quote}
[t]he Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.\textsuperscript{145}
\end{quote}

This list of measures is not exhaustive. Over time, the Security Council’s practice has evolved and now also includes the establishment of international criminal tribunals, like the International Criminal Tribunal for the former Yugoslavia\textsuperscript{146} and the International Criminal Tribunal for Rwanda,\textsuperscript{147} as well as the establishment of missions in charge of the civilian administration of a territory.\textsuperscript{148} It should be stressed that the coercive nature of such missions is almost absent. The mission performs some of the regalian functions of the host State (e.g. performing basic administrative, legislative and executive functions, and maintaining civil law and order), while the host State is simply required not to obstruct the fulfilment of the mission.\textsuperscript{149}

\begin{flushleft}
\textsuperscript{143} U.N. Charter art. 39.
\textsuperscript{145} U.N. Charter art. 41.
\textsuperscript{149} Evelyne Lagrange & Pierre M. Eisemann, Article 41, in LA CHARTE DES NATIONS UNIES: COMMENTAIRE ARTICLE PAR ARTICLE 1221-22 (J.-P. Cot, A. Pellet, M.
With regard to the implementation of military enforcement measures, the founding members of the UN Charter designed a very centralized mechanism of collective security, with national troops under the command and control of the Security Council. Article 42 of the UN Charter provides:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.\(^{150}\)

In order for the Security Council to be able to ‘take such action,’ Article 43 requires that Members of the United Nations “undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities.’\(^ {151}\) However, this original mechanism has never been implemented as such. Indeed, due to political and ideological divergences between Members of the Organization, the special agreements mentioned under Article 43 have never been concluded, and without these agreements and multinational contingents under its command and control the Security Council has not been able to take military action – *stricto sensu* – whenever necessary. Therefore, and especially since the end of the Cold War, the Security Council decided to develop a new practice, in conformity with the spirit of the Chapter VII, a practice which consists of authorizing UN Member States or regional arrangements to use force in order to maintain or restore international peace and security. In other words, the Security Council has decided to transfer or delegate to Member States some of its discretionary enforcement powers.\(^{152}\) This process of delegation has introduced an element of decentralization in the system of collective security in the sense that States can now decide on a voluntary basis whether, to which degree and for how long, they will take the necessary measures called for by the Security Council.\(^{153}\)

The Security Council’s practice authorizing States to use force under Chapter VII has led to the creation of two different types of military operations: the peace operations (blue helmets)\(^ {154}\) and the multinational

Footnotes:

\(^{150}\) U.N. Charter art. 42.

\(^{151}\) U.N. Charter art. 43.


\(^{154}\) Some peacekeeping operations are also established under the ‘Chapter 6 bis’.  

2. Quid of the ‘Right of Humanitarian Intervention’?

Humanitarian intervention can be defined as “armed intervention by a state or group of states without SC authorization to put an end to grave human rights violations.” Despite the doctrinal controversies, it

In that case, peacekeepers are authorized to use armed force in case of personal self-defence only.

Peacekeepers operations and multidimensional operations have been established to maintain and restore peace and security in East Timor. This is the case of UNTAET (see Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999)) and INTERFET (see Res. 1264, U.N. Doc. S/RES/1264 (Sept. 15, 1999)). At that time, however, East Timor was not a State, stricto sensu, but a non-self-governing territory and then a territory under the authority of the United Nations.


Kohen, supra note 48, at 162. For writings on ‘humanitarian intervention’ see the bibliography in the footnotes of the book of CORTEN, supra note 77, at 495 ff. The concept also includes sometimes the rescue of nationals abroad, see, e.g., NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY (1985).
seems that humanitarian intervention is not a rule of international law.\textsuperscript{160} Olivier Corten, who conducted the analysis of legal texts and actual State practice, concluded that “the ‘right of humanitarian intervention’ has no basis in any of the relevant legal texts, whether the UN Charter or other treaties or non-treaty instruments.”\textsuperscript{161} He also noted that

[a] review of practice confirms that in almost all precedents States acting militarily for humanitarian reasons or to rescue their nationals do so by relying legally on a classical justification [such as self-defence or the consent of the States in whose territory the military operation was conducted] and not on any independent rule conferring a right to intervention.\textsuperscript{162}

In other words, the so called ‘right of humanitarian intervention’ is not accepted in positive international law; it is neither an exception to the principle prohibiting the use of force nor an exception to the principle of non-intervention. The same observation can be made with the concept of ‘responsibility to protect’ (R2P) which, today, “has replaced, both terminologically and conceptually, the doctrine of humanitarian intervention.”\textsuperscript{163}

