

Reconstructing The Principle of Non-Intervention and Non-Interference – Electoral Disinformation, *Nicaragua*, and the Quilt-work Approach

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In Nicaragua, the International Court of Justice defined intervention as coercion of a State's sovereign choices. This is accepted as unquestioned lex lata by virtually all international legal scholarship. Troublesomely, the coercion definition fails to reckon with dangerous methods of twenty-first century interpositions such as electoral disinformation campaigns. In response, scholars call for the cardinal principle of non-intervention and non-interference to be redefined to prohibit, among other things, disruptive and persuasive interferences.

This Article makes two novel propositions. First, it argues the coercion definition is an incomplete statement of the lex lata. A close examination of the textual history reveals States never even managed to define the principle of non-intervention and non-interference. Rather, the principle has functioned as an empty container, evolving rapidly against the backdrop of burgeoning economic interdependence, the Cold War, and decolonization. Indeed, States have sought to prohibit some manifestations of non-coercive interpositions, such as electoral interference and subversive propaganda.

Second, this Article contends that attempts to redefine a principle which is inherently fluid and evolutionary are bound for futility. Borrowing from the policy-oriented perspective of international law, this Article instead proposes a “Quilt-work” approach, which suggests that States work toward identifying and prohibiting specific manifestations, or “sub-norms,” of dangerous interventions and interferences. The sum of these sub-norms would resemble a quilt of concrete rules that can guide State behavior even without an overarching definition of intervention and interference. This unprecedented and pragmatic approach to international lawmaking has far-reaching implications for other international law conundrums.

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INTRODUCTION

The time is ripe to rethink how the principle of non-intervention and non-interference (“PNIVIF”) applies when a State uses non-coercive measures to interpose itself in the sovereign affairs of another. Despite its being a fundamental duty of statehood, the principle that forbids intervention or interference has often languished as an afterthought. It is not expressly codified in any international treaty, and it is often outshone by its doctrinal cousin, the use of force.¹ Nonetheless, the International Court of Justice (“ICJ”) made an influential statement on the principle in *Military and Paramilitary Activities in and Against Nicaragua*.² In that case, the ICJ defined intervention as the coercion of a State’s

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1. Russell Buchan, *Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions*, 17 J. CONFLICT & SEC. L. 211, 221 (2012).

2. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27).

sovereign choices. Virtually all scholarship on the subject has since treated *Nicaragua*'s pronouncement as unquestioned *lex lata*.³

Recent transnational events have created fresh reasons to doubt the cogency of defining intervention as coercion. One phenomenon stands out: foreign electoral disinformation campaigns. In 2016, the US presidential election fell victim to what Special Counsel Robert Mueller decried as “sweeping and systematic” interference.⁴ Historically, a minority of States have treated elections as opportunities for interposition. The United States and the Soviet Union are reported to have interposed in one out of every nine executive-level elections during the Cold War.⁵ What is striking about the 2016 election is the scale and effectiveness of the disinformation campaign. One study estimated that over thirty million US social media users shared content purportedly created by the Internet Research Agency (“IRA”), an entity based in Russia, between 2015 and 2017.⁶ Other reports found that some States took similar measures in the more recent 2020 US presidential election.⁷

Disinformation campaigns are methods of influence operations (“IO”), which refer to the integrated use of a State’s levers of power to foster attitudes and behaviors in a foreign target audience.⁸ Unlike other IO tools, disinformation campaigns are especially reprobable because of their fraudulent character. Free

3. See, e.g., TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 317 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL 2.0]; Christopher T. Stein, *Hacking the Electorate: A Non-Intervention Violation Maybe, but Not an Act of War*, 37 ARIZ. J. INT’L & COMP. L. 29, 43 (2020); Duncan Hollis, *The Influence of War; the War for Influence*, 32 TEMP. INT’L & COMP. L.J. 31, 40 (2018); Eric Corthay, *The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention*, 17 ASIAN-PAC. L. & POL’Y J. 1, 13–14 (2016); Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AM. J. INT’L L. 583, 641 (2018); Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT’L SEC. J. 349, 354 (2014); Buchan, supra note 1, at 222–23; Philip Kunig, *Intervention, Prohibition of*, OXFORD PUB. INT’L L. ¶¶ 5–6,

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434> (last updated Apr. 2008).

4. ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, at 1 (Mar. 24, 2019), <https://www.justice.gov/storage/report.pdf> [hereinafter MUELLER REPORT].

5. Dov H. Levin, *Partisan electoral interventions by the great powers: Introducing the PEIG Dataset*, 36 CONFLICT MGMT. & PEACE SCI. 88, 89 (2016).

6. PHILIP N. HOWARD ET AL., COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012–2018, at 3 (2018), <https://comprop.ox.ac.uk/wp-content/uploads/sites/93/2018/12/The-IRA-Social-Media-and-Political-Polarization.pdf>.

7. David E. Sanger & Julian E. Barnes, *U.S. Warns Russia, China and Iran Are Trying to Interfere in the Election. Democrats Say It’s Far Worse.*, N.Y. TIMES (July 24, 2020), <https://nyti.ms/3jDBrac>.

8. See ERIC V. LARSON ET AL., FOUNDATIONS OF EFFECTIVE INFLUENCE OPERATIONS: A FRAMEWORK FOR ENHANCING ARMY CAPABILITIES, at 2 (2009).

speech norms are abused to turn open, democratic societies against themselves.⁹ Their potential for mischief has been aggravated in today's information age.¹⁰ Notably, social media has capacitated the unfiltered and virulent dissemination of disinformation.¹¹ Elections, being junctures for the realignment of political power, are especially vulnerable.

It is no wonder that prominent international lawyers have sought recourse through PNIVIF. Two days prior to the 2016 US presidential election, the US State Department's top lawyer, Brian Egan, remarked that a cyber operation that undermines another country's ability to hold an election constitutes a "clear violation" of the principle.¹² One of Egan's predecessors, Harold Koh, also expressly echoed these sentiments.¹³

There is but one problem—these views cannot be reconciled with *Nicaragua*. The test of coercion finds unlawfulness only when an interposing act compels a State to make a sovereign choice it otherwise would not. Disinformation campaigns are not only merely persuasive; they may not even be directed at affecting a State's *choices* to begin with. Additionally, *Nicaragua's* understanding of a State's sovereign will appear predisposed to government prerogatives. It is therefore unclear whether disinformation campaigns, targeting voters rather than the government, can be regarded as coercive of some sovereign will.

Most scholars, responding to this quandary, tend to abide by a singular narrative. They accept *Nicaragua's* definition of coercion as *lex lata* and proceed to call for a new definition of PNIVIF to deal with twenty-first century interpositions. In this vein, some scholars propose a test of "disruption" to prohibit cyber-attacks with significantly disruptive effects.¹⁴ Others have made the case for a test of "consequentiality," which would treat some persuasive interpositions as coercive.¹⁵ In a recent article, Stephen Townley called for coercion to be reimagined as a "standard" rather than a "rule."¹⁶

9. Nathalie Marechal, *Networked Authoritarianism and the Geopolitics of Information: Understanding Russia Internet Policy*, 5 MEDIA & COMM. 29, 37 (2017).

10. See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 214 (2017).

11. See *infra* text accompanying notes 74–78.

12. Brian J. Egan, *International Law and Stability in Cyberspace*, 35 BERKELEY J. INT'L L. 169, 175 (2017).

13. HAROLD H. KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 83–84 (2018).

14. See Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SEC. J. 146, 172–73 (2018).

15. See Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, in CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS 249, 257 (Jens David Ohlin et al. eds., 2015).

16. Stephen Townley, *Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention*, 42 FORDHAM INT'L L.J. 1167, 1200 (2019).

This Article defies the dominant narrative to offer two novel propositions. First, I argue *Nicaragua* is an incomplete statement on the *lex lata*. A proper examination of PNIVIF's textual history actually reveals that most States have held to a prohibition on certain types of non-coercive interpositions. Second, I contend that calls to redefine PNIVIF represent a deficient solution. PNIVIF is an amorphous and evolutionary principle that functions as an "empty container," allowing States to lay down rules on the infinite ways in which they interact with one another. The trouble with attempts at defining the principle is that they are either too restrictive, thus confining the principle's ability to respond to twenty-first-century methods of interposition, or too broad as to be edentate. Instead, I advance a novel method of international lawmaking—the "Quilt-work" approach. This approach eschews all attempts at defining PNIVIF, and conversely proposes that States work toward identifying, negotiating, and coming to agreement on *specific manifestations*, or "sub-norms," of non-coercive interference in an incremental manner. As more of these sub-norms are identified, they aggregate into a quilt, thus establishing concrete rules for guiding State behavior that can evolve to meet new circumstances.

In scrutinizing UN General Assembly ("UNGA") Resolutions, bilateral and regional treaties, and State pronouncements, this Article demonstrates that States have never managed to define PNIVIF, let alone restrictively define intervention as coercion. The textual history makes clear that the principle's content has been in perpetual motion, transforming from a limited rule against armed intervention into a broader one against various subtler interpositions in the twentieth century context of increasing economic interdependence, decolonization, and the Cold War. *Sans* definition, States nonetheless managed to concur, or come close to concurring, on certain manifestations of PNIVIF. These manifestations include norms against non-coercive interpositions, such as certain categories of merely persuasive or destabilizing interferences. PNIVIF is an unruly corpus, and it is reductive to define it as coercion.

The inherently amorphous and evolutionary nature of PNIVIF underscores the central conundrum of this Article—how can concrete rules be created to give certainty to a principle which constantly changes? In this regard, scholarly attempts to redefine PNIVIF are inadequate, because they bear the risks of under- or over-inclusivity, auto-interpretation, and arbitrariness. Relying on the policy-oriented perspective of international law,¹⁷ this Article argues it is not necessary to furnish an ideal definition that draws a clear line between permissible and impermissible interpositions. Instead, it proposes a Quilt-work approach, which focuses on augmenting the *process* by which States identify and negotiate the content of PNIVIF. By disaggregating a fluid principle into thinner threads, the Quilt-work approach adroitly navigates the demands of flexibility and certainty, creating tangible benchmarks against which State conduct can be measured

17. See generally Myres S. McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NAT. L.F. 53 (1956).

without inhibiting the principle's evolution. This is made clear by the Quilt-work approach's potential application not only to disinformation campaigns, but also to hybrid conflicts and complex problems of cyber attribution. In sum, the Quilt-work approach suggests that there is no need to define an empty container: it is sufficient that the container's contents are clearly known.

All in all, this Article sketches a way forward for PNIVIF to be applied to electoral disinformation campaigns, which stand as one of the greatest threats to democratic systems today. This distinguishes the Article from others in the electoral interference scholarship which find answers in an attempt to redefine PNIVIF,¹⁸ human rights frameworks,¹⁹ proposals for new treaties,²⁰ or domestic law.²¹ In so doing, it pioneers a new approach to international lawmaking that has far-reaching implications. The Quilt-work approach can be used to clarify other fields of PNIVIF, such as those relating to hybrid conflict or cyber operations. The same approach may also be analogically applied to revitalize other international legal concepts which stand uneasily between certainty and flexibility, such as those relating to sovereign equality and State responsibility.

This Article defines disinformation campaigns as deliberate State efforts to spread false information with the intent to deceive. Disinformation ought to be distinguished from misinformation, which is non-deliberate.²² The word "campaign" also points to their prolonged and concerted nature. While I will primarily draw from examples of the 2016 US presidential election, it serves to note that these were not isolated incidents. Electoral interpositions, mostly covert,

18. See *supra* text accompanying notes 12–15.

19. See, e.g., JENS DAVID OHLIN, *ELECTION INTERFERENCE: INTERNATIONAL LAW AND THE FUTURE OF DEMOCRACY* (2020) (approaching electoral interference from the perspective of the self-determination right); William J. Aceves, *Suing Russia: How Americans Can Fight Back against Russian Intervention in American Politics*, 43 *FORDHAM INT'L L.J.* 1 (2019) (relying on the rights of political participation and freedom from racial discrimination).

20. See, e.g., Christina Lam, *A Slap on the Wrist: Combatting Russia's Cyber Attack on the 2016 U.S. Presidential Election*, 59 *B.C. L. REV.* 2167 (2018); Logan Hamilton, *Beyond Ballot-Stuffing: Current Gaps in International Law regarding Foreign State Hacking to Influence a Foreign Election*, 35 *WIS. INT'L L.J.* 179 (2017); Ashley C. Nicolas, *Taming the Trolls: The Need for an International Legal Framework to Regulate State Use of Disinformation on Social Media*, 107 *GEO. L.J. ONLINE* 36 (2018).

21. See, e.g., Joshua Geltzer, *A Checklist for Protecting Our Elections from Foreign Meddling*, *JUST SECURITY* (Jan. 12, 2018), <https://www.justsecurity.org/50948/checklist-protecting-elections-foreign-meddling/>; Andrew Moshirnia, *Countering Pernicious Images: Memetic Visual Propaganda and the 2018 Elections*, 50 *SETON HALL L. REV.* 79 (2019); Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 *B.U. J. SCI. & TECH. L.* 168 (2018).

22. Dean Jackson, *Issue Brief: Distinguishing Disinformation from Propaganda, Misinformation, and "Fake News"*, *NAT'L ENDOWMENT FOR DEMOCRACY* (Oct. 17, 2017), <https://www.ned.org/issue-brief-distinguishing-disinformation-from-propaganda-misinformation-and-fake-news/>.

are supposedly not uncommon tools of US foreign policy either.²³ Notably, some have accused the Central Intelligence Agency (“CIA”) of using “fake news” to foment the violent overthrow of the Allende government in Chile.²⁴ Rather, it is the apparent effectiveness, sophistication, and cutting-edge nature of the 2016 disinformation campaign that leads this Article to rely on it as illustration.

Part I of this Article elaborates on the coercion definition under *Nicaragua* and explains why it is ill-fit for electoral disinformation campaigns. Part II excavates the textual history of PNIVIF to demonstrate that coercion is an under-inclusive definition of *lex lata*. Part III makes a case for the Quilt-work approach as a method to progressively clarify PNIVIF.

I.

RECOUNTING *NICARAGUA*

The cardinal duty²⁵ of States to not intervene or interfere in each other’s sovereign affairs is a rule of customary international law.²⁶ At its heart, the principle aspires to protect the independence of States from illegitimate forms of interpositions.²⁷ Simultaneously, international law recognizes that external influence is unavoidable in an increasingly interdependent world, and therefore inextricable from foreign policy.²⁸ Finding an “acceptable balance” between idealism and reality was, up until *Nicaragua*, a fixation for international lawyers.²⁹

This proved to be an elusive task.³⁰ Few captured the miasma of collective exasperation as evocatively as Percy Winfield:

23. Ishaan Tharoor, *The Long History of the U.S. Interfering with Elections Elsewhere*, WASH. POST (Oct. 13, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/10/13/the-long-history-of-the-u-s-interfering-with-elections-elsewhere/>.

24. See, e.g., Ariel Dorfman, *Now, America, You Know How Chileans Felt*, N.Y. TIMES (Dec. 16, 2016), <https://nyti.ms/2hQR7Ks>.

25. *Nicar. v. U.S.*, 1986 I.C.J. at 192, 199 (separate opinion by Sette-Camara, J.). Some authorities have gone further to characterize the principle as a *jus cogens* norm. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 147–48 (1986).

26. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 202.

27. 1 EMER DE Vattel, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* § 54 (1758).

28. See Wolfgang Friedmann, *Intervention and the Developing Countries*, 10 VA. J. INT’L L. 205, 207 (1969); Rep. of the Special Comm. on Principles of Int’l L. concerning Friendly Rels. and Co-operation among States, ¶¶ 205–207, U.N. Doc. A/5746 (Nov. 16, 1964) [hereinafter 1964 SPECIAL COMMITTEE REPORT]. The Third World Approaches to International Law (TWAIL) perspective is naturally wary of interpositions and perceive them as hegemonic exercises. See, e.g., Henry J. Richardson III, *Critical Perspectives on Intervention*, 29 MD. J. INT’L L. 12, 18 (2014). It suffices to note that all States, including states in the Third World, attempt to influence and interpose on other States.

29. Rosalyn Higgins, *Intervention and International Law*, in *INTERVENTION IN WORLD POLITICS* 29, 273 (Hedley Bull ed., 1984).

30. See, e.g., HENRY BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 156 (4th ed. 1905); THOMAS J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 125 (University of Michigan Library, 5th ed. 1913); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 267 (University Presses of California, Columbia and Princeton eds., 1964).

The subject of intervention is one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all. A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland.³¹

Nicaragua was indubitably an important judgment of its time. It reaffirmed the political independence of a Developing World State facing down a global superpower. It implicitly confirmed that non-forcible interventions, such as economic or political interpositions, can be unlawful.³² Above all, the Court rescued a fundamental tenet of international law from the nadir of nebulosity by defining intervention as coercion.

This Part elaborates on the content of the test of coercion. The line drawn by the Court nonetheless falls short of capturing emerging methods of damaging foreign interpositions, not least disinformation campaigns in elections.

A. *Defining Intervention as Coercion*

According to *Nicaragua*, coercion "forms the very essence of" prohibited intervention.³³ "Coercion," as an unqualified word, is nonetheless imprecise. What kind of behavior amounts to coercion? Who is being coerced?

First, coercion always bears on a State's choices. Only acts that compel the target State to make choices it otherwise would not freely make are coercive.³⁴ In *Nicaragua*, the Court found that the United States provided material support and assistance to the *Contras*, a rebel group waging violent insurgency against the ruling socialist government.³⁵ In doing so, the United States sought to compel changes in Nicaraguan governmental policy, which constituted coercion.³⁶ The Court's focus on choice closely follows the early twentieth century writings of eminent jurists.³⁷ According to Thomas Lawrence, intervention "endeavors to compel [a State] to do something which, if left to itself, it would not do."³⁸ Lassa Oppenheim more forcefully declared that intervention is "always dictatorial interference, not interference pure and simple."³⁹

31. P. H. Winfield, *The History of Intervention in International Law*, 3 BRIT. Y.B. INT'L L. 130, 130 (1922-1923).

32. *See* *Nicar. v. U.S.*, 1986 I.C.J. ¶ 205.