A brief analysis of some of the legal texts shows that ASEAN Member States, as well as many other members of the international community, reject the right of humanitarian intervention. For example, in their Ministerial Declaration issued at the Twenty-third Annual Meeting held in New York on September 24, 1999, the Ministers for Foreign

\textsuperscript{160} Humanitarian intervention must be distinguished from ‘humanitarian assistance’. In the Nicaragua case (\textit{supra} note 42, at \S 242), the Court held that “[t]here can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law.” However, “to escape condemnation as an intervention in the internal affairs”, humanitarian assistance must meet some features. As underlined by the Court, it must be non-discriminatory, and its purpose must be limited “to prevent and alleviate human suffering”, and “to protect life and health and to ensure respect for the human being” (\textit{id. at} \S 243). Humanitarian assistance must respect the sovereignty of States. As noted by the General Assembly who has adopted and framed the concept of humanitarian assistance in many resolutions, “[t]he sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal by the affected country.” (G.A. Res. 46/182, U.N. Doc. A/RES/46/182 (Dec. 19, 1991)).

\textsuperscript{161} CORTEN, \textit{supra} note 77, at 497.

\textsuperscript{162} \textit{Id. at} 549. For the analysis of precedents before and after 1990, see \textit{id. at} 526 ff.

\textsuperscript{163} Kohen, \textit{supra} note 48, at 163.
Affairs of the Group of 77 declared that “[t]hey rejected the so-called right of humanitarian intervention, which had no basis in the UN Charter or in international law.” In 2012, Marcelo Kohen stated that their position had not changed since 1999. Later on, in the 2005 World Summit Outcome adopted by the UN General Assembly, the international community stressed that in case States fail to protect their population against atrocities, other countries are allowed to take other than peaceful measures. These measures – and this is what must be stressed – cannot be taken unilaterally but only with the authorization of the UN Security Council. Paragraph 139 of the 2005 World Summit Outcome reads as follows:

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 are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

Finally, the reading of plenary meetings before the UN General Assembly shows that some Southeast Asian States have expressly emphasized the fact that the idea of humanitarian intervention is a threat to the sovereignty of States, hence the need for any armed intervention to be carried out only with the authorization of the Security Council. For example, the Representative of Malaysia stated in 1999 that “whatever the merits of the argument in support of humanitarian intervention, we should

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164 The Group of 77 is currently composed of more than 130 States, among which are the Members of the ASEAN.


166 Kohen, supra note 48, at 162.


not lose sight of the necessity of securing the authorization of the Security Council for any use of force against States.”

IV. THE POTENTIAL EFFECTS OF ASEAN STATES’ PRACTICE ON THE INTERNATIONAL CUSTOMARY LAW OF NON-INTERVENTION

There is no doubt that the principle of non-intervention is a legal obligation. It is worth repeating that the Court has considered that the principle “is part and parcel of customary international law.”¹⁷¹ That being said, examples of breach of the principle by members of the international community are not infrequent. ASEAN State practice – whether or not it is aligned with the doctrine of non-interference – shows some discrepancies with the principle. For example, criticisms towards the actions of a member government have been seen as a violation of the principle of non-intervention,¹⁷² assistance has sometimes been provided to rebels seeking to destabilize the government of another country,¹⁷³ and military interventions without authorization have sometimes been conducted or at least backed or legitimized.¹⁷⁴ This gap between, on the one hand, what the principle of non-intervention requires and, on the other hand, what States actually do and say poses the question of the potential effects of ASEAN States’ practice on the content and scope of the customary law of non-intervention.

The custom-formation (and evolution) depends on the existence of two basic elements. In the Libya/Malta case, the Court noted that “the material of customary international law is to be looked for primarily in the actual practice and opinio juris of States.”¹⁷⁵ In other words, the two elements to take into account when identifying the emergence or existence of a rule of customary law, or a new interpretation of the existing rule, are “the material facts, that is the actual behavior of states, and the psychological or subjective belief that such behavior is ‘law.”¹⁷⁶ The essential components of the actual practice engaged in by States – i.e. what they say, what they do, even their silence – are its consistency and uniformity. In the Asylum case, the Court declared that a customary rule must be “in accordance with a constant and uniform usage practised by the


¹⁷¹ Nicaragua, supra note 42, at ¶ 202.

¹⁷² See Wu, supra note 19, at 25.

¹⁷³ See JONES, supra note 23, at 49, 83; HUXLEY, supra note 126, at 16; Buszynski, supra note 126, at 731; HEININGER, supra note 126, at 2.

¹⁷⁴ See JONES, supra note 23, at 71; EVANS & ROWLEY, supra note 118, at 191.

¹⁷⁵ Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment, 1985 I.C.J. ¶ 27 (Jun. 3).

States in question. The existence of a rule of customary law cannot be inferred from an actual State practice which is not constant and uniform.

The principle of non-intervention refers to an obligation to refrain from doing certain actions. Therefore, identifying actual State practice by merely analysing concrete situations in the field is highly challenging because such an analysis would lead to highlighting essentially the situations where the rule has been breached, and not the situations where the rule has been respected. Indeed, State’s compliance with the principle often goes unnoticed. Thus, giving a particular attention to the opinio juris is required. The opinio juris, as to the binding character of an abstention, may be induced from the attitude of the States toward the normsetting resolutions of the UN General Assembly. Resolution 2625 (XXV) of the General Assembly, in which the content and limits of the principle have been clarified, is such a normsetting resolution that often conveys the opinio juris of States. It is worth repeating that it has been adopted by consensus by the Members of the United Nations, including a large majority of the current ASEAN States. In the Nicaragua case, the Court held that

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\text{[t]he effect of consent to the text of such resolutions [...] may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. [...] It would therefore seem apparent that the attitude referred to expresses an opinio juris respecting such rule (or set of rules).}
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Therefore, it is highly likely that in 1970 any conduct of an ASEAN Member which was not in conformity with the principle of non-intervention – as it has been described in the Friendly Relations Declaration – constituted a violation of the international law, whether the conduct was in line with the operational aspects of the ASEAN doctrine or not.

Since 1970, however, examples of trespass against the principle of non-intervention have not been infrequent. Such deviation may have consequences on the contour and content of the rule of customary law. Indeed, in the Nicaragua case, the Court held:

\[
\text{It is not to be expected that in the practice of States the application of the rules in question should have been}
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177 Colombian-Peruvian asylum case (Colombia v. Peru), Judgment, 1950 I.C.J. 276 (Nov. 20) [hereinafter Asylum].


179 Nicaragua, supra note 42, at ¶ 188. See also Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. ¶ 70. (Jul. 8).
perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.\textsuperscript{180}

We can conclude from the statement of the Court that some deviation from the principle of non-intervention does not destroy the legally binding character of the principle, nor modify its content. But we can also infer from that statement that the conduct of States inconsistent with a given rule could reflect the emergence of a new rule (e.g. a new exception to the principle of non-intervention – for instance, the right to assist rebel groups seeking to destabilize or overthrow the government of a neighbouring State) or a new interpretation of the existing rule (e.g. considering any criticisms against a government as a violation of the principle of non-intervention). However, for that to be the case, first of all “[e]ither the States taking such action or other States in a position to react to it, must have behaved so that their conduct is ‘evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’”\textsuperscript{181} (i.e. existence of an \textit{opinio juris sive necessitatis}), and secondly, the States’ conduct which is inconsistent with the rule must be constant and uniform.\textsuperscript{182}

The ASEAN States’ practice of military intervention (e.g. in East Timor), or endorsement of such intervention, as well as the practice of assistance to rebels (e.g. to the Moro National Liberation Front and to the Khmer Rouge), are marginal, and often condemned by many members of the international community. Consequently, such a practice does not seem to constitute a constant and uniform practice of the members of the

\textsuperscript{180} Nicaragua, \textit{supra} note 42, at ¶ 186.

\textsuperscript{181} Id. at ¶ 207.

\textsuperscript{182} Asylum, \textit{supra} note 170, at ¶ 276.
international community contrary to the terms of the principle clarified in Resolution 2625 (XXV). Moreover, at the regional level, it is not certain that such behaviours were accompanied by a strong *opinio juris*. It is sometimes asserted that the above mentioned ASEAN practice which is inconsistent with international law has been motivated by strategic and ideological reasons rather than legal convictions.\footnote{JONES, *supra* note 23, at 33, 97.}