33. *Id.*

34. *Id.*; *see also* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT'L L. 345, 348 (2009); Marcelo Kohen, *The Principle of Non-Intervention 25 Years after the Nicaragua Judgment*, 25 LEIDEN J. INT'L L. 157, 161 (2012).

35. *Nicar.*, 1986 I.C.J. ¶ 240.

36. *Id.* at ¶ 242.

37. *See, e.g.*, ELLERY STOWELL, INTERVENTION IN INTERNATIONAL LAW 317-318 (John Byrne & Co. ed., 1921); WILLIAM E. HALL, INTERNATIONAL LAW § 10 (7th ed. 1917).

38. LAWRENCE, *supra* note 30, at 119.

39. I LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 222 (1912).

Second, intervention must bear on sovereign prerogatives.⁴⁰ Such prerogatives include the *domaine réservé*, or a State's choice of political, economic, or social system.⁴¹ Naturally, these are fluid concepts that metamorphose as sentiments about the role of the State changes over time.⁴²

Third, *Nicaragua* further held that the interposition must be carried out “with a view” to coercion of another State.⁴³ Intent is therefore another indispensable element.⁴⁴ The element of intent prevents the intervention principle from being spread too thinly. Because States are always adjusting their policies in response to the conduct of others, the element of intent ensures that no State can claim coercion simply because it feels compelled to react to another State going about its own business.

Fourth, coercion, on its plain meaning, only contemplates interpositions of sufficient magnitude. Influence which “could reasonably be resisted” is not coercive.⁴⁵ In *Nicaragua*, the Court had little difficulty concluding material support for the *Contras*' violent insurgency constituted a clear breach of the non-intervention principle. However, it was unable to say the same of economic actions Nicaragua had complained of, including the United States' trade embargo and cessation of economic aid.⁴⁶ Presumably, the Court bore doubts about the gravity of the United States' economic actions.

For the majority of experts who contributed to the Tallinn Manual 2.0,⁴⁷ coercion would exclude merely persuasive interpositions, such as “criticism, public diplomacy, propaganda, retribution, mere maliciousness, and the like.” The dividing line between coercion and persuasion appears to be that coercion introduces an external factor, such as an express threat, which weighs against the target's existing preferences.⁴⁸ By contrast, persuasion operates by convincing the target to reassess the validity of those preferences. It follows that no coercion occurs if the target State comes to its own decisions, even if it was misled or talked into them.⁴⁹

40. *Nicar.*, 1986 I.C.J. ¶ 205.

41. *Id.*

42. Katja S. Ziegler, *Domaine Réservé*, OXFORD PUB. INT'L L. ¶ 1, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398> (last updated Apr. 2013).

43. *Nicar.*, 1986 I.C.J. ¶ 241.

44. TALLINN MANUAL 2.0, *supra* note 3, at 321–322; *cf.* Watts, *supra* note 15, at 249 (offering a different interpretation of Nicaragua's position on the requirement of intent).

45. Jamnejad & Wood, *supra* note 34, at 348.

46. *Nicar.*, 1986 I.C.J. ¶¶ 123–125, 244–245.

47. The Tallinn Manual 2.0 is an influential document authored by nineteen international law experts which analyses how international law applies to cyberspace. *See* TALLINN MANUAL 2.0, *supra* note 3.

48. *Id.* at 318–319.

49. Ido Kilovaty, *The Elephant in the Room: Coercion*, 113 AM. J. INT'L L. UNBOUND 87, 88 (2019).

Fifth, coercion's bearing on choices has led it to be described as a compulsion of the target State's "sovereign will." An often-overlooked question is who, exactly, represents the metaphorical "sovereign will?"⁵⁰ The traditional view resolves the question in favor of government prerogatives.⁵¹ The doctrine of consent is key to this analysis. On this doctrine, no intervention occurs if there is government consent, since such consent is itself an expression of sovereign will.⁵² Contrastingly, military assistance for dissidents, insurgents, and opposition groups is generally illegal.⁵³ *Nicaragua* hewed to tradition when it held intervention is "allowable at the request of the government," but not at the request of an opposition faction.⁵⁴ The Court does, however, appear to hint at a limited exception to the doctrine of consent when it wrote that it is "not here concerned with the process of decolonization."⁵⁵

Consequently, coercion, comprehensively composed, is an (1) intentional (2) compulsion of choices that are (3) sovereign in nature. Such compulsion (4) is not merely persuasive, and (5) typically affects the government's choices.

B. Electoral Disinformation Campaigns and Nicaragua

"The lie is a condition of life."⁵⁶ Throughout history, humans have often weaponized deception. In his quest for empire, Genghis Khan dispatched spies, disguised as merchants, to intimidate cities by exaggerating the ferocity of the Mongolian army.⁵⁷ During the Cold War, planting false information in foreign newspapers appeared to be a go-to for world superpowers.⁵⁸ Military deception has been, and continues to be, commonplace in combat.⁵⁹

50. On this note, it has been pointed out that the "metaphorical abstraction" of the "sovereign will" "tends to confuse rather than assist analysis." See Lori Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT'L L. 1, 5 (1989).

51. Tom Ruys, *Of Arms, Funding and Non-Lethal Assistance – Issues Surrounding Third-State Intervention in the Syrian Civil War*, 13 CHINESE J. INT'L L. 13, 42 (2014).

52. TALLINN MANUAL 2.0, *supra* note 3, at 323.

53. Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 511 (1969); Philip Jessup, *The Spanish Rebellion and International Law*, 15 FOREIGN AFF. 260, 268–269 (Jan. 1937).

54. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 246.

55. *Id.* at ¶ 206.

56. This quote is typically attributed to Friedrich Nietzsche.

57. Terry Beckenbaugh, *Genghis Khan*, in GREAT COMMANDERS 35, 52 (Christopher R. Gabel & James H. Willbanks eds., 2013).

58. MARK CONNELLY ET AL., PROPAGANDA AND CONFLICT: WAR, MEDIA AND SHAPING THE TWENTIETH CENTURY 185–189 (2019).

59. See Christopher M. Rein, *Introduction: Multi-Domain Deception*, in WEAVING THE TANGLED WEB: MILITARY DECEPTION IN LARGE-SCALE COMBAT OPERATIONS 1, 1 (Christopher M. Rein ed., 2018);

Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, in CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS 249, 257 (Jens David Ohlin et al. eds., 2015).

Operationally speaking, State-led campaigns to spread disinformation are rarely *ad hoc*, but usually prolonged and concerted. The alleged interposition in the 2016 US presidential election is no exception. Extensive intelligence collection on US think tanks, lobbying groups, and candidates' campaigns allegedly laid the groundwork for this campaign.⁶⁰ Demographic preferences, pressure points, and incendiary issues were identified therefrom. To lend believability to falsehoods,⁶¹ alleged Russian trolls falsified and stole US identities.⁶² Bots were used to repost disinformation and distort social media algorithms to win “eyeballs.”⁶³ The content of the disinformation was also customized to their target audience. Memes, for example, were mainly directed at younger internet users.⁶⁴ Additionally, the operation also allegedly fed certain demographic groups incorrect voting procedures to suppress their votes.⁶⁵ Whereas most of the disinformation geared toward US audiences was propagated covertly, there was also an overt side to the campaign. The report of the US Director of National Intelligence (“ODNI Report”), for instance, accused Russian State-run media of unabashedly promoting false messages concerning the US elections to Russian and international audiences.⁶⁶

Disinformation campaigns are typically employed in coordination with other “hybrid”⁶⁷ instruments of State power—prominently cyber-ops and other IO capabilities. Russian agents stand accused of engaging in cyber-hacks, gaining electronic access to voting machines, and resorting to doxing.⁶⁸ As is characteristic of the “hybrid” playbook, these instruments could be used in synchronization. After John Podesta, Hillary Clinton’s campaign manager, had his personal emails hacked and published on WikiLeaks, their contents were misrepresented to falsely insinuate that Clinton had attended a satanic dinner

60. OFF. OF THE DIR. OF NAT'L INTEL., ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 2 (Jan. 6, 2017) [hereinafter ODNI REPORT].

61. Criminal Complaint at 4, U.S. v. Khusyaynova (E.D. Va. Sept. 28, 2018) (No. 1:18-MJ-464).

62. Indictment at ¶¶ 4, 6, 35–36, 41, U.S. v. Internet Rsch. Agency L.L.C. (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032-DLF).

63. Gabe O'Connor & Avie Schneider, *How Russian Twitter Bots Pumped Out Fake News During The 2016 Election*, NAT'L PUB. RADIO (Apr. 3, 2017), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

64. Nicholas Thompson & Issie Lapowsky, *How Russian Trolls Used Meme Warfare to Divide America*, WIRED (Dec. 17, 2018), <https://www.wired.com/story/russia-ira-propaganda-senate-report/>.

65. *Id.*

66. ODNI REPORT, *supra* note 60, at iii.

67. Hybrid tactics refer to a State’s coordination of multiple instruments of power, kinetic and non-kinetic, military and non-military, to achieve operational goals. Such instruments include economic sanctions, cyber-ops, IOs, and even lawfare. Whereas conventional military operations permit vertical escalation and de-escalation, hybrid tactics allow for the horizontal synchronization of different instruments of power.

68. Doxing is the exfiltration and leaking of sensitive information.

party.⁶⁹ Doxing was thus used to lend credence to disinformation tactics. The extent of coordination and scale distinguishes State-led disinformation campaigns from mere misinformation or fake news.

Elections are sensitive times for States. High passions and opportunities for the realignment of political power render States relatively vulnerable to IOs.⁷⁰ Not all methods of IOs are reprobable. What differentiates disinformation campaigns, and renders them especially dangerous, is their fraudulent character. Disinformation tugs at intuitive biases,⁷¹ such as over-confidence in our own beliefs and our desire for validation.⁷² In a startling statistic, 24,483 participants in 206 experiments conducted over four decades were only able to discern lies from truths 54 percent of the time—a statistic that is only marginally better than the toss of a coin.⁷³

Modern developments have increased the effectiveness of disinformation campaigns exponentially. Worryingly, social media has emerged as a material source of unverified news,⁷⁴ possessing the capacity to spread virulently through cyberspace.⁷⁵ Social media algorithms, which encourage spiraling recirculation in

69. Ben Popken, *Russian Trolls Pushed Graphic, Racist Tweets to American Voters*, NBC NEWS (Nov. 30, 2017), <https://www.nbcnews.com/tech/social-media/russian-trolls-pushed-graphic-racist-tweets-american-voters-n823001>.

70. MEGAN WARD ET AL., FORMATIVE BATTLES: COLD WAR DISINFORMATION CAMPAIGNS AND MITIGATION STRATEGIES 2–3 (2019),

https://www.wilsoncenter.org/sites/default/files/media/documents/publication/cold_war_disinformation_campaign.pdf.

71. Herbert Lin & Jackie Kerr, *On Cyber-Enabled Information/Influence Warfare and Manipulation* 8-9 (Stan. U. Ctr. for Int'l Security & Cooperation, Working Paper, 2017), <https://cisac.fsi.stanford.edu/publication/cyber-enabled-informationinfluence-warfare-and-manipulation>.

72. See generally Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 230 (Thomas Gilovich et al. eds., 2002); DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); DOUGLAS RUSHKOFF ET AL., THE BIOLOGY OF DISINFORMATION: MEMES, MEDIA VIRUSES, AND CULTURAL INOCULATION (2018), <https://www.iftf.org/partner-with-iftf/research-labs/digital-intelligence-lab/research-archive/biology-of-disinformation/>; Bence Bago et al., *Fake News, Fast and Slow: Deliberation Reduces Belief in False (but Not True) News Headlines*, 149 J. EXPERIMENTAL PSYCH. 1608 (2020); Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303 (2010). See also Cass Sunstein et al., *How People Update Beliefs about Climate Change: Good News and Bad News*, 102 CORNELL L. REV. 1431 (2017); Edward Glaeser & Cass Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 6 (2014).

73. Charles Bond Jr. & Bella DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 230 (2006).

74. Elisha Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RSCH. CTR. (Sep. 7, 2017), <https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

75. DAVID PATRIKARAKOS, WAR IN 140 CHARACTERS: HOW SOCIAL MEDIA IS RESHAPING CONFLICT IN THE TWENTY-FIRST CENTURY 133 (2017).

virtual echo-chambers,⁷⁶ facilitate the proliferation of disinformation.⁷⁷ Technologies, such as Deepfake,⁷⁸ make falsehoods harder to spot.

Disinformation campaigns bear certain unique characteristics when utilized against elections. Unlike other IOs aimed at duping government actors, electoral disinformation targets voters. It is conventionally assumed that electoral disinformation campaigns seek to swing votes in favor of the perpetrator's preferred candidate. This is not always so.⁷⁹ No doubt, one objective of the supposed 2016 disinformation campaign was to support Donald Trump's candidacy and harm Clinton's electability.⁸⁰ Yet, it remains inconclusive as to whether these efforts played a significant role in skewing the electoral college. The campaign's cumulative nature can partly explain this ambivalence. Because disinformation efforts operated as "background noise" and did not manifest in an obvious discrete event, it is difficult to assess through polling how Americans responded to them.⁸¹ Some have also pointed out that the disinformation campaign probably did more to confirm existing biases than to change minds in a highly partisan political milieu.⁸² By contrast, there were other objectives the disinformation campaign strived to achieve, and arguably did.

As the ODNI Report concludes, the disinformation campaign undermined the legitimacy of US democratic processes and discredited the image of a liberal State on the international plane.⁸³ The Russian-based IRA appears to have conceived of its "translator project" as early as April 2014, even before Trump had announced his candidacy or emerged as a viable competitor for the Oval Office.⁸⁴ At that point, the IRA's original goal was reportedly to "spread distrust towards the candidates and the political system in general".⁸⁵ To this end, disinformation efforts did not myopically focus on promoting Trump, but were

76. Chris Meserole, *How Misinformation Spreads on Social Media—and What to Do about It*, BROOKINGS (May 9, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/>.

77. See generally Michela del Vicario et al., *Echo Chambers: Emotional Contagion and Group Polarization on Facebook*, 6 SCI. REP. 37825 (2016); Amy Mitchell et al., *Political Polarization & Media Habits*, PEW RSCH. CTR. (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>.

78. Deepfake refers to the use of machine learning to fabricate convincing images.

79. See Katie Starbird et al., *Disinformation as Collaborative Work: Surfacing the Participatory Nature of Strategic Information Operations*, 109 DISINFORMATION 127 (2019).

80. ODNI REPORT, *supra* note 60, at ii, 1.

81. Nate Silver, *How Much Did Russian Interference Affect The 2016 Election?*, FIVETHIRTYEIGHT (Feb. 16, 2018), <https://fivethirtyeight.com/features/how-much-did-russian-interference-affect-the-2016-election/>.

82. Brendan Nyhan, *Fake News and Bots May Be Worrisome, but Their Political Power Is Overblown*, N.Y. TIMES (Feb. 13, 2018), <https://nyti.ms/2BUTshD>. Cf. Sinan Aral & Dean Eckles, *Protecting Elections from Social Media Manipulation*, 365 SCI. 858 (2019).

83. ODNI REPORT, *supra* note 60, at ii, 1.

84. Indictment at 6, U.S. v. Internet Rsch. Agency L.L.C. (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032-DLF).

85. *Id.* at ¶ 10(e).

also directed towards sowing division between both sides of the left-right spectrum.⁸⁶ Tellingly, perpetrators of the disinformation campaign sought to instigate a series of simultaneous protests and counter-protests on provocative issues, such as those pitting Islamophobic groups against Islam-tolerant groups.⁸⁷ By undermining the legitimacy of democratic elections, perpetrating States could also use democratic regimes as foils to buttress perceptions of their own systems of governance.⁸⁸

On this note, there is a clear instance of electoral disinformation which strongly suggests assaulting the legitimacy of democratic processes can be the broader goal for perpetrators. One need not look further than the messaging of RT America⁸⁹ in the 2012 US presidential elections, which has received less attention. There is little evidence that the disinformation tactics used there attempted to prop up either the Democratic candidate, Barack Obama, or the Republican candidate, Mitt Romney. Instead, it seems amply established that RT America endeavored to impair the legitimacy of the electoral process by running false reports alleging election fraud and voting machine vulnerabilities.⁹⁰ Indeed, it is the damage done to the legitimacy of the electoral process that appears to be most threatening.⁹¹ Whichever candidate emerged victorious, their mandate could have faced serious misgivings in the aftermath of a fractious and “rigged” electoral process.⁹²

Cybersecurity researchers Herbert Lin and Jaclyn Kerr have pointed out that some disinformation campaigns are alternatively exercises in political distraction, or “chaos-producing” operations.⁹³ Instead of seeking to influence the audience’s behavior, these operations distract the target State’s policy makers so perpetrators can gain space to pursue their own foreign policy goals.⁹⁴ Notably, not all disinformation campaigns seek to promote a particular message or idea. Sometimes, the tactical goal is to flood the cyber battleground with a “multitude

86. Criminal Complaint at ¶¶ 37–71, *U.S. v. Khusyaynova*, (E.D. Va. Sept. 28, 2018) (No. 1:18-MJ-464); see generally HOWARD ET AL., *supra* note 6.

87. Indictment at ¶ 57, *U.S. v. Internet Rsch. Agency L.L.C.* (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032-DLF); Natasha Bertrand, *Russia Organized 2 Sides of a Texas Protest and Encouraged ‘Both Sides to Battle in the Streets’*, BUSINESS INSIDER (Nov. 1, 2017), <https://www.businessinsider.com/russia-trolls-senate-intelligence-committee-hearing-2017-11>.

88. ODNI REPORT, *supra* note 60, at 7.

89. RT America is a television network of Russia Today.

90. ODNI REPORT, *supra* note 60, at 6.

91. Herbert Lin, *On the Organization of the U.S. Government for Responding to Adversarial Information Warfare and Influence Operations*, 15 I/S: A J. L. & POL’Y FOR THE INFO. SOC’Y 1, 39 (2019).

92. Prior to election day, late October polling already indicated more than half of Republicans believed Clinton could only win because of illegal voting. Even if she won, her mandate would have been doubted. The same could be said of Trump. See Maurice Tamman, *Half of Republicans Would Reject ‘Rigged’ Election Result if Hillary Clinton Wins*, REUTERS (Oct. 21, 2016), <https://www.reuters.com/article/us-usa-election-poll-rigging-idUSKCN12L2O2>.

93. Lin & Kerr, *supra* note 71, at 6, 10.

94. Clint Watts, *Why Russia Wants the U.S. to Believe the Election Was Hacked*, PBS (Oct. 27, 2016), <https://www.pbs.org/wgbh/nova/article/election-cybersecurity/>.

of contradictory messages,” leaving the audience in a “befuddled stasis,” unable to choose what to believe.⁹⁵ A real-life example of disinformation as distraction is the Chinese government’s alleged practice of inundating domestic social media with “50¢ party” posts, masquerading as the views of ordinary people.⁹⁶ In a revealing study of 43,000 “50¢ party” posts, researchers demonstrated that those posts were primarily devoted to cheerleading the government, and engaged in almost no counter-arguments with domestic criticism. In other words, “50¢ party” impersonators partake in a Brobdingnagian exercise to divert attention away from domestic controversies, not refute them.⁹⁷

The very act of mounting a disinformation campaign, then, could help an interposing State achieve its legitimacy-undermining goals without having to bank on the victory of a preferred candidate. As one commentator writes, altering the results of an election is not easy, but “merely raising doubts about it would give [the interposing State] a strategic victory.”⁹⁸

It is these characteristics of electoral disinformation campaigns which make them ill-fitted for the coercion framework. No doubt, electoral processes, being inextricable from the political systems of democratic States, fall squarely within the *domaine réservé*.⁹⁹ It is the other elements of coercion which invite apprehension.

At the outset, disinformation campaigns operate by affecting the choices of voters, not the government. Problematically, only the latter is assumed to represent the “sovereign will” under *Nicaragua*.¹⁰⁰ This challenge is compounded when an incumbent party in government acquiesces to foreign disinformation campaigns. The lead up to the 2018 parliamentary elections in Hungary is instructive. According to Polygraph.info,¹⁰¹ during those elections, public broadcasters reproduced false Russian narratives in support of the government’s

95. Keith Scott, *Dissuasion, Disinformation, Dissonance: Complexity and Autocritique as Tools of Information Warfare*, 14 J. INFO. WARFARE 257, 261 (2016).

96. Gary King et al., *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 AM. POL. SCI. REV. 484, 484–85, 497 (2017). The “50¢ party” posts are so called because they are rumored to be churned out by Chinese citizens who are paid 0.50RMB per post. The authors of the study conclude that these posts are likely to be the work of government employees.

97. *Id.* at 485.

98. Watts, *supra* note 94.

99. Michael N. Schmitt, *Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19 CHI. J. INTL L. 30, 49 (2018); TALLINN MANUAL 2.0, *supra* note 3, at 315.

100. Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law*, 95 TEX. L. REV. 1579, 1592 (2017).

101. Polygraph.info is a US funded fact-checking website produced by Voice of America and Radio Free Europe/Radio Liberty.

Eurosceptic, antimigrant posture.¹⁰² The government was also accused of turning a blind eye to a hundred Russia-linked disinformation sites operating locally.¹⁰³ It is difficult to see how a government can be described as “coerced” if the foreign disinformation campaign buttresses its existing policy choices.

Perhaps one could argue that disinformation campaigns, by distorting votes, indirectly bear on the “sovereign will” of the future government.¹⁰⁴ Even so, disinformation campaigns are not coercive, but merely persuasive. They do not factually compel the target to voluntarily abandon preferred choices, and only mislead the target to believe those choices are no longer preferable.¹⁰⁵ The Tallinn Manual 2.0 reaches a similar conclusion on the analogous situation of propaganda,¹⁰⁶ which can be defined as coordinated communication, often relying on falsehoods and aiming to influence the behavior of peoples.¹⁰⁷

Moreover, electoral disinformation campaigns do not always bear upon the target State’s choices. Disinformation campaigns that swing election results arguably do so by predetermining the future government and its expected policies.¹⁰⁸ Coercion would, however, be inapplicable if the object of the campaign is to undermine the legitimacy of elections, despite that being a serious affront on a democratic State’s fundamental institutions and processes. More broadly, disinformation can and has been used to propagate perceptions of electoral subterfuge, aggravate animosity along cultural and ideological lines, disenfranchise citizens from political participation, contribute to voter suppression, and distract policymakers; all to the erosion of democratic governance. Yet, such conduct, which “seek[s] no action on the part of the target State at all,”¹⁰⁹ is not coercive under *Nicaragua*.

Coercion, as envisioned by the *Nicaragua* Court, thus presents considerable hurdles for finding a prohibition on electoral disinformation campaigns.

102. See *Disinfo News: Media Consolidation and ‘Fake News’ Plague Hungary in Orban Era*, POLYGRAPH.INFO (Apr. 26, 2018), <https://www.polygraph.info/a/fake-news-in-hungary/29194591.html>.

103. LÓRÁNT GYŐRI ET AL., *Does Russia Interfere in Czech, Austrian and Hungarian Elections?*, POL. CAPITAL 12–13 (Oct. 12, 2017), https://politicalcapital.hu/news.php?article_read=1&article_id=2199.

104. See Manuel Rodriguez, *Disinformation Operations Aimed at (Democratic) Elections in the Context of Public International Law: The Conduct of the Internet Research Agency During the 2016 US Presidential Election*, 47 INT’L J. L. INFO. 149, 169–70 (2019).

105. Hollis, *supra* note 3, at 41.

106. TALLINN MANUAL 2.0, *supra* note 3, at 318–19.

107. See Eric De Brabandere, *Propaganda*, OXFORD PUB. INT’L L. at ¶ 1, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e978> (last updated Aug. 2019).

108. See Nicholas Tsagourias, *Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace*, EJIL:TALK! (Aug. 26, 2019), <https://www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/>.

109. TALLINN MANUAL 2.0, *supra* note 3, at 319.

Curiously, the textual history demonstrates that States never defined intervention as coercion to begin with.

II.

DECONSTRUCTING NON-INTERVENTION AND NON-INTERFERENCE: A TEXTUAL HISTORY

Since *Nicaragua*, the coercion definition has been taken for granted as settled law. This definition has faced increasing normative criticisms from international lawyers, ardently arguing that coercion fails to reckon with twenty-first century threats. What has not been attempted is an empirical analysis of whether, contrary to *Nicaragua*, the *lex lata* already says something about non-coercive forms of intervention and interference. A careful examination of the textual history suggests *Nicaragua*'s statement on the principle is incomplete.

This Article's textual methodology—relying heavily on UNGA Resolutions, bilateral and regional treaties, and official statements—mirrors the Court's in *Nicaragua*.¹¹⁰ The underlying supposition is that words are equally, if not more, important than deeds as evidence of customary international law (“CIL”). Over the past decades, States, tribunals, and legal experts have gradually accorded more primacy to text-based materials.¹¹¹ The ICJ is quick to treat some non-binding UNGA Resolutions as highly persuasive evidence of CIL,¹¹² and multilateral instruments play a leading role in shaping contemporary international law.¹¹³ This reformation has occurred to the chagrin of traditionalists, who insist that actions speak louder than words. Notably, Anthony D'Amato has trenchantly condemned *Nicaragua* for “thrashing” CIL.¹¹⁴

Critics of contemporary approaches to CIL sometimes make the case that text-based sources are often politically motivated, rather than reflective of “good faith efforts” to develop international law.¹¹⁵ It is asserted that States often vote

110. *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 186, 188.

111. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758–59 (2001).

112. David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GER. Y.B. INT'L L. 198, 203 (1996). *See, e.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 142, 150–160 (Feb. 25); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 146, 162, 244 (Dec. 19); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 70–73 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*].

113. Jonathan Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543 (1993); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 89–90 (1988).

114. Anthony D'Amato, *Thrashing Customary International Law*, 81 AM. J. INT'L L. 101, 102–103 (1987).

115. JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 162 (2006).

for UNGA Resolutions to embellish their image or for reasons of peer pressure.¹¹⁶ These attempts to color the legal force of a rule by reference to a State's motives are largely misguided. While the motives of States and their actors are not irrelevant to the study of international law, they do not form a basis for challenging the empirical validity of international law's existing rules.¹¹⁷ Indeed, whereas much of international law's development has been commandeered by "national interests and political pressures," this "obvious fact" has never precluded "States from regarding certain decisions as having the 'force of law.'"¹¹⁸ At any rate, it is unclear how questioning the motives of States resolves the words versus acts debate, since States also frequently act for political reasons.

Alternatively, it is rebutted that there is an inherent contradiction in ascribing legal effect to non-binding texts, particularly UNGA Resolutions.¹¹⁹ As with the earlier argument, this account passes over the debate, since physical acts are not binding either. In any case, the contradiction is resolved by the straightforward explanation that UNGA Resolutions do not make *binding* CIL but are *evidence* thereto. Even though the UNGA has no mandate to create binding law, it has always had a role in "encouraging the progressive development of international law and its codification" pursuant to the UN Charter.¹²⁰ States themselves acknowledge this, as is made clear in the "widespread approval" of Conclusion 12(2) of the International Law Commission's 2018 Draft Conclusions on the Identification of Customary International Law.¹²¹ States are keenly sensitive toward how words create or modify legal meaning in UNGA Resolutions.¹²² A shortsighted preoccupation with binding-ness is all the more misplaced when one

116. Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT'L L.J. 439, 447 (2010).

117. Rosalyn Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 AM. SOC'Y INT'L L. PROC. 116, 117 (1965).

118. Oscar Schachter, *Book Review*, 59 AM. J. INT'L L. 168, 168 (1965) (reviewing ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963)). See also OBED Y. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 10 (1966).

119. H. C. M. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT'L L. 1, 28 (1984-1987).

120. U.N. Charter Art. 13, ¶ 1(a). See also G.A. Res. 174 (II), at 105 (Nov. 17, 1947); Ivan S. Kerno, *International Law and International Organization: Prospects for the Future*, 46 AM. SOC'Y INT'L L. PROC. 12, 13-16 (1952).

121. Conclusion 12(2) provides that resolutions of international organizations may "provide evidence for determining establishing the existence and content of a rule of customary international law." See *Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session*, U.N. Doc. A/73/10, at 121 (2018). Draft Conclusion 12(2), which was made available to States for comment, was received with widespread approval, with some States even suggesting that the relevance of UNGA resolutions be emphasized. See Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Fifth Rep. on Identification of Customary Int'l L.*, ¶¶ 90-92, U.N. Doc. A/CN.4/717 (Mar. 14, 2018).

122. Charney, *supra* note 113, at 548.

considers that ICJ jurisprudence, which most States treat as having significant legal import, is strictly speaking only binding between disputants.¹²³

A more persuasive argument asserts that words, as opposed to physical acts, are poor predictors of how States will actually behave.¹²⁴ In marginalizing acts, contemporary approaches foster a compliance gap between text-based international law and actual State behavior. This is said to inspire less confidence in the international legal system.¹²⁵ The words versus acts debate, so framed, is reflective of two divergent responses to the fundamental question of what justifies the lawmaking force of customs. Traditionalists would argue that customs are law because they reflect how States are presently behaving. For contemporary scholars, international law is not about *predicting* how States will behave, but creating expectations of how States are *supposed* to behave.

Traditionalist approaches run up against a quandary akin to Hume's guillotine—just because nearly all States *are* doing something is no justification for why all States *ought* to be doing the same. More problematically, in reducing CIL into what States are already doing rather than treating it as a factor which affects how States behave,¹²⁶ traditionalist approaches beg the question of what purpose CIL serves. One possible response here is that CIL ensures States do not betray implied promises or reasonable expectations cultivated through long-standing practice. Yet, this response remains unsatisfactory because it suggests CIL's *raison d'être* is to affirm normative values, such as protecting one's reasonable expectations. Consequently, any examination of what States actually do ought not to be treated as determinative of CIL's content, but merely as one method of identifying what reasonable expectations to protect.

The contemporary approach does not treat CIL as a purely retrospective account of State behavior, but recognizes that it stands uneasily between description and normativity.¹²⁷ This places a premium on words, which are capable of conveying clear normative instruction.¹²⁸ By contrast, deeds alone often say little about a State's normative impetus.¹²⁹ Furthermore, any compliance gap between the normative standard prescribed by text-based CIL and actual State behavior is seen as preferable to a highly descriptive acts-based CIL. If anything, the latter is more likely to give rise to an emaciated *lex*, wherein the concept of compliance is made illusory by the fact that what States are supposed to be doing

123. U.N. Charter art. 94, ¶ 1.

124. ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 89–90 (1971).

125. Charlesworth, *supra* note 119, at 28; Roberts, *supra* note 111, at 769–770.

126. See Michael Byers, *Custom, Power, and the Power of Rules - Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 126–127 (1995).

127. Martti Koskenniemi, *The Normative Force of Habit: International Custom and Social Theory*, 1 FIN. Y.B. INT'L L. 77, 83 (1990).

128. See Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 148–49 (2005).

129. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 36–37 (1965).

is already being done.¹³⁰ On this note, concerns that the prioritization of texts will culminate in over-idealized international law are probably unfounded. In practice, the usual complaint is that multilateral instruments, such as UNGA Resolutions, typically contain negotiated language that reflects the lowest common denominator.¹³¹ Surely, a focus on words will discourage States from making fanciful proclamations they have zero intention of fulfilling, a prospect which will reinforce perspectives that multilateral processes are farcical.¹³²

Other reasons for valuing words abound. First, critical legal scholars and Third World Approaches to International Law (TWAAIL) proponents have long recognized the role of power in CIL-making.¹³³ An acts-based CIL would reinforce existing power disparities, giving preference to States with the relative capacity to take action.¹³⁴ Even though power disparities would persist in words-based CIL, it remains that “words” are generally less costly than acts and can be available to even the weakest States.¹³⁵ UNGA Resolutions, in particular, are thought to promise relative universality and egalitarianism.¹³⁶ Second, and relatedly, a CIL based on States doing as they please is more likely to produce arbitrariness, which is antithetic to the rule of law. Words, by contrast, encourage States to offer reasons for their behavior.¹³⁷ Third, if one accepts that States are their own lawmakers, it is unclear why the reality of States relying on non-binding UNGA Resolutions as evidence of law ought to be contradicted.¹³⁸ Fourth, in

130. Stephen Donaghue, *Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law*, 16 AUSTL. Y.B. INT'L L. 327, 329 (1995).

131. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 159, U.N. Doc. A/59/2005 (Mar. 21, 2005). See also THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 43–44 (1991); Oisín Tansey, *Lowest Common Denominator Norm Institutionalization: The Anti-coup Norm at the United Nations*, 24 GLOBAL GOVERNANCE 287 (2018).

132. James D. Fry, *Formation of Customary International Law through Consensus in International Organizations*, 17 AUSTRIAN REV. INT'L & EUR. L. 49, 60 (2012).

133. See generally B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1 (2018). See also Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOWARD L.J. 95, 106 (1962); Byers, *supra* note 126, at 112–135.

134. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 505 (2000); Chimni, *supra* note 133, at 20–28; Byers, *supra* note 126, at 116–117.

135. Charney, *supra* note 113, at 548. Cf. Chimni, *supra* note 133, at 35–43.

136. EDWARD McWHINNEY, *UNITED NATIONS LAW MAKING: CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION* 214–215 (1984); Roy Lee, *Rule-Making in the United Nations: Opinio Communis*, 27 N.Y.U. J. INT'L L. & POL. 571, 572 (1995).

137. See MARCUS TULLIUS CICERO, *ON THE COMMONWEALTH AND ON THE LAWS* 113 (James E. G. Zetzel ed. & trans., Cambridge Univ. Press 1999) (c. 54–51 B.C.E.) (“What is there, not just in humans, but in all heaven and earth, more divine than reason?”); J. L. BRIERLY, *LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 66–68 (Humphrey Waldock ed., 6th ed. 1963).

138. See Lee, *supra* note 136, at 575–576; Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 262 (1980).

practice, States rarely have the opportunity to act on most questions of international law.¹³⁹ An acts-based customary international space law, for instance, would exclude the perspectives of the supermajority of non-spacefaring States, never mind their interests in outer space. Fifth, words are typically less open to interpretation than acts, thus offering stronger evidence of *opinio juris*.¹⁴⁰ A State may appear to abstain from a particular course of action not because it accepts some rule as law, but because it is unable to do so.¹⁴¹ By contrast, words can serve a clarificatory function, putting States on notice of legal developments in multilateral fora and affording them the opportunity to respond unambiguously and with due deliberation.¹⁴² Sixth, recognizing the value of words resolves one of the traditional approach's greatest paradoxes. In traditional CIL, rules may only be changed through a series of long-standing violations.¹⁴³ Contemporary CIL allows words to play the catalyzing function.

The growing import of UNGA Resolutions, in particular, has been driven by practical considerations too. Apart from the promise of universality, UNGA Resolutions sidestep laborious treaty processes to permit accelerated international law formation.¹⁴⁴ An acts-based examination is unlikely to be methodologically feasible or cost-effective either. In the context of PNIVIF, a duty that can manifest in a "superabundance of situations,"¹⁴⁵ it is near impossible to catalogue the physical acts of close to two hundred States. The alternative, a case-study approach, poses a risk of selection bias, simply because evidence of States interfering in the affairs of others is more obvious, while evidence of States deciding against interference is likely scant.¹⁴⁶ The negative nature of the duty also invites ambivalence over whether inaction ought to be construed as acquiescence, lack of capability, or plain disinterest.

I do not mean to suggest physical acts are therefore legally irrelevant. Additionally, it cannot be denied that the present practice of referring to textual documents bucks the traditional ideation of "custom" as socially observable and

139. See Ernest A. Young, *Sorting Out the Debate over Customary International Law* 42 VA. J. INT'L L. 365, 386 (2002).

140. ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 2 (1963).

141. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 3 (1974–1975).

142. ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 193 (1986); Fry, *supra* note 132, at 73–74; ALVAREZ, *supra* note 115, at 594–595.

143. Akehurst, *supra* note 141, at 8.

144. Jutaro Higashi, *The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law*, 25 JAPANESE ANN. INT'L L. 11, 16 (1982); Scharf, *supra* note 116, at 450.

145. John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT'L L. REV. 1, 2 (1995).

146. Cf. Kelly, *supra* note 134, at 470.

repeated communal behavior.¹⁴⁷ In light of this, there is an ongoing debate (which lies outside the scope of this Article) on whether the textual methodology ought to be treated as an expansion of CIL,¹⁴⁸ or as a new source of international law altogether.¹⁴⁹

Not all UNGA Resolutions and other text instruments have legal effect. Most probably do not. This calls for a case-specific inquiry that looks at, *inter alia*, the Resolution's content, how States understand its effect, and the context of its adoption.¹⁵⁰ *Sans* widespread consensus, it will be difficult to accept that a UNGA Resolution reflects international law.¹⁵¹ Strong majority support, while potentially hinting at emerging rules of international law, is usually inadequate.¹⁵²

Contrary to *Nicaragua*, this Part illustrates how States never agreed to restrictively define PNIVIF as coercion. In particular, States accept a prohibition on certain types of interpositions that are persuasive, and a majority of States have converged on treating them as illegal interpositions that are destabilizing but not coercive. The question of who represents the "sovereign will" has also been steadily reoriented.

Remarkably, States never succeeded in defining PNIVIF to begin with, even as they sometimes concurred that specific acts constituted violations of the principle, in identification of some of the principle's manifestations. If anything, PNIVIF has functioned as an empty container, evolving to meet new methods of interposition. Defining intervention as coercion gives short shrift to the principle's evolutionary character.

A. *From Intervention to Interference*

The textual history of PNIVIF brims with dynamism and evolution. Scholars have sometimes described non-intervention and non-interference as a shrinking principle, not least because globalization appears to erode the outer limits of a

147. Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 94–96 (1991).

148. See, e.g., Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8–10 (1995–1996).

149. See, e.g., Charney, *supra* note 113, at 546–547 (describing the contemporary international lawmaking process as reflective of "general international law" rather than CIL *stricto sensu*).

150. Nuclear Weapons Advisory Opinion, *supra* note 112, ¶¶ 70–73; *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 106–107. See also Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Third Rep. on Identification of Customary International Law*, ¶¶ 45–54, U.N. Doc. A/CN.4/682 (Mar. 27, 2015).

151. HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL LEGAL ORDER* § 1226 (6th ed. 2018). See also Nuclear Weapons Advisory Opinion, *supra* note 112, ¶ 73.

152. Karl Zemanek, *Majority Rule and Consensus Technique in Law-Making Diplomacy*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW* 857, 867 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983). Cf. Charney, *supra* note 113, at 544 (writing that "unanimous support is not required" for a Resolution to reflect international law).

State's *domaine réservé*.¹⁵³ The historical narrative this Article tells qualifies this description. Instead, increasing interdependence among States over the twentieth century rendered national interests vulnerable to the foibles of international politics. As new and subtler forms of foreign interposition emerged, States were constantly made to assess which legal position, prohibition, or permission was more advantageous.

A retelling of this textual history begins with the oft-neglected distinction between “intervention” and “interference.” Some scholars use these terms interchangeably.¹⁵⁴ A close reading suggests there used to be a meaningful distinction between both terms.

“Interference” first appeared on the text of a UNGA Resolution in 1965. Resolution 2131 reads:

No State 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 condemned.¹⁵⁵

This paragraph is practically identical to the 1948 Charter of the Organization of American States (Bogotá Charter), Article 15.¹⁵⁶ Until 1965, prior UNGA Resolutions had strictly limited themselves to the word “intervention.”¹⁵⁷ The addition of the word “interference” under Resolution 2131 cannot be chalked up to careless drafting.

It is well-established that prior to Resolution 2131, the law of intervention only dealt with forcible types.¹⁵⁸ States much took this for granted. When the word “intervention” appeared in previous UNGA Resolutions, it was used to describe the use of force and armed hostilities.¹⁵⁹ Indeed, eminent jurists of the early twentieth century who wrote on the law of intervention were discussing what we know today to be the doctrine on the use of force.¹⁶⁰

153. See, e.g., Jyoti Rattan, *Changing Dimensions of Intervention Under International Law: A Critical Analysis*, 9 SAGE OPEN 1, 1 (2019), <https://doi.org/10.1177/2158244019840911>; Hitoshu Nasu, *Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?*, 3 ASIAN J. INT'L L. 25, 28 (2013).

154. See, e.g., Niki Aloupi, *The Right to Non-intervention and Non-interference*, 4 CAMBRIDGE J. INT'L & COMP. L. 566 (2015).

155. G.A. Res. 2131 (XX), ¶ 1 (Dec. 21, 1965).

156. Charter of the Organization of American States art. 15, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

157. See, e.g., G.A. Res. 1236 (XII) (Dec. 14, 1957).

158. Kunig, *supra* note 3, ¶¶ 6, 18.

159. See G.A. Res. 380 (V), pmb. (Nov. 17, 1950) (condemning “[I]ntervention ... by the threat or use of force”); G.A. Res. 498 (V) (Feb. 1, 1951) (describing the People’s Republic of China’s armed intervention in the Korean War); G.A. Res. 1004–1006 (ES-II) (Nov. 4, 1956) (describing Soviet armed intervention in the Hungarian Uprising).

160. Hans Kelsen, Thomas Lawrence, and Ian Brownlie (in one of his first works) all defined intervention as “force, or the threat of force.” See HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW*

A limited law of intervention was nonetheless unacceptable to some States. First, these States were wary of *indirect* intervention. The typical example is for a State to provide material support to an insurgent group. Second, non-forcible methods of interposition were also recognized as increasingly menacing. “Interference” would emerge as a terminology that captured the principle’s expansion.

The legal turning point traces to the jurisprudence of the American States.¹⁶¹ Latin American States have long been disconcerted with what they perceived to be US regional imperialism.¹⁶² In the inter-war years, the Roosevelt Administration eventually renounced all rights of armed intervention under its Good Neighbor Policy.¹⁶³ This propitiative climate begot the 1933 Montevideo Convention, which codified a prohibition on “the right to intervene.”¹⁶⁴ As the *travaux préparatoires* indicate, intervention therein was understood to mean “violence.”¹⁶⁵

In the next two decades, Latin American States would champion a more expansive prohibition, and their persistence paid off in the Bogotá Charter. By proscribing “*not only* armed force *but also* any other form of interference” (emphasis added), the Charter made clear that the previously limited prohibition on forcible intervention was expanded to other non-forcible categories. The US delegation’s own notes in the Ninth Inter-American Conference confirms the distinction between the Montevideo Convention and the Bogotá Charter.¹⁶⁶

In hindsight, it is perhaps not surprising that the danger of non-forcible and indirect interpositions were first recognized in the Americas. US regional imperialism was unique in that, unlike the empires of Asia or Europe, the United States generally did not seek conquest or colonization.¹⁶⁷ The words of the Bogotá Charter would have also appeared acceptable to the United States in the immediate post-War period. None of the continent’s States were openly

63-64 (1952); LAWRENCE, *supra* note 30, at 124; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 44 (1963).

161. ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 4 (1956).

162. James B. Scott, *The Seventh International Conference of American States*, 28 AM. J. INT’L L. 219, 224–226 (1934).

163. L. S. Rowe, *The Significance of the Seventh International Conference of American States*, 28 AM. SOC’Y INT’L L. PROC. 34, 38 (1934).

164. Convention on Rights and Duties of States, art. 8, Dec. 26, 1933, U.S.T. 881, 165 L.N.T.S. 19.

165. Seventh International Conference of American States, First, Second and Eight Committees: Minutes and Antecedents, at 113 (Arg.), 118 (El Sal.) (May 31, 1933).

166. William Sanders, *The Organization of American States: Summary of the Conclusions of the Ninth International Conference of American States, Bogota, Colombia, March 30-May 2, 1948*, 26 INT’L CONCILIATION 383, 392 (1948) (writing that the Charter “expanded” the non-intervention principle and “condemn[ed] subtle forms of Communist intervention in which subversive activities are instigated and directed by a foreign government to achieve political and other objectives”).

167. THOMAS & THOMAS, *supra* note 161, at 52.

communist, and an expanded PNIVIF proscription could serve as justification to stave off foreign Communist activities.¹⁶⁸ This idyll was short-lived, and the Central Intelligence Agency would facilitate a coup to oust the Guatemalan President Jacobo Árbenz on assertions of “Red penetration” just a few years later.¹⁶⁹

A similar legal development took place in international law at the onset of the Cold War, beginning with individual States decrying foreign “interference” before the UN. The substance of their complaints hints at why “interference” was the word of choice—these States were complaining about non-forcible interpositions. In 1953, Czechoslovakia and the Soviet Union proposed UNGA Resolutions to condemn alleged US financial support for subversive elements in interference of the sovereign affairs of Communist States.¹⁷⁰ Before the Security Council in 1958, Jordan accused the newly-formed United Arab Republic of smuggling saboteurs, clandestinely supplying arms, and spreading broadcasts to overthrow King Hussein.¹⁷¹ For both Congo-Leopoldville and Iraq, even a foreign State’s diplomatic attempt to put before the Security Council questions that fell within their jurisdictions were considered “flagrant” interferences.¹⁷²

On the topic of elections, it is remarkable that as early as 1947, there were already signs that States believed election-meddling to be a form of illegitimate interference. In the lead up to UN-supervised elections scheduled for a newly independent Korean Peninsula, the UNGA called upon its Members to “refrain from interfering in the affairs of the Korean people.”¹⁷³

At the forefront of the quest to expand PNIVIF stood non-aligned and developing States. The former were deathly wary of being caught in the Cold War cross-fire.¹⁷⁴ It was not beyond either superpower to non-forcibly and indirectly seek to expand their spheres of influence.¹⁷⁵ Non-aligned concerns of aid leverage,

168. Chia-Yi Liu, *Permissibility of Intervention under Current International Law*, 1 ANNALS CHINESE SOC’Y INT’L L. 46, 48 (1964). See also Sanders, *supra* note 166, at 392.

169. WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY AND C.I.A. INTERVENTIONS SINCE WORLD WAR II* 78 (2d ed. 2003).

170. U.N. GAOR, 7th Sess., 1st Comm., 582d mtg. ¶ 6, U.N. Doc. A/C.1/SR.582 (Mar. 23, 1953).

171. Letter from the Permanent Rep. of Jordan to the President of the Security Council, U.N. Doc. S/4053 (July 17, 1958).

172. Letter from the Acting Chargé D’Affaires of the Congo (Leopoldville) to the President of the Security Council, U.N. Doc. S/5254 (Mar. 7, 1963); Letter from the Permanent Representative of Iraq to the President of the Security Council, U.N. Doc. S/5346 (July 10, 1963).

173. G.A. Res. 112 (II) B, ¶ 5 (Nov. 14, 1947).

174. See Edward McWhinney, *Introductory Note*, DECLARATION ON THE INADMISSIBILITY OF INTERVENTION IN THE DOMESTIC AFFAIRS OF STATES AND THE PROTECTION OF THEIR INDEPENDENCE AND SOVEREIGNTY, U.N. AUDIOVISUAL LIBR. INT’L L. (Jun. 2009), https://legal.un.org/avl/ha/ga_2131-xx/ga_2131-xx.html.

175. See Harry Rositzke, *America’s Secret Operations: A Perspective*, 53 FOREIGN AFF. 334, 342 (Jan. 1975); CHRISTOPHER ANDREW & OLEG GORDIEVSKY, *KGB: THE INSIDE STORY OF ITS FOREIGN OPERATIONS FROM LENIN TO GORBACHEV* 341–543 (1990).

proxy armed groups, subversive propaganda, sabotage, and arms smuggling were incessantly raised at UN meetings.¹⁷⁶ Condemning “interference,” “openly, or insidiously, or by means of subversion and the various forms of political, economic and military pressure,”¹⁷⁷ was ergo a priority for the Non-Aligned Movement. On the other hand, neo-colonialism, primarily through economic pressures, was the seed of worry for developing States. For the Third World, it was the “manipulation of the international economic environment” by developed States, such as through foreign mining concessions, that embodied illegitimate interference.¹⁷⁸

Efforts to prohibit non-forcible interpositions faced initial resistance, most prominently from the United States. As the Cold War dove into full gear, the United States witnessed its southern neighbors rely on the Bogotá Charter to criticize its clandestine efforts against allegedly leftist governments. One might speculate that the United States was wary not to allow the same to repeat on a global scale. Up until 1964, the United States insisted non-intervention was coterminous with UN Charter Article 2(4).¹⁷⁹

The United States would make a *volte-face* only a year later. During First Committee negotiations over Resolution 2131, it was the US delegate who proposed prohibiting “indirect” and “covert” interventions.¹⁸⁰ Plainly, the United States realized a widened proscription could be used to condemn Soviet “encouragement of guerilla warfare” and “secret training of armed bands.”¹⁸¹ A general consensus therefore emerged against support for subversion and terrorist activities, interference in civil strife, and coercion through “economic, political or any other type of measures.”¹⁸²

The word “interference” was thus used to modify the previously limited principle of intervention. At the Plenary Meeting, the Brazilian delegation described Resolution 2131 as a “revision of many concepts and principles to

176. See, e.g., U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. ¶ 38 (Rwanda), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1400th mtg. ¶¶ 7 (Guinea), 13 (Braz.), 28 (Hond.), U.N. Doc. A/C.1/SR.1400 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1401st mtg. ¶ 17 (Alg.), U.N. Doc. A/C.1/SR.1401 (Dec. 8, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1405th mtg. ¶ 3 (Jordan), U.N. Doc. A/C.1/SR.1405 (Dec. 9, 1965).

177. Second Summit Conference of Heads of State or Government of the Non-Aligned Movement, Declaration on the Programme for Peace and International Co-operation, at 15, Doc. NAC-II/HEADS/5 (Oct. 10, 1964).

178. U.N. Secretary-General, Implementation of the Declaration on the Strengthening of International Security: Non-interference in the Internal Affairs of States, at 9 (Jam.), U.N. Doc. A/34/192 (Oct. 4, 1979). See also U.N. GAOR, 20th Sess., 1st Comm., 1401st mtg. ¶ 35 (Uru.), U.N. Doc. A/C.1/SR.1401 (Dec. 8, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1405th mtg. ¶ 27 (Mong.), U.N. Doc. A/C.1/SR.1405 (Dec. 9, 1965); U.N. GAOR, 25th Sess., 6th Comm., 1183d mtg. ¶ 37 (Ecuador), U.N. Doc. A/C.6/SR.1183 (Sept. 28, 1970).

179. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶¶ 205, 207, 252.

180. U.N. GAOR, 20th Sess., 1st Comm., 1396th mtg. ¶ 8, U.N. Doc. A/C.1/SR.1396 (Dec. 3, 1965).

181. *Id.*

182. G.A. Res. 2131 (XX), *supra* note 155, ¶¶ 1–2.

reflect the realities of our times.”¹⁸³ Similar statements were made by other delegates.¹⁸⁴

Resolution 2131’s legal persuasiveness is doubtful, primarily because some States then envisioned it to be mere political statement.¹⁸⁵ Regardless, the substance of its provisions must now be treated as CIL in light of the 1970 Friendly Relations Declaration.¹⁸⁶ The latter Declaration, rehashing Resolution 2131, expressly states that its provisions reflect “basic principles of international law” and warrant “strict observance.”¹⁸⁷ Whereas Resolution 2131 merely condemned intervention and interference, the Declaration describes these acts as “violation[s] of international law.”¹⁸⁸ The Declaration’s preeminent legal significance is confirmed by the context of its negotiation. When it was introduced to the Sixth Committee, the acting Chairperson extolled it to be “as important as the [UN] Charter” itself.¹⁸⁹ The Declaration’s customary status was subsequently confirmed in *Nicaragua*.¹⁹⁰

In the coming years, the original distinction between intervention (forcible) and interference (indirect or non-forcible) would blur as States used those words less consistently. The word “interference” would nonetheless occupy another function in the lexicon of multilateral fora—for States advocating for a further expansion of PNIVIF’s prohibition, “interference” was the preferred vocabulary. States have expressly juxtaposed “interference” against “intervention” to argue against, *inter alia*, the foreign funding of political parties and the acts of diplomats in host countries.¹⁹¹ “Interference” was also the word choice of States lobbying to outlaw non-coercive acts such as subversive propaganda,¹⁹² bribery,¹⁹³ the exploitation of ethnic differences,¹⁹⁴ and foreign regulation of foreign

183. U.N. GAOR, 20th Sess., 1408th plen. mtg. ¶ 116, U.N. Doc. A/PV.1408 (Dec. 21, 1965).

184. *See, e.g., id.* ¶ 149 (US delegate noting the Resolution “establishes a new injunction against intervention by one State in the affairs of another”); Rep. of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, ¶ 303, U.N. Doc. A/6230 (June 27, 1966) [hereinafter 1966 SPECIAL COMMITTEE REPORT].

185. 1966 SPECIAL COMMITTEE REPORT, *supra* note 184, ¶¶ 342 (Fr.), 344 (Japan), 351 (Austl.).

186. G.A. Res. 2625 (XXV), annex, Friendly Relations Declaration (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

187. *Id.* at annex pmb1.

188. *Id.* at 123.

189. U.N. GAOR, 25th Sess., 6th Comm., 1178th mtg. ¶ 1, U.N. Doc. A/C.6/SR.1178 (Sept. 23, 1970).

190. *Nicar. v. US*, 1986 I.C.J. ¶ 118.

191. *See, e.g.,* Rep. of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, ¶ 360, U.N. Doc. A/6799 (Sept. 26, 1967) [hereinafter 1967 SPECIAL COMMITTEE REPORT].

192. 1966 SPECIAL COMMITTEE REPORT, *supra* note 184, ¶ 311.

193. U.N. GAOR, 20th Sess., 1st Comm., 1406th mtg. ¶ 24 (Burundi), U.N. Doc. A/C.1/SR.1406 (Dec. 10, 1965).

194. *Id.*

investments.¹⁹⁵ At any rate, the transition from “intervention” to “interference” from 1948 to 1970 foreshadows the principle’s continued evolution.

B. Destabilizing Interferences

In expanding the principle of non-intervention, the Friendly Relations Declaration made a key innovation in banning “the use of economic, political or any other types of measures to coerce another State.”¹⁹⁶ This provision formed the basis for *Nicaragua*’s definition of PNIVIF. Yet, it is premature to therefrom assert that the principle is entirely encapsulated by coercion.

Six years after the Friendly Relations Declaration, the UNGA identified a category of condemnable interpositions—destabilizing interferences. By Resolution 31/91, the Assembly condemned interferences aimed at “disrupting the political, social or economic order of other States or destabilizing the Governments seeking to free their economies from external control or manipulation.”¹⁹⁷

True to form, non-aligned states tabled and strongly advocated for Resolution 31/91.¹⁹⁸ In context, these States were fearful that their nascent economies and governments were vulnerable to external pressures and the whims of the global market.¹⁹⁹ More broadly speaking, non-aligned States approached the issue from a starkly different perspective. Whereas coercion is chiefly concerned with the *conduct* of the interposing State, destabilization focuses on the *consequences* suffered by the State being interposed on. Unlike coercion, the destabilization perspective is less concerned with whether a foreign act was taken to compel choices, and instead looks at whether the act has the effect of undermining sovereign rights or institutions.

The victim-oriented perspective is laid bare in the textual instruments. States such as Ghana, Philippines, Qatar, Suriname, and Yugoslavia began to explicitly draw a link between the acts of foreign States and the threat posed to their

195. See also U.N. GAOR, 34th Sess., 1st Comm., agenda item 46(a) ¶ 1(b)(v), U.N. Doc. A/C.1/34/L.56 (Dec. 3, 1979).

196. *Friendly Relations Declaration*, *supra* note 186.

197. G.A. Res. 31/91, Non-interference in the internal affairs of States (Dec. 14, 1976), <https://digitallibrary.un.org/record/188903?ln=en>.

198. Resolution 31/91 was introduced by Algeria, Bangladesh, Egypt, Guyana, India, Sri Lanka, Yugoslavia and Zambia, and co-sponsored by Bhutan, Botswana, Burundi, Chad, Cuba, Ghana, Grenada, Jamaica, Jordan, Kuwait, Madagascar, Mali, Mauritius, Morocco, Nepal, Rwanda, Sudan, the Syrian Arab Republic, Uganda, Cameroon, and Tanzania.

199. See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT’L L. 189, 209 (1985); Daniel D. Bradlow, *Development Decision-Making and the Content of International Development Law*, 27 B.C. INT’L & COMP. L. REV. 195, 205 (2005).

“political stability” and economic security.²⁰⁰ The Sri Lankan delegate to the UNGA First Committee, on introducing Resolution 31/91, made an expressly strong statement on the subject:

The most unfortunate feature of this practice of interference is that it tends to destabilize the economies of countries. The erratic meanderings of the international money market in recent years have amply demonstrated the extent to which economic disequilibrium can effect [sic] even the most highly developed countries in the world. How much worse could be the impact of economic destabilization on developing countries whose resources are scarcer . . . and whose economic survival is already beset with problems over which they have little or no control.²⁰¹

Attempts to progressively develop a prohibition on destabilizing interferences continued beyond Resolution 31/91. In successive meetings, the Non-Aligned Movement prioritized proscribing measures “calculated to cause disruption and destabilization.”²⁰² Before the UN, non-aligned States took aim at the foreign use of “multinational corporations” and “media of mass information” to destabilize host governments.²⁰³ The consequentialist perspective eventually found expression in UNGA Resolution 36/103 (1981), Declaration on Intervention and Interference.²⁰⁴ This significant milestone identified the duty of States to refrain from “any action or attempt . . . to destabilize or to undermine the stability of another State or any of its institutions.”²⁰⁵

The obvious wrinkle is that neither Resolution 31/91 nor the Declaration on Intervention and Interference represents settled law. Only ninety-nine out of 146 States supported Resolution 31/91.²⁰⁶ The only objector—the US delegate—

200. U.N. GAOR, 31st Sess., 1st Comm., 55th mtg. at 27 (Ghana), U.N. Doc. A/C.1/31/PV.55 (Dec. 9, 1976); U.N. GAOR, 31st Sess., 1st Comm., 56th mtg. at 27 (Yugoslavia), U.N. Doc. A/C.1/31/PV.56 (Dec. 10, 1976); U.N. Secretary-General, *Implementation of the Declaration on the Strengthening of International Security: Non-interference in the Internal Affairs of States*, at 8 (Phil.), 9 (Surin.), U.N. Doc. A/32/164 (Sept. 2, 1977) [hereinafter 1977 SECRETARY GENERAL REPORT]; U.N. Secretary-General, *Implementation of the Declaration on the Strengthening of International Security: Non-interference in the Internal Affairs of States*, at 30 (Qatar), U.N. Doc. A/33/216 (Sept. 21, 1978) [hereinafter 1978 SECRETARY GENERAL REPORT].

201. U.N. GAOR, 31st Sess., 1st Comm., 55th mtg. at 18–21, U.N. Doc. A/C.1/31/PV.55 (Dec. 9, 1976).

202. See, e.g., Fifth Summit Conference of Heads of State or Government of the Non-Aligned Movement, Political Declaration, ¶ 144, Doc. NAC/CONF.5/S.2 (Aug. 21, 1976); Fifth Conference of Ministers for Foreign Affairs of Non-Aligned Countries, *Declaration of the Conference of Ministers for Foreign Affairs of Non-Aligned Countries*, ¶ 25, Doc. NAC/CONF.5/FM/ (July 30, 1978).

203. 1977 SECRETARY GENERAL REPORT, *supra* note 200, at 9 (Surin.), 12 (Yugoslavia); 1978 SECRETARY GENERAL REPORT, *supra* note 200, at 10 (India).

204. G.A. Res. 36/103, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, A/RES/36/103 annex (Dec. 9, 1981), <https://digitallibrary.un.org/record/27066?ln=en> [hereinafter *Declaration on Intervention and Interference*].

205. *Id.* at annex ¶ 2(II)(e).

206. Of the other States, eleven abstained and thirty-five did not vote. See U.N. GAOR, 31st Sess., 98th plen. mtg. ¶ 23, U.N. Doc. A/31/PV.91 (Dec. 14, 1976).

subsequently corrected its vote to reflect an abstention.²⁰⁷ More problematically, the Resolution used exhortatory language and was treated as non-codifying by some States.²⁰⁸ By contrast, the Declaration on Intervention and Interference adopted the language of States' rights and duties.²⁰⁹ That said, the Declaration was only adopted by a vote of 120-22. Objectors, including Austria, Finland, and the United States, argued it created new obligations falling outside UN Charter principles.²¹⁰

The Declaration must now be read with Resolution 44/147 (1989), which deals squarely with interference in electoral processes.²¹¹ Resolution 44/147 characterizes interferences with the "free development of national electoral processes" and activities designed to sway election results as violations of PNIVIF.²¹² It also strongly appeals to States to abstain from undermining foreign electoral processes. Such interpositions could be classified as destabilizing but not necessarily coercive. Context is salient. Resolution 44/147 was introduced as a counterweight to Resolution 44/146, which implicitly acknowledged the international community could "assist" States to achieve "genuine" elections.²¹³ The former was therefore a pre-emptive strike by States suspicious of election-meddling under the pretext of electoral assistance.²¹⁴

Troublesomely, subsequent iterations of Resolution 44/147, or the "electoral interference" Resolutions, were decidedly unpopular.²¹⁵ The silver lining is that objecting States did not find fault with the "election interference" Resolutions' reproof of efforts to sway votes or undermine electoral processes. In fact, some objecting and abstaining States supported these provisions.²¹⁶ Rather, the bone of contention appears to lie in the perception that the Resolutions sabotaged international efforts to enhance democratic participation.²¹⁷

207. *Id.* ¶ 28.

208. *See, e.g.*, 1977 SECRETARY GENERAL REPORT, *supra* note 200, at 3 (Barb.); 1978 SECRETARY GENERAL REPORT, *supra* note 200, at 8 (Ghana), 11 (Pan.), 30 (Qatar), 36 (Yugoslavia).

209. *Declaration on Intervention and Interference*, *supra* note 204, at annex ¶ 3.

210. U.N. GAOR, 36th Sess., 1st Comm., 51st mtg. at 58 (U.S.), 58 (Fin.), 59–60 (Austria), U.N. Doc. A/C.1/36/PV.51 (Dec. 3, 1981).

211. G.A. Res. 44/147, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, A/RES/36/103 (Dec. 15, 1989), <https://digitallibrary.un.org/record/27066?ln=enG.A.%20Res.%2044/147>.

212. *Id.* ¶ 3.

213. G.A. Res. 44/146 (Dec. 15, 1989).

214. GUY S. GOODWIN-GILL, *FREE AND FAIR ELECTIONS* 24 (2006).

215. *See id.* at 24–27.

216. *See, e.g.*, U.N. GAOR, 44th Sess., 82d plen. mtg. at 24 (Costa Rica), U.N. Doc. A/44/PV.82 (Dec. 29, 1989).

217. *See id.*; U.N. GAOR, 44th Sess., 3d Comm., 56th mtg. at 8 (Fr.), U.N. Doc. A/C.3/44/SR.56 (Nov. 27, 1989); U.N. GAOR, 46th Sess., 75th plen. mtg. at 46 (Arg.), U.N. Doc. A/46/PV.75 (Jan. 3, 1992); U.N. GAOR, 50th Sess., 3d Comm., 55th mtg. ¶ 12 (U.S.), U.N. Doc. A/C.3/50/SR.55 (Dec. 13, 1995).

In any case, the aforementioned account suggests, prior to and after *Nicaragua*, a majority of States held to the view that certain destabilizing interpositions, including those carried out during elections, are violations of the principle of non-interference. These legal opinions, *de minimis*, point to an emerging position on PNIVIF.

Thus far, I have examined how the claimed norm on destabilizing interferences developed *after* the 1970 Friendly Relations Declaration. There are nonetheless arguments to be made that the law, as reflected in that Declaration itself, did not merely contemplate coercive types of interference.

This is made bare by a textual examination of the Friendly Relations Declaration. The Declaration's section on PNIVIF begins with a prefatory paragraph which authoritatively prohibits "armed intervention and all other forms of interference" against States.²¹⁸ The second, third, and fourth paragraphs prohibit (1) coercive measures; (2) support of subversive or terrorist activities; (3) interference in civil strife; (4) use of force against peoples; and (5) interference with a State's choice of political, economic, social, and cultural systems.²¹⁹ One method of interpretation is to construe these paragraphs conjunctively. The Declaration's limb on coercive measures would inform PNIVIF as a whole. The alternative method is to treat the prefatory paragraph as the crux of the principle, the other paragraphs its exemplifications. Coercive measures would therefore constitute a mere manifestation of PNIVIF. The structure of the Declaration confirms this second interpretation. The Declaration refers to six other general principles of international law. Each section on those principles begins with a prefatory paragraph capturing the relevant principle's essence, followed by a series of elaborative paragraphs.

Indeed, there is no evidence that States agreed to restrictively define PNIVIF as coercion in the discussions leading up to Resolution 2131 and the 1970 Friendly Relations Declaration. As I will explain later, States never even managed to agree on a definition of PNIVIF in the first place.²²⁰

A return to PNIVIF's regional origins also suggests some kinds of destabilizing interferences were thought to be illegal as early as in 1948. In the *Asylum Case*, a military *coup d'état* in Peru impelled the founder of the American Popular Revolutionary Alliance, Víctor Raúl Haya de la Torre, to seek asylum with the Colombian embassy in Lima.²²¹ At issue was the interpretation of Article 2 of the 1928 Havana Convention on Asylum, which provided that asylum "may not be granted except in urgent cases."²²² The ICJ concluded that the threat of regular prosecution, even for "political" offences, was not an "urgent" case that

218. *Friendly Relations Declaration*, *supra* note 186.

219. *Id.*

220. *See infra* Part II.D.

221. *Asylum (Colom. v. Peru)*, Judgment, 1950 I.C.J. Rep. 266 (Nov. 20).

222. *Convention Fixing the Rules to Be Observed for the Granting of Asylum*, art. 2, Feb. 20, 1928, 132 L.N.T.S. 323.

would permit the grant of asylum.²²³ Notably, part of its reasoning averred that to hold otherwise would be inconsistent with the “established tradition” of PNIVIF in Latin America.²²⁴ Parties to the Asylum Convention are unlikely to have consented to “foreign interference in the administration of domestic justice,” which the Court castigated as “intervention in its least acceptable form.”²²⁵

It may be noted that the Court did not actually make a pronouncement on PNIVIF as a substantive rule of law but relied on it as a principle in support of its restrictive interpretation of the Asylum Convention. Regardless, this does not detract from the point I wish to make, which is that even before the 1970 Friendly Relations Declaration, the ICJ had recognized that an interposition that undermines the justice system—a core institution of the State—was inconsistent with PNIVIF. The Inter-American Juridical Committee would reach the same conclusion years later.²²⁶ Bearing in mind the Friendly Relations Declaration’s regional origins, one might conclude that the document treated the destabilization of another State’s system of justice as illegal.

Recognizing that PNIVIF applies not just to coercion, but also to *some* destabilizing interferences, would bear implications for electoral disinformation campaigns. It is arguably a sovereign prerogative of democratic States to design and direct the very process that determines how their government is constituted. When the campaign distorts electoral results, it commits a fraud on the process itself.²²⁷ A disinformation campaign that undermines the legitimacy of electoral processes is equally destabilizing, since the democratic social contract is premised on public perception that its leaders are proper representatives. Thus, any electoral disinformation campaign will generally abrogate a sovereign prerogative of democratic States, whatever the pretext.

C. Persuasive Interferences

A plain meaning construction of “coercion” would, according to the majority view in the Tallinn Manual 2.0, exclude merely persuasive interpositions. There is nonetheless evidence that affirms some persuasive interpositions are prohibited by *lex lata*. The issue of subversive propaganda, or propaganda that foments or incites insurgency against the government, is instructive.

Not all forms of propaganda are outlawed by international law.²²⁸ However, subversive propaganda was recognized as unlawful even before World War II.²²⁹

223. *Colom. v. Peru*, 1950 I.C.J. at 284.

224. *Id.* at 285.

225. *Id.* at 285–286.

226. Inter-American Juridical Committee, *Instrument Relating to Violations of the Principle of Non-Intervention*, Doc. CIJ-51, 10 (1959).

227. Gary Corn & Eric Jensen, *The Technicolor Zone of Cyber Space – Part I*, JUST SECURITY (May 30, 2018), <https://www.justsecurity.org/57217/technicolor-zone-cyberspace-part/>.

228. Brabandere, *supra* note 107, ¶¶ 4, 9.

229. F. de Martens, *Traité de Droit International* § 74 (1883).

Historically, the prohibition against subversive propaganda was not rooted in PNIVIF but in response to its being seen as an act of indirect aggression.²³⁰ Eventually, as PNIVIF expanded, it became another justification for prohibiting subversive propaganda.²³¹ Hints of this could be first gleaned in 1933, when President Roosevelt and Maxim Litvinov exchanged a series of letters that committed the United States and the Soviet Union to a mutual policy of non-interference and renounced any “agitation or propaganda” that sought to bring about forcible changes in the other’s socio-political order.²³² France and the Soviet Union reached a similar agreement in 1932.²³³ In 1948, Resolution XXXII of the Ninth Inter-American Conference also called upon American States to adopt measures against, *inter alia*, “subversive propaganda” in the name of countering “interference by any foreign power.”²³⁴

Unsurprisingly, making subversive propaganda illegal was an idea with which many governments could get on board. In the 1960s, a scattered cluster of States advanced the position that PNIVIF realizes a prohibition on subversive propaganda.²³⁵ This view eventually prevailed in the Friendly Relations Declaration. Its text reads, “[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities” directed at violent regime ouster. Considering that propaganda was a key weapon States used to “foment” or “incite” subversion, surely States must have contemplated propaganda under this provision. Besides, the provision’s reference to “tolerate” should *a fortiori* justify a prohibition against subversive propaganda. In light of the plain text of the Friendly Relations Declaration, it is unclear how one can conclude all persuasive interferences fall outside PNIVIF’s prohibition.

Electoral disinformation campaigns are by no means subversive. Notwithstanding, the aforementioned account of subversive propaganda does disprove the theory that merely persuasive interferences are never captured under PNIVIF. More to the point, the Declaration on Intervention and Interference actually affirms that the dissemination of “false or distorted news” can be

230. See, e.g., G.A. Res. 380 (V), *supra* note 159. See also Quincy Wright, *Subversive Intervention*, 54 AM. J. INT’L L. 521, 524 (1960).

231. Brabandere, *supra* note 107, ¶¶ 10, 14.

232. Letter from Maxim Litvinov to Franklin D. Roosevelt (Nov. 16, 1933), FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 805-806 (U.S. Dep’t of State ed., 1933).

233. Treaty of Non-Aggression, Fr.-U.S.S.R., art. V, Nov. 29, 1932, 157 L.N.T.S. 411.

234. Ninth International Conference of American States, *Resolution XXXII: The Preservation and Defense of Democracy in America*, 1 Annals of the O.A.S. 133, 133–134 (1949).

235. See, e.g., 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶¶ 271, 273; 1966 SPECIAL COMMITTEE REPORT, *supra* note 184, ¶ 310; 1967 SPECIAL COMMITTEE REPORT, *supra* note 191, ¶ 364; U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. ¶¶ 11 (Austl.), 38 (Rwanda), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1400th mtg. ¶ 7 (Guinea), 16 (Braz.), 40 (Dem. Rep. Congo), U.N. Doc. A/C.1/SR.1400 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1404th mtg. ¶ 23 (Isr.), U.N. Doc. A/C.1/SR.1404 (Dec. 9, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1406th mtg. ¶ 27 (Saudi Arabia), U.N. Doc. A/C.1/SR.1406 (Dec. 10, 1965).

interpreted as interference in internal affairs.²³⁶ This leaves open the possibility that electoral disinformation campaigns may be treated as violations of PNIVIF even if they are not subversive.

D. Sovereign Will and an Empty Container

Traditional formulations of PNIVIF situate the government at the center of a State's "sovereign will." The textual history nonetheless suggests that the "sovereign will" may also vest in "the people." The starting point is Resolution 2131, which recognized that peoples enjoy "the right of self-determination . . . without any foreign pressure."²³⁷ This provision arguably reformulated PNIVIF into a principle that protects the people's political independence.

Notably, Resolution 2131 and the Friendly Relations Declaration describe the use of force to "deprive people of their national identity" as a violation of *both* "their inalienable rights and of the principle of non-intervention."²³⁸ By the conjunctive, the use of force against peoples is not only rendered illegal on account of the self-determination right but is also *per se* a prohibited intervention. The UNGA's 1970 Declaration on the Strengthening of International Security also affirmed the "right of peoples to determine their own destinies, free of external intervention, coercion or constraint."²³⁹ The less authoritative Declaration on Intervention and Interference went beyond self-determination to affirm the "right of States and peoples . . . to develop fully, without interference, their system of information and mass media."²⁴⁰

The principle of self-determination was folded into PNIVIF in response to the protest of newly independent States, who were aghast that colonial governments relied on PNIVIF to stave off foreign support for peoples fighting for independence.²⁴¹ Shifting conceptions of "sovereign will" are best exemplified in the literature on civil strife, a more encompassing situation than civil war. The crystallizing standpoint is that a request for military assistance from either side to a civil strife no longer permits armed intervention.²⁴² Civil strife is the process by which the State, encompassing government and dissidents, navigates its choice of political system. Military assistance on behalf of either side hijacks that choice.

236. *Declaration on Intervention and Interference*, *supra* note 204, at annex ¶ 2(III)(d).

237. G.A. Res. 2131 (XX), *supra* note 155, ¶ 6.

238. *Id.* ¶ 3.

239. G.A. Res. 2734 (XXV), ¶ 4 (1970).

240. *Declaration on Intervention and Interference*, *supra* note 204, at annex ¶ 2(I)(c).

241. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶ 258. *See also* First Summit Conference of Heads of State or Government of the Non-Aligned Movement, *Declaration of the Heads of States or Government of Non-Aligned Countries*, ¶ 14 (1961).

242. *See, e.g.*, Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641 (1984); John Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT'L & COMP. L. 191, 196 (1983).

Louise Doswald-Beck's study on State responses to Cold War interventions is persuasive. Her study led her to conclude that CIL prohibits armed intervention by consent on behalf of either side.²⁴³ The doctrine of consent was initially a self-serving rule designed by governments to handicap revolutionary movements.²⁴⁴ As the self-determination right gained salience, intervening States faced greater difficulty justifying armed support for incumbents on the basis of the latter's request. The doctrine of consent was steadily abandoned and a new strategy was formulated—incumbent patrons shifted to argue their intervention was a permissible response to counter another State's prior intervention in support of rebels.²⁴⁵ In practice, this new justification of counter-intervention was also vexed. States could simply rely on "they did it first" polemics to threaten intervention.

This account brings into doubt the persuasiveness of *Nicaragua's* pronouncement on the doctrine of consent. More broadly, it suggests that the choices of a people can represent the sovereign will. A related question concerns the nature of the protected choices. The choice of government form is obviously a strong contender. Under the Declaration on Intervention and Interference, another possibility is the people's freedom to develop their system of information. Arguably, so too, are electoral choices, which are prey to disinformation campaigns designed to sway votes. It is granted that the right of self-determination, or the right of peoples to choose *whatever* form of government, is not the same as the freedom to vote in a democratic system.²⁴⁶ Still, insofar as an interference with either bears on fundamental political choices affecting the constitution of governments, they are analogizable.

On the whole, the textual history plainly suggests some non-coercive interpositions are unlawful. Yet, the ambits of this category of non-coercive interpositions remain ill-defined. Subversive propaganda, which is not coercive, is an illegal interposition. It is nonetheless incorrect to extrapolate therefrom a rule against all forms of persuasive interferences. Whereas the *Asylum Case* may have recognized a rule against interferences with a State's administration of justice, a broader prohibition against destabilizing interferences at large can only be considered nascent. While armed intervention against peoples fighting for self-determination is illegal, it remains unclear how far this reconceptualization of a State's "sovereign will" applies to other situations. It understates the case to say that PNIVIF is an unruly corpus.

What is striking in this recounting is that States never succeeded in defining PNIVIF, let alone restrictively defining it as coercion. There is nothing in the textual history, let alone UNGA Resolutions, that points to a settled definition of

243. Doswald-Beck, *supra* note 199, at 213-252.

244. See Friedmann, *supra* note 28, at 210.

245. See generally Doswald-Beck, *supra* note 199. See also Olivier Corten, LAW AGAINST WAR, 288-310 (2010).

246. Doswald-Beck, *supra* note 199, at 203.

PNIVIF. The most that can be said is that States only managed to agree, or come close to agreement, on some *manifestations* of the principle.

In this regard, the textual history reveals that States did debate the antecedent question of whether intervention or interference ought to be defined. Some States had the prescience to recognize that any attempt at defining PNIVIF would have been “unwise and unprofitable.”²⁴⁷ For them, it was preferable that the principle could be flexibly applied to new circumstances, and nothing would be gained from turning a useful principle into formula.²⁴⁸ Others pointed out that the task of defining PNIVIF would be akin to herding cats.²⁴⁹ Among the States that held out hope for a “new formulation” of PNIVIF that would take into account new methods of foreign interposition,²⁵⁰ none proposed a definition that was accepted by other States. Considering that States never even settled the debate on whether intervention or interference ought to be defined in the first place, it is astounding that the present consensus has simply assumed to the principle a *lex lata* definition.

In reality, PNIVIF has functioned as an empty container. Because the concept of intervention and interference is gargantuanly broad, States rely on it to contest, reject, and occasionally accept new rules on how they, as sovereign entities, are expected to relate to one another. This is made bare by the principle’s rapid evolution,²⁵¹ which witnesses States jostling to outlaw forcible, political, economic, and other interpositions by which they are threatened. The result is that the principle’s content is constantly on the move. Indeed, as will be seen, it is the evolutionary and amorphous quality of PNIVIF that brings about the central conundrum of this Article—how can concrete rules be created to give effect to a principle on the lam?

A final point to address is the distinction between “intervention” and “interference.” The textual history suggests “intervention” and “interference” did not begin as interchangeable terms. Notably, the latter was used to emphasize PNIVIF’s expansion to prohibit non-forcible and indirect types of intervention and interference. This distinction eroded over time. Because States treated PNIVIF as an empty container, there was no reason for them to define the principle, let alone attempt to fastidiously distinguish “intervention” and “interference.” The word “interference” nonetheless retained some rhetorical uses, insofar as it was the preferred word when States sought to further expand the principle. In any case, it is incorrect to assert that interferences are legal under

247. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶ 231.

248. *See, e.g., id.*

249. *See, e.g., id.* ¶ 232. *See also* U.N. Secretary-General, *Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: Comments Received from Governments*, U.N. Doc. A/5725, at 11 (Bulg.) (July 22, 1964) [hereinafter *Comments on Principles of International Law*].

250. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶ 230.

251. Moore, *supra* note 242, at 194.

international law, since they are expressly declared illegal under the Friendly Relations Declaration.

All said, the superficial distinction between “intervention” and “interference” may present a way for the ICJ to restate the principle without contradicting its own judgment. It will be observed that the *Nicaragua* judgment primarily made reference to “intervention.” By contrast, the word “interference” was barely mentioned. Of the word’s eleven appearances, four were quotes of external sources,²⁵² three were related to the law of sea encumbrances;²⁵³ and three were used to describe the factual matrix.²⁵⁴ In its single appearance vis-à-vis the principle, the word “interference” was simply used to define “intervention”, a situation where it would have been problematic for the Court to tautologically use “intervention.”²⁵⁵ A future bench may therefore hold that *Nicaragua* had only defined “intervention” as coercion, but not “interference.” This, of course, requires some measure of creative interpretation.

III.

RECONSTRUCTING NON-INTERVENTION AND NON-INTERFERENCE: GRASPING A PRINCIPLE ON THE LAM

PNIVIF is an empty container principle which has never stopped evolving. The principle’s frustrating fluidity has long been recognized by various eminent jurists.²⁵⁶ There are two underlying reasons for the principle’s nebulosity. First, the principle molds to the mutative ambits of sovereignty.²⁵⁷ The absorption of the self-determination right into the “sovereign will” question is an obvious example of such a mutation. As a result, PNIVIF invites conceptual discussions on the scope of a State’s sovereignty but offers few clear answers.²⁵⁸

Second, the principle evolves as States constantly reevaluate and modulate the ways in which they interact with one another.²⁵⁹ As States became more economically and politically intertwined over the twentieth century, they had to contend with subtler forms of foreign interpositions and could no longer abide by a thin law of armed intervention. The perceived threat of neo-colonialism was a grave concern for newly independent States. Non-aligned States, seeking to guard their nascent economies and political institutions from the vagaries of international politics, pressed strongly against destabilizing interferences.

252. *Nicar. v. US*, 1986 I.C.J. ¶¶ 55, 140, 192, 204.

253. *Id.* ¶¶ 214, 253, 279.

254. *Id.* ¶¶ 93, 241, 291.

255. *Id.* ¶ 202 (“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference”).

256. *See supra* text accompanying notes 30-31.

257. Kunig, *supra* note 33, ¶ 1.

258. *See* John Norton Moore, *Low-Intensity Conflict and The International Legal System*, 67 INT’L L. STUD. 25, 25 (1995).

259. Friedmann, *supra* note 28, at 207.

Subversive propaganda was also perceived as a powerful threat in the Cold War milieu.

It is no surprise, then, that the *lex lata* on PNIVIF is an unruly corpus. The difficulty with *Nicaragua*, or at least the way in which it has been construed, is that it froze the principle's evolution. The development of the International Law Commission's ("ILC") Draft Code of Offences Against the Peace and Security of Mankind attests to this. A year before the *Nicaragua* judgment, the ILC Special Rapporteur recognized two limbs to a proposed international crime of interference:

The following, *inter alia*, constitute interference in the internal or external affairs of a State:

- (a) Fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State;
- (b) Exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.²⁶⁰

Evidently, coercion was only treated as a subset of PNIVIF. More significantly, the first limb of the proposed crime spoke precisely to a prohibition on certain types of destabilizing and persuasive interferences. The use of the phrase "*inter alia*" is also significant. As the Special Rapporteur's report notes, limbs (a) and (b) were not meant to be exhaustive but envisaged only two situations "in particular."²⁶¹ The same Special Rapporteur would switch course two years after *Nicaragua* to treat coercion as "the dividing line."²⁶² Subsequent Draft Codes confined intervention to coercion.²⁶³

It is ironic that the bright-line definition of coercion froze in place an inherently evolutionary principle. This freezing effect is even more problematic in light of the provenance of the coercion rule. The coercion definition was formulated by eminent jurists at a time when international law was only thought to prohibit armed interventions. Why else would States forcibly intervene, if not as a threat, then to compel the government's choices or overthrow it altogether? As PNIVIF has since extended beyond armed interventions, it is worth questioning whether the coercion definition remains equally applicable.

260. Doudou Thiam (Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind), *Third Rep. on the Draft Code of Offences Against the Peace and Security of Mankind*, at 40, U.N. Doc. A/CN.4/387 (Apr. 8, 1985).

261. *Id.* ¶ 111.

262. Doudou Thiam (Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind), *Sixth Rep. on the Draft Code of Offences Against the Peace and Security of Mankind*, ¶¶ 12–33, U.N. Doc. A/CN.4/411 (Feb. 19, 1988).

263. Linarelli, *supra* note 145, at 26–43. The proposed crime of intervention was eventually removed from the Draft Code because, among other things, (1) it was considered to be too vague for a criminal provision; (2) it was thought that the Code should only cover serious offences like crimes against humanity; (3) it was thought that PNIVIF was not entirely relevant for a Code that is meant to deal with offences against the peace and security of mankind; and (4) there were concerns that a vague offense of interference would criminalize ordinary modes of diplomacy. *See id.* at 27–29.

In this regard, coercion is an under-inclusive definition that fails to confront the threats posed by twenty-first century methods of foreign interpositions. Its poor application to electoral disinformation campaigns, for which there are good reasons to prohibit, is demonstrative. By contrast, there are good reasons to proscribe some of the non-coercive interferences canvassed in this Article.

Foremost, the logic of defining intervention as coercion is that certain non-coercive acts, threatening the same sovereign prerogatives protected by PNIVIF, would be permissible even if they caused “comparable or even greater damage.”²⁶⁴ This is evident in electoral disinformation campaigns, which sabotage the sovereign prerogative of democratic States to design and direct their own elections. If PNIVIF was to be enunciated as a principle *protective* of sovereignty, it is only prudent to consider prohibiting certain forms of destabilizing interference.

A further inadequacy that arises from the requirement of a coercive intent is that States do not always have in mind the compellation of policy changes when they set out to seriously interpose on a target State. In practice, States may also set out to discredit or distract their target, or simply seek to throw a wrench in the broader political environment. These kinds of potentially injurious State behaviors fall outside the coercion framework, even though they could qualify as destabilizing interferences.

The inability of the coercion framework to capture disinformation campaigns, as persuasive interferences, is also objectionable. As military thinkers have emphasized, disinformation campaigns, and more broadly IOs, are effective precisely because they consist of a flood of smaller, subtle acts that aggregate into larger “synergistic strategic effects.”²⁶⁵ Separating “coercive” acts from “persuasive” ones obscures this actuality. The effectiveness of disinformation campaigns lies in how they produce a bevy of content, ranging from patently false information to memes or emotive messaging.²⁶⁶ The injurious impact of such persuasive interference is exacerbated because some States have pursued influence capabilities as a science, folding them in with hybrid tactics. Of particular concern is the adoption of emerging technologies, including photograph manipulation and artificial intelligence-powered fake news bots.²⁶⁷ It is naïve to

264. Corn & Jensen, *supra* note 227; Kilovaty, *supra* note 14, at 172.

265. Timothy B. McCulloh, *The Inadequacy of Definition and the Utility of a Theory of Hybrid Conflict: Is the “Hybrid Threat” New?*, in 141 *TERRORISM: COMMENTARY ON SECURITY DOCUMENTS* 57, 57–58 (Douglas C. Lovelace Jr. ed., 2016). *See also* Jovana Marović, *Wars of Ideas: Hybrid Warfare, Political Interference, and Disinformation*, in *NEW PERSPECTIVES ON SHARED SECURITY: NATO’S NEXT 70 YEARS* 27, 27–28 (Tomáš Valášek ed., 2019).

266. Björnstjern Baade, *Fake News and International Law*, 29 *EUR. J. INT’L. L.* 1357, 1358–1361 (2018).

267. *See* SAMANTHA BRADSHAW & PHILIP N. HOWARD, *TROOPS, TROLLS AND TROUBLEMAKERS: A GLOBAL INVENTORY OF ORGANIZED SOCIAL MEDIA MANIPULATION*, at 9–12 (2017), accessible at <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/07/Troops-Trolls-and-Troublemakers.pdf>.

assume merely persuasive methods, employed in concert, are always less effective.²⁶⁸

Moreover, *Nicaragua*'s proclivity for government prerogatives exemplifies an outmoded conception of sovereign will.²⁶⁹ It is an artificial view of States as "black boxes that are properly represented by whatever faction can maintain itself in power."²⁷⁰ Plainly, not all choices that are fundamental to *governance* are held by *governments*. Elections are obvious examples. On this note, the ongoing conundrum for scholars is how to reconceptualize a vision of sovereign will that accurately realizes the government-people relationship.²⁷¹ It remains unclear what sphere of sovereign choices belongs to the government, and what sphere belongs to the people. The conundrum is further complicated by questions of how a people-centric "sovereign will" ought to reckon with different forms of governance, democratic or undemocratic. Thankfully, these challenges do not feature in electoral disinformation campaigns. This is because democratic States, by their nature, relegate electoral choices to the people, not the government. Disinformation campaigns which seek to sway votes, in turn, always interpose on the electoral choices of a significant subset of the people. Neither should government consent to the foreign disinformation campaign vitiate the illegality of the interference.

Beyond disinformation campaigns, there is a palpable sense of discontent with *Nicaragua* among practitioners working in the field of IOs, cyber-ops, and other hybrid threats.²⁷² Steven Barela calls for the norm to be strengthened in light of the "rapidly growing capacity for all States to engage in meddling through cyberspace."²⁷³ A most forceful opinion has been put forth by Kilovaty, writing that coercion "excludes a variety of harmful cyber operations" that would "significantly jeopardize the internal and external affairs of a [S]tate, including election integrity, territorial and political sovereignty, self-determination, and many other values that international law has long recognized and defended from undue external influence."²⁷⁴

From this perspective, it is evident that the characterization of PNIVIF as an "empty container" ought not to be construed as pure criticism. As stated, the principle serves a crucial function for States, relying on it to ceaselessly negotiate and lay the boundaries of acceptable inter-State behavior. Indeed, States

268. See Kilovaty, *supra* note 49, at 88.

269. Elizabeth A. Wilson, *People Power and the Problem of Sovereignty in International Law*, 26 DUKE J. COMP. & INT'L L. 551, 569–570 (2016).

270. Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 816, 839 (Marc Weller ed., 2015).

271. See Wilson, *supra* note 269, at 570–586; see also Damrosch, *supra* note 50, at 42–43.

272. See, e.g., Corn & Jensen, *supra* note 227.

273. Steven J. Barela, *Zero Shades of Grey: Russian-Ops Violate International Law*, JUST SECURITY (Mar. 29, 2018), <https://www.justsecurity.org/54340/shades-grey-russian-ops-violate-international-law/>.

274. Kilovaty, *supra* note 49, at 87–88.

themselves emphasized it was crucial that the principle be allowed to evolve to meet new circumstances.²⁷⁵ The need to maintain PNIVIF's evolutionary character remains pressing today.

Lamentably, the fluidity of the principle comes at a price. Almost two hundred years ago, Charles-Maurice de Talleyrand-Périgord was asked what exactly non-intervention meant. The artful diplomat smiled and replied that non-intervention meant roughly the same thing as intervention.²⁷⁶ A chronic problem for PNIVIF is its ambiguity. At best, this makes it difficult for the principle to guide State behavior and leads to arbitrary outcomes. At worst, the principle's ambiguity risks rendering it near toothless and manipulatable to State whims.²⁷⁷ In *Nicaragua's* defense, this was possibly the Court's concern when it laid down a bright-line coercion definition. To note, even *Nicaragua's* attempt at defining the principle with clear ambits was not foolproof. The realpolitik view continues to have some salience today and it is not uncommon to find State actors exploiting the principle's "grey zone" to call out or deny interference where expedient.²⁷⁸

The legally trained mind would, at this juncture, recognize the all-too-familiar quandary between flexibility and certainty. Is it then possible to create concrete rules that give effect to a fluid and evolutionary general principle?

The nihilistic response would dismiss the possibility altogether. PNIVIF lacks at least two of Lon Fuller's eight requirements of legality, being neither clear nor constant. Can it then be considered law? Notably, D'Amato has, albeit for different reasons, proclaimed that there is "no norm of intervention or non-intervention in international law."²⁷⁹ It is an outré hypothesis to renounce a cardinal principle which traces back to the Peace of Westphalia itself. As the historian Wang Gungwu has noted, the Peace of Westphalia was essentially about establishing a compact of non-interference as a solution to the cycle of war.²⁸⁰

275. See, e.g., 1964 Special Committee Report, *supra* note 28, ¶¶ 216–217, 230–231; U.N. GAOR, 20th Sess., 1st Comm., 1395th mtg. ¶¶ 23–25, 28 (Colom.), U.N. Doc. A/C.1/SR.1395 (Dec. 3, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1396th mtg. ¶¶ 6–8 (U.S.), U.N. Doc. A/C.1/SR.1396 (Dec. 3, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. ¶ 38 (Rwanda), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1403d mtg. ¶¶ 15 (Malay.), 20 (El Sal.), U.N. Doc. A/C.1/SR.1403 (Dec. 9, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1404th mtg. ¶ 38 (Iran), U.N. Doc. A/C.1/SR.1404 (Dec. 9, 1965); U.N. GAOR, 20th Sess., 1408th plen. mtg. ¶¶ 116 (Braz.), 125 (Guat.), 149 (U.S.), U.N. Doc. A/PV.1408 (Dec. 21, 1965); U.N. GAOR, 31st Sess., 1st Comm., 55th mtg. at 26 (Ghana), 38–40 (Zam.), U.N. Doc. A/C.1/31/PV.55 (Dec. 9, 1976); 1977 Secretary General Report, *supra* note 200, at 12 (Yugoslavia); U.N. GAOR, 36th Sess., 1st Comm., 50th mtg. at 11 (Rom.), U.N. Doc. A/C.1/36/PV.50 (Dec. 3, 1981).

276. See Emmanuel de Waresquiel, TALLEYRAND: LE PRINCE IMMOBILE pt. 4 ch. 20 (2015).

277. Oppenheim cynically noted that States have always found it easy to "find or pretend some legal justification for intervention." See OPPENHEIM, *supra* note 39, at 195.

278. See Schmitt, *supra* note 99, at 66–67.

279. See generally Anthony D'Amato, *There Is No Norm of Intervention or Non-Intervention in International Law*, 7 INT'L LEGAL THEORY 33 (2001).

280. Wang Gungwu, *What if the Nation-State is No Longer the Key Organisational Unit of the International Community?*, in INSIGHTS ON SINGAPORE'S POLITICS AND GOVERNANCE FROM

Notwithstanding PNIVIF's ambiguity, it is equally possible to identify specific manifestations of the principle that take the form of concrete rules, the most obvious being the prohibition on the use of force.²⁸¹ The dearth of clarity or constancy has not prevented PNIVIF from playing a very "law-like" function either—guiding the behavior of States. The principle possesses argumentative force in the lexicon of inter-State relations, and States often justify or eschew particular courses of action in view of non-intervention and non-interference. In this regard, PNIVIF is not dissimilar from other amorphous, general concepts such as sovereign equality—despite eluding abstract theories about the nature of the law, they are historically and presently inextricable from international relations and international law.

By contrast, most scholars who write on the problem of PNIVIF have tended to advocate for a new definition that would encapsulate the more dangerous non-coercive interpositions of today. In the context of cyber operations, Ido Kilovaty proposed a test of "disruption" that would prohibit cyber-attacks that have significantly disruptive effects.²⁸² As to the "sovereign will" question, Lori Damrosch argues that the norm should be redefined to protect "the political freedoms of the target [S]tate's people."²⁸³

Elsewhere, other scholars have attempted to squeeze new interpositions within *Nicaragua* itself. For example, Sean Watts's test of consequentiality would treat merely persuasive interpositions as coercive if their effects occur on a significant enough scale.²⁸⁴ Other writers have also used the language of "rising to the level of coercion" to describe acts that would not normally qualify as such under *Nicaragua*.²⁸⁵ For all that, these proposals are essentially attempts to redefine PNIVIF. As Kilovaty notes, they ignore the "elephant" in the room, which is that the substance of the coercion test simply does not translate well to modern forms of interpositions.²⁸⁶

These attempts at redefinition are unlikely to be satisfactory. Because intervention and interference exist in infinite categories of situations, ranging from economic sanctions to IOs, generalized rules tend to verge on over-inclusivity or under-inclusivity. The coercion framework is illustrative. Coercion, as stated, was formulated by reference to a time when only forcible interventions were contemplated. Yet, coercion does not transpose neatly to IOs, which by its namesake is entirely persuasive. Similarly, coercion is not easily applicable to

LEADING THINKERS 151, 152–153 (Jiang Yulin ed., 2019). *See also* Colin Flint & Peter J. Taylor, POLITICAL GEOGRAPHY: WORLD-ECONOMY, NATION-STATE AND LOCALITY 135 (7th ed. 2018).

281. *See supra* text accompanying notes 150–152.

282. *See* KILOVATY, *supra* note 14, at 172–173.

283. Damrosch, *supra* note 50, at 48. *See also* TSAGOURIAS, *supra* note 108.

284. *See* Watts, *supra* note 15, at 257.

285. TALLINN MANUAL 2.0, *supra* note 3, at 319; Jamnejad & Wood, *supra* note 34, at 368.

286. *See* Kilovaty, *supra* note 14, at 171.

cyber operations, which tend to be “non-forceful, non-dictatorial, and secretive.”²⁸⁷

On the flip side, new generalized rules also risk over-inclusivity. While the textual history may recognize some kinds of destabilizing or persuasive interpositions as possibly illegal, a claim that all such interferences are unlawful is a stretch. Nor is it ideal to write off all destabilizing, disruptive, or persuasive interpositions as problematic. The prohibition on persuasive interferences may, in a subset of contexts, be defensible in IOs and cyber-ops. Yet, it would be highly problematic to prohibit merely persuasive interferences in the context of diplomatic interactions, where persuasion is the norm.

A main cause for PNIVIF’s ambiguity lies in the expansiveness of its possible application. The problem with new generalized definitions, proposing to prohibit “disruptive” acts or sufficiently persuasive interpositions, is that they compound the obfuscation.²⁸⁸ For instance, a prohibition on destabilizing interferences will become a dead letter so long as States can auto-interpret what would constitute a serious undermining of sovereign rights or institutions. Similar challenges would confront the tests of disruption or consequentiality proposed by other authors. One may wonder what this would mean for State compliance with the principle.²⁸⁹ Rather than fulfilling the basic function of guiding State behavior, new generalized definitions merely restate the confusion, introducing indeterminacy and arbitrariness.

One may also worry about how attempts to expand PNIVIF by redefining the principle may bear on humanist interests. When words such as “intervention” and “interference” are spread too thinly, as in the test of consequentiality, they can easily become veneers for the abrogation of individual rights and interests through *ad hominem* attacks on individuals based on their nationalities, national origins, ethnicities, or place of residence. Governments have been known to invalidate dissent, thus, caricaturing dissenters as puppets of foreign cabals rather than agents of their own thoughts, notwithstanding the stoking of xenophobic sentiments. Further, a sweeping expansion of the principle may give legitimacy to draconian countermeasures which are taken in response to “benign” interpositions.

In any case, the chances of States accepting a new generalized definition of PNIVIF are slim. It is not a coincidence that States never succeeded in defining PNIVIF. On reflection, the vagaries of PNIVIF attest to a chicken-or-egg problem. The difficulty States have had in defining the principle rests, in part, on a lack of “a clear perspective on where [...] national interests lie” with respect to the norm.²⁹⁰ Virtually all States, including so-called weak ones, are at any one time influencing and influenced by other States. States, based on their unique

287. *Id.* at 172.

288. Linarelli, *supra* note 145, at 43.

289. *See* Farer, *supra* note 53, at 525–526.

290. Damrosch, *supra* note 50, at 13.

capabilities, employ and are threatened by different tools of influence. As a result, generalized rules are double-edged swords, simultaneously capable of fettering States' tools of influence while cushioning them from foreign influence.²⁹¹ This breeds ambivalence. The United States' pirouettes on non-forcible interpositions are a case in point.²⁹² A closer re-examination of destabilizing interferences also shows that non-aligned States did not fully agree on its ambit when they pushed for Resolution 44/147.²⁹³ Whereas some States would prefer to prohibit foreign funding of political parties, others made reservations in that respect.²⁹⁴ A broad definition of PNIVIF is unlikely to gain traction with States, and even if it does, States will probably apply the test thereto inconsistently. Even though a prohibition on disruptive or destabilizing interferences may lend the United States a stronger legal basis for criticizing electoral disinformation campaigns, it may also expose United States' own cyber-ops, such as its alleged creation of Stuxnet, to legal criticism. That a test of destabilization, disruption, or consequentiality may apply to an unknown number of United States' influencing activities would urge the United States to either apply said test inconsistently or reject it altogether.

The daring proposal that is put forth by this Article is that to properly reinvigorate PNIVIF, the focus ought to be shifted away from defining the principle and on to the *process* by which the principle may be progressively clarified.

A. *International Law as Process*

Before describing the Quilt-work approach, it is apropos to discuss its fundamental premise—international law is not just a body of *static products* commonly called “rules,” but a *dynamic process* of competition and cooperation, a public (dis)order of State actors, governments, and other actors making claims and counterclaims, accepting compromises, and coming to tentative truces on expectations of State behavior. At any one time, the picture of international law is but a snapshot of the momentary consensus, emerging practices, and the distribution of power.

This vision of international law as process was, perhaps, most famously propounded by the policy-oriented school and its founder, Myres S. McDougal.²⁹⁵ The holistic view of international law goes beyond the identification of rules and extends to an understanding of how international law is influenced, and itself

291. See Barrie Sander, *Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 CHINESE J. INT'L L. 1, 53–54 (2019).

292. For further discussion, see *supra* Part II.A.

293. G.A. Res. 44/147 (Dec. 15, 1989).

294. Compare U.N. GAOR, 44th Sess., 3d Comm., 50th mtg. at 11 (Pan.), U.N. Doc. A/C.3/44/SR.50 (Dec. 4, 1989), with U.N. GAOR, 44th Sess., 82d plen. mtg. at 26, U.N. Doc. A/44/PV.82 (Dec. 29, 1989).

295. Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357 (1955).

influences, State decisions in practice.²⁹⁶ In other words, international law as process attempts to empirically demonstrate how the law operates in reality, while refuting political-realist denial of international law as parochial theory.²⁹⁷ The textual history of PNIVIF covered in Part II presents a vivid illustration of international law as process.

There are four characteristics of international law as process that merit emphasis. First, law is a living, growing body; an “institution which grows in response to felt necessities and within the limits set by historical conditions and human attitudes.”²⁹⁸

Second, international law is perceived as a platform for the continuation of politics by other means. This observation should come as no surprise to critical legal scholars, legal realists, and lawfare practitioners. In particular, international law is often a site for political compromise and contestation.²⁹⁹ States instrumentally rely on arguments and processes to lobby for new expectations for, or even constraints on, the behavior of other States. The salience of the *rule of law* is hoped for, even as the *rules* of law are treated as contestable.

Third, international law as process recognizes that “pre-law”—that is, non-binding claims, counterclaims, declarations, and statements—can have *legal effect* even before they are positively identified as “law.”³⁰⁰ In practice, it is not uncommon for States to rely on unestablished claims or non-binding instruments, such as UNGA Resolutions, to justify their behavior, create new expectations for legitimate conduct, or influence other States to adopt a certain position.³⁰¹ Unlike domestic legal systems, wherein private persons are generally not harried into complying with draft legislation, States sometimes face pressures to observe not only strict positivist law, but what others *claim* to be the law. An obvious explanation for this state of affairs lies in the relatively horizontal structure of the international legal system. Since States cannot enact laws in a decentralized “interpretive community,” they seek to convince their sovereign counterparts to treat their claims as law.³⁰²

296. Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 144–145 (1953).

297. McDougal & Reisman, *supra* note 138, at 258–259.

298. Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1, 7 (1962).

299. *See, e.g.*, Paul R. Williams, *Lawfare: A War Worth Fighting*, 43 CASE W. RES. J. INT'L L. 145, 145 (2010).

300. Nigel D. White, *Lawmaking*, in THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 559, 571 (Jacob Katz Cogan et al. eds., 2016).

301. *See* Obed Asamoah, *The Legal Effect of Resolutions of the General Assembly*, 3 COLUM. J. TRANSNAT'L L. 210, 227–228 (1964); Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445, 466–468 (1981); Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437 (2003).

302. Johnstone, *supra* note 301, at 449–450.

Indeed, it is arguable most of international law-creation is driven by this “interactive process” of States appealing to other States.³⁰³ It is no wonder “pre-law” fulfils some very law-like functions outside their argumentative force, chief of all the creation of common expectations in guidance of State behavior.³⁰⁴ Such expectations can in turn form base points for further negotiations, consent, and the eventual formation of “hard” law. The processes of multilateral institutions, such as the UNGA, stand out in demonstrating this.³⁰⁵ Christopher Joyner, for one, has pointed out that UNGA Resolutions can operate as “catalytic agents for norm-creation”.³⁰⁶ An obvious example is the genesis of the constitutional principles on outer space law.³⁰⁷ Separately, Schachter has noted that various ILC drafts have been used as bases for the negotiation and conclusion of multilateral conventions.³⁰⁸

Fourth, multilateral fora are hotbeds for process activities. It is not uncommon for new norms of international law to be proposed through reports, resolutions, or draft treaties of multilateral fora. Processes of multilateral fora facilitate deliberation, legal argumentation, negotiations, compromise, articulation, and diffusion of the proposed norm.³⁰⁹ In particular, the UN is thought to offer familiar and stable platforms for States to engage in lawmaking.³¹⁰ Not surprisingly, the UN has played a key role in clarifying various aspects of international law, ranging from human rights obligations to the definition of aggression.³¹¹

This view of international law as process removes a mental roadblock that frequently besets scholars tasked to offer legal prescriptions—there is no longer a need to ask what the ideal “test” for PNIVIF should be. An alternative response is to simply elucidate the steps that can be taken to progressively develop and clarify the ambits of impermissible interpositions. In other words, the focus is shifted away from an evaluation of the desirability of international rules and toward the anterior question of how the lawmaking process can be augmented.³¹² Prescriptions to strengthen the international legal system can then be about

303. *Id.*

304. *See generally* Asamoah, *supra* note 301.

305. Higashi, *supra* note 144, at 24; Oscar Schachter, *Recent Trends in International Law Making*, 12 *AUSTL. Y.B. INT'L L.* 1, 14 (1988–1989).

306. Joyner, *supra* note 301, at 463.

307. *See generally* Myres S. McDougal, *Emerging Customary Law of Space*, 58 *NW. U. L. REV.* 618 (1963–1964).

308. Schachter, *supra* note 305, at 3.

309. Ian Johnstone, *Law-Making through the Operational Activities of International Organizations*, 40 *GEO. WASH. INT'L L. REV.* 87, 88 (2008); Charney, *supra* note 113, at 543–546.

310. *See generally* Sufyan Droubi, *Institutionalisation of Emerging Norms of Customary International Law through Resolutions and Operational Activities of the Political and Subsidiary Organs of the United Nations*, 14 *INT'L ORG. L. REV.* 254 (2017).

311. Joyner, *supra* note 301, at 465–468.

312. McDougal & Reisman, *supra* note 138, at 272.

“nurturing an organic growth, not designing an ideal pattern.”³¹³ It is on this premise that I introduce the Quilt-work approach.

B. *The Quilt-work Approach*

In brief, the Quilt-work approach proposes that States work toward identifying, discussing, and prohibiting *specific manifestations* of prohibited interference in an incremental manner. It eschews any attempt to reformulate or define a generalized norm or principle, however broad or ambiguous. Nor does it attempt to enunciate an all-inclusive definitional test that can be used to exhaustively identify breaches of that norm or principle. By identifying specific manifestations, or “sub-norms,” of the general principle, the Quilt-work approach can progressively clarify the general principle in a practical manner.

By way of illustration, a loose coalition of States may come to the view that electoral disinformation campaigns are, or ought to be, prohibited under PNIVIF. Having identified the claimed sub-norm, these States may rely on the complex of international legal processes and multilateral fora to advance their case and persuade other States. If the sub-norm receives widespread support, it may eventually find expression in a multilateral instrument. The question of a workable definitional test that perfectly encapsulates the general principle of non-intervention and non-interference is entirely sidestepped.

The Quilt-work approach consists of a two-step cycle. In the first stage, international actors are encouraged to identify sub-norms with which they are concerned, bearing in mind the purpose of the general principle and expectations of permissible behavior. In the context of PNIVIF, the extent to which the specific behavior in question is destabilizing or inimical to the “sovereign will” of the people can all be relevant considerations. Claimed sub-norms may also be identified by analogy to other sub-norms that are clear violations of the general principle. Ideally, identified sub-norms ought to be sufficiently specific, responsive, and anticipatory. They ought to be specific enough to guide State behavior and hold States to account. Sub-norms should be responsive enough to bear relevance to ongoing events. Alternatively, they may lay down rules of the road in anticipation of future developments. This ensures that those sub-norms that are timely, forward-looking, and most relevant to States are prioritized.

In the second stage of the Quilt-work approach, States ought to rely on the variety of international legal processes to advocate for, negotiate, and come to agreement on proposed sub-norms. Here, States would have many options in an increasingly decentralized international legal complex containing a proliferation of inter-State organizations, tribunals, and treaty regimes.³¹⁴ Again, the role of the

313. Schachter, *supra* note 298, at 7.

314. JOSEPH NYE JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 90 (2004); Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of*

UNGA is worth highlighting. Savvier States may even recognize the importance of working with lobbyists, the private sector, ordinary citizens, and NGOs to capitalize on “bottom-up international lawmaking.”³¹⁵

Thus, the Quilt-work approach is not concerned with furnishing an ideal rule that draws a line between permissible and impermissible interpositions. Rather, it is a prescription that seeks to enhance the process through which States arrive at concord on the content of PNIVIF. The Quilt-work approach will eventually produce a picture of PNIVIF that comes close to a Pointillist artwork. Each dot on the canvas is a clear sub-rule on whether a specific interposition is permissible. On further reflection, this approach to international law is not entirely novel. In the context of transnational terrorism, States have managed to create a piecemeal patchwork to handle different categories of terrorist acts, even as a definition of terrorism remains elusive.³¹⁶

There are a number of justifications for why the Quilt-work approach is an ideal response to PNIVIF. Its chief attraction is its ability to navigate the demands of flexibility and evolution the principle calls for, alongside the specificity required to effectively guide State behavior. It does so by deconstructing an expansive concept into manageable threads. States may, for instance, agree to prohibit electoral disinformation campaigns as a *manifestation* of destabilizing interference without outlawing all destabilizing interpositions. By clarifying the specific manifestations of illegal interferences, the Quilt-work approach creates tangible benchmarks against which State conduct can be measured. At the same time, it avoids the risks of under-inclusivity, over-inclusivity, auto-interpretation, and arbitrariness associated with attempts to redefine PNIVIF at large.

Consider the application of the Quilt-work approach to one of hybrid conflict’s “single greatest challenge[s]”—attribution.³¹⁷ There are two obstacles in the particular field of cyber operations. The first is technical. Sophisticated cyber-attacks are often conducted through intermediate computer systems that

International Law, 3 TRADE L. DEV. 103, 106–108 (2011). Cf. Int’l Law Comm’n, Rep. of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 5–20, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

315. Janet Koven Levit, *Bottom-up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393, 395 (2007).

316. See Rep. of the High-level Panel on Threats, Challenges and Change, transmitted by Letter Dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change Addressed to the Secretary-General, ¶¶ 157–62, U.N. Doc. A/59/565 (Dec. 2, 2004). See also Andrea Bianchi, *Enforcing International Law Norms Against Terrorism: Achievements and Prospects*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 491, 498–99 (Andrea Bianchi ed., 2004).

317. Todd C. Huntley, *Controlling the Use of Force in Cyberspace: The Application of the Law of Armed Conflict During a Time of Fundamental Change in the Nature of Warfare*, 60 NAVAL L. REV. 1, 34 (2010).

have been hijacked and may span different jurisdictions.³¹⁸ Perpetrators may also mask their identities using IP spoofing.³¹⁹ All said, the technical difficulties ought not to be overstated, since States have also developed more potent traceback capabilities.³²⁰

The second obstacle is legal. Even if States are able to technically identify the perpetrators of malicious cyber operations, establishing State responsibility under the present secondary rules of international law can prove difficult.³²¹ Shrewd States conveniently employ non-State actors (“NSA”) to fudge State responsibility and maintain a veneer of plausible deniability.³²² The ODNI Report, for instance, states that disinformation during the 2016 US presidential elections was promulgated by a mix of “State-funded media, third-party intermediaries, and paid social media users or ‘trolls.’”³²³ Yet, the traditional rules for imputing NSA activities to States set standards that are arguably too onerous. Under Article 8 of the Draft Articles on the Responsibility of States, attribution is made out when NSAs act “on the instructions” or “under the direction” of a State.³²⁴ This seems theoretically sound, but is difficult to apply in practice because of the basic problem of information asymmetry. Any evidence of “instruction” or “direction” usually rests in the hands of the perpetrator State.³²⁵

Alternatively, the Draft Articles also impute State responsibility when NSAs act under the “control” of the perpetrating State.³²⁶ The ICJ has interpreted this to mean that a State must have effective control over the illegal NSA acts in question

318. Daniel B. Garrie, *Cyber Warfare, What Are the Rules?*, 1 J. L. & CYBER WARFARE 1, 4 (2012); Matthew J. Skelrov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 77–78 (2009).

319. Erik M. Mudrinich, *Cyber 3.0: The Department of Defense Strategy for Operating in Cyberspace and the Attribution Problem*, 68 A.F. L. REV. 167, 195 (2012).

320. See PANAYOTIS A. YANNAKOGEORGOS, STRATEGIES FOR RESOLVING THE CYBER ATTRIBUTION CHALLENGE 9 (2013); RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR 214 (2010); Kubo Mačák, *Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors*, 21 J. CONFLICT & SEC. L. 405, 410 (2016); William C. Banks, *The Bumpy Road to a Meaningful International Law of Cyber Attribution*, 113 AM. J. INT'L L. UNBOUND 191, 192 (2019).

321. Michael N. Schmitt & Liis Vihul, *Proxy Wars in Cyberspace: The Evolving International Law of Attribution*, 1 FLETCHER SEC. REV. 53, 71 (2014).

322. U.S. Dep't of Defense, *The Department of Defense Cyber Strategy*, at 9 (Apr. 2015), https://archive.defense.gov/home/features/2015/0415_cyber-strategy/Final_2015_DoD_CYBER_STRATEGY_for_web.pdf (“state and non-state threats often also blend together; patriotic entities often act as cyber surrogates for states, and non-state entities can provide cover for state-based operators.”). See also David E. Graham, *Cyber Threats and the Law of War*, (2010) 4 J. NAT'L SEC. L. & POL'Y 87, 93.

323. ODNI REPORT, *supra* note 60, at 2.

324. G.A. Res. 56/83, annex art. 8 (Jan. 28, 2002) [hereinafter Draft Articles on State Responsibility].

325. Hans-Georg Dederer & Tassilo Singer, *Adverse Cyber Operations: Causality, Attribution, Evidence, and Due Diligence*, 95 INT'L L. STUD. 430, 436–37 (2019).

326. Draft Articles on State Responsibility, *supra* note 324, at annex art. 8.

for attribution to be established (the “effective control” test). Proving that the perpetrator State exercised control with respect to the overall actions taken by the NSAs is not enough.³²⁷ This is an unrealistic standard in the context of cyber acts. In electoral disinformation and hybrid conflict, which derive their effectiveness from a series of synchronized acts, is it then necessary to prove the perpetrator State’s “effective control” over *each and every* single act? Surely such an expectation is fanciful. These legal challenges are compounded by the double-bind problem—when victim States are expected to furnish evidence to prove each and every act can be traced back to the perpetrator State, the risk of revealing the victim State’s cyber-defense capabilities to the perpetrator is increased. This has the ironic effect of strengthening the perpetrator’s future offensive efforts.³²⁸

Palpable discontent with the current situation has led many commentators to propose revisions to the law of State responsibility. Some have advocated for attribution to be based on a State’s overall control of NSAs, even though this standard was rejected by the ICJ in *Bosnian Genocide*.³²⁹ Others have argued for territorial-based imputation, which would attribute State responsibility for cyber operations emanating from a State’s territory.³³⁰ This raises practical concerns when one considers how this test would apply to situations like the 2016 US presidential elections, where some of the disinformation emerged from persons and computer systems operating in the United States itself.³³¹ Constantine Antonopoulos proposes relying on presumptions to shift the burden of evidence.³³² Similarly, Peter Margulies suggests a test of virtual control that would call upon a state to prove that it did not fund a cyber-attack that emanated from its territory.³³³

There are nonetheless reasons to be cautious about proposed revisions to the law of State responsibility. Because cyber operations exist on a wide spectrum, it is not clear that a revision to State responsibility rules would be equally applicable to all cyber operations.³³⁴ Consider the employment of non-Internet cyber-attacks, such as the physical smuggling of an infected thumb-drive into an “air-gapped”

327. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 400 (Feb. 26); Nicar. v. US, 1986 I.C.J. ¶ 115.

328. Schmitt, *supra* note 99, at 58.

329. See, e.g., YANNAKOGEORGOS, *supra* note 320, at 56.

330. See, e.g., Mudrinich, *supra* note 319, at 193–94.

331. See, e.g., Indictment at para. 5, U.S. v. Internet Rsch. Agency L.L.C., No. 1:18-cr-00032-DLF, (D.D.C. Feb. 16, 2018).

332. Constantine Antonopoulos, *State Responsibility in Cyberspace*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 55, 63–65 (Nicholas Tsagourias & Russell Buchan eds., 2015).

333. Peter Margulies, *Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility*, 14 MELB. J. INT'L L. 496, 514–16 (2013).

334. See Jason Healy, *Beyond Attribution: Seeking National Responsibility for Cyber Attacks*, ATLANTIC COUNCIL (Feb. 22, 2012), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/beyond-attribution-seeking-national-responsibility-in-cyberspace/>.

network. In such an instance, the operation is not so different from a kinetic act and “can be addressed through real world forensics, investigation, and intelligence.”³³⁵ While an “effective control” test may have little resonance with composite operations, it may still bear relevance for one-off cyber-attacks.

More broadly, this speaks to the risk of modifying State responsibility as a general system of secondary rules. Not only do such modifications set a precedent for laxer attribution standards outside the context of cyber, they also discourage the take-up of new international law obligations—since States must be wary that primary obligations they once agreed to may now be expanded by modifications to the secondary rules. Moreover, laxer attribution rules may have the opposite effect of giving States that cry wolf more excuses to pursue drastic countermeasures.

The Quilt-work approach cuts across these difficulties by introducing a possible solution that meets the requirements of flexibility and specificity. Instead of making *lex generalis* modifications to the regime of secondary rules, States can modify the primary rules, *lex specialis*, to respond to the attribution difficulties that attend to particular sub-norms.

In the context of electoral disinformation campaigns, States may specifically prescribe that an “extensive and long-running pattern of conduct” can suffice as evidence of wrongdoing. It may be further clarified that such a pattern of conduct is established even if a State organizes the disinformation campaign through persons or entities affiliated with the State. As with most hybrid operations, electoral disinformation campaigns derive their strength from the synchronization of multiple sub-acts, aggregating to create a larger effect.³³⁶ As stated, this makes the “effective control” test ill-fitting. A “pattern of conduct” evidentiary standard allows victim-States to rely on indirect evidence on the implicit condition that the quantity of evidence and relationship among the factual postulates may compensate for the lesser quality of evidence. The timing of the acts at issue and evidence of coordination among various actors may be taken into account. Composite acts, such as electoral disinformation campaigns, may even work to the perpetrator’s disadvantage since there are more opportunities for the perpetrator State to leave evidence of its involvement. A “pattern of conduct” standard also partially addresses the double-bind problem, since victim-States are no longer expected to demonstrate technical attribution for each and every act.

A “pattern of conduct” standard gets around the secondary rules of attribution by modifying the evidentiary yardstick for the particular sub-norm of electoral disinformation campaigns. At the same time, it does not impose itself on other cyber or hybrid operations. Clearly, the “pattern of conduct” standard cuts no ice with one-off cyber-attacks. Neither does it seem applicable to the specific

335. Planning for the Future of Cyber Attack Attribution: Hearing Before the Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech., 111th Cong. 91 (2010) (statement of Robert Knake, International Affairs Fellow, Council on Foreign Relations).

336. See *supra* text accompanying notes 67–69.

case of State-sponsored economic cyber espionage, which may benefit more from an obligation on States to criminalize and prevent such espionage. The point to emphasize is that, by employing the Quilt-work approach to progressively clarify which types of cyber or hybrid operations are unlawful as interventions or interferences, States may also seize the opportunity to apply *lex specialis* frameworks that circumvent attribution difficulties, all while maintaining the integrity of the secondary rules of State responsibility.

Additionally, the Quilt-work approach is well-suited to PNIVIF's evolutionary character. As alluded to earlier, defining intervention as coercion stymied PNIVIF's development and precipitated inattention toward various emerging and extant rules on non-coercive interferences. Contrastingly, the Quilt-work approach permits gaps to be filled as the principle evolves.

In this regard, the approach has particular relevance to the field of hybrid conflict. Because hybrid acts come in all shapes and sizes, the Quilt-work approach avoids the difficulty of having to pronounce on a single legal test which is capable of accommodating all hybrid acts. Additionally, it permits the law on PNIVIF to grow as States develop new offensive and defensive hybrid capabilities. In entailing specific clarification of the rules of engagement in hybrid conflicts, the Quilt-work approach holds out the promise of shedding light on an area of international concern that languishes in a legal grey zone.³³⁷

Furthermore, the Quilt-work approach presents a feasible way for clarifying and reinvigorating a fluid principle by operating alongside, rather than against, the interests of States. Attempts to redefine PNIVIF naturally involve fashioning a generalized rule about the nature of a State's duty of non-intervention and non-interference. As discussed, the practical problem with generalized rules is that they can be double-edged swords—they may simultaneously curtail a State's ability to influence others while affording them legal protection against foreign influence. It becomes difficult for States to assess where their interests lie vis-à-vis the generalized rule, and this breeds ambivalence to generalized PNIVIF rules.³³⁸ The Quilt-work approach circumvents this difficulty by deconstructing PNIVIF into manageable sub-norms, thus allowing States to clarify their positions with a greater awareness as to where their interests lie vis-à-vis the specific sub-norm. Technical expertise may even be included to assist in standard-setting over particular sub-norms, an option that is probably unavailable where the principle is discussed in general terms. States would therefore be in a better position to lobby for specific sub-norms that meet their concerns.

This, of course, does not imply that any one State has *carte blanche* to shape PNIVIF in its national interest. Ideally, the international law of non-intervention and non-interference will reflect the claimed sub-norms of many States, and the strongest of them will be backed by consensus or a supermajority. Sub-norms

337. See James Dever & Jack Dever, *Cyber Realpolitik*, 25 B.U. J. SCI. & TECH. L. 597, 599 (2019).

338. See *supra* text accompanying notes 290-294.

backed by State practice and *opinio juris* may even ascend into “hard” law or develop into their own niche regimes. The resulting image is a quilt-work that is woven incrementally from State concurrence with the disaggregated sub-norms, without alarming States with sweeping generalized rules on their PNIVIF obligation. In this regard, the Quilt-work approach is simple to put into effect. It is sufficient that States are encouraged to do so by appealing to their self-interest.

The incremental aspect of the Quilt-work approach also distinguishes it from attempts to introduce a comprehensive list of specific acts prohibited under PNIVIF. In retrospect, the need to identify specific manifestations of the principle was long ago recognized by some States, especially non-aligned ones. As early as 1964, Bulgaria noted that although “no definition of the principle... can be expected to embrace all the possible forms of intervention,” “an enumeration of these forces of intervention might be appended for purposes of example and illustration.”³³⁹ The Declaration on Intervention and Interference should be seen as a partial attempt to “elaborate” on specific manifestations of prohibited interpositions. For instance, the prohibition on armed intervention was expounded into no less than six paragraphs, dealing specifically with matters such as mercenaries.³⁴⁰ As one may recall, twenty-two States objected to the Declaration. It is suggested this opposition had more to do with, first, the Resolution’s attempt to prohibit a variety of new interpositions, including the broad concept of destabilizing