With regard to the practice consisting of refraining from criticizing the actions of a member government towards its own people, it has been seen that this practice is generally followed by the ASEAN members, with some exceptions. Does it mean that this practice of abstention reflects a rule of general – or maybe regional – customary international law? This is uncertain. It is difficult to find statements from members of the international community condemning criticisms towards other governments as a violation of the international law. The reason is probably due to the fact that criticisms or open statements, as inimical as they can be, are not coercive, and thus not regarded as illegal. Finally, it must be emphasised that, in order for a certain practice specific to the States of a certain geographical area, or those constituting a community of interest, to be considered as a rule of regional (or particular) customary law – e.g. a rule binding to ASEAN States only – it must be proven that the rule invoked is the result of a constant and uniform practice among the States concerned that is accepted by *each of them* as law.\footnote{Michael Wood, Special Rapporteur at the International Law Commission, *Third report on identification of customary international law* ¶¶ 80-84, U.N. Doc. A/CN.4/682 (Mar. 27, 2015).} This remains to be verified. But at the very least, it can be said that the few examples mentioned above seem to already show a lack of uniform practice among ASEAN States.

V. CONCLUSION

The principle of non-intervention is a fundamental principle of international law. The fact that unlawful intervention, either forcible or non-forcible, has sometimes occurred in Southeast Asia as well as in other parts of the World, does not mean that the legally binding character of the principle is destroyed. The ASEAN doctrine of non-interference includes the principle but also extends beyond it. If the operational aspects of the doctrine which are inconsistent with the principle do not reflect a constant and uniform practice of all the members of the Association, a practice accepted by each of them as law, then these marginal elements of the doctrine cannot be assigned to a regional customary legal value.

The doctrine of non-interference has its own merit. Interfering in the internal or external affairs of other countries would certainly create more unnecessary tensions between States who actually need peace and
stability in order to prosper. Nonetheless, to give to the doctrine of non-interference and to its exception a definition that departs from the principle of non-intervention is also counter-productive to the attainment of an objective of peace and stability.

Peace, stability and prosperity are not only achieved by complying with the principle of non-intervention. ASEAN members have declared that the ASEAN Security Community process must also be guided by other principles such as respect of national sovereignty, renunciation of the threat or use of force, peaceful settlement of disputes (especially through consultation) and consensus based decision-making.

In the area of conflict management, ASEAN is known for its inclination to settle disputes through consensus and consultation, avoiding binding dispute settlement mechanisms, or other strong, direct and formal measures. This sociological approach to conflict management reflects the ASEAN Way, which can be defined as a set of procedural norms that guides ASEAN States’ conduct with each other and with external partners. This *modus operandi* has undoubtedly helped States overcome tensions. The ASEAN Way, however, has also shown its limits. It was, for example, criticized for being responsible for ASEAN’s weak response to the Asian economic crisis. Moreover, the ASEAN Way is sometimes perceived as being too slow to prevent and solve transnational issues like those relating to human rights violations, and for victims of such violations, time is a luxury that they do not have.

With respect to human rights, it is clear that peace, stability and prosperity cannot be achieved in the long run if those rights are not respected. Therefore, if ASEAN wants to build an efficient Security Community, we can encourage the Association to adopt and implement a robust regional human rights system with normative instruments and institutional mechanisms, such as those adopted and implemented by the African Union in order to foster the respect and effective enforcement of human rights in the continent.

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185 Gillian Goh, *The ASEAN Way: Non-Intervention and ASEAN’s Role in Conflict Management*, 3 STAN. J. EAST. ASIAN AFF. 113, 114 (2003). For Gillian Goh the ASEAN Way includes “the principle of seeking agreement and harmony, the principle of sensitivity, politeness, non-confrontation and agreeability, the principle of quiet, private and elitist diplomacy versus public washing of dirty linen, and the principle of being non-Cartesian, non-legalistic.”

186 ACHARYA, supra note 2, at 152.

187 For a comprehensive study on the African human rights system, *see notably MORRIS K. MBONDENYI, INTERNATIONAL HUMAN RIGHTS AND THEIR ENFORCEMENT IN AFRICA* (2011). It is sometimes argued (*see, e.g.,* SEVERINO, supra note 4, at 90) that ASEAN cannot set up a regional human rights system with enforcement mechanisms, like the one established by the African Union, because of the considerable diversity with and among the Southeast Asian nations, because ASEAN members have recently experienced colonialism and Western intervention, and because ASEAN members are led by national self-interest. In our opinion, the African Union shares similar features, and yet
be freely agreed upon and carried out with ASEAN members’ consent, the principle of non-intervention would not be infringed.

it has succeeded in establishing an interesting regional human rights mechanism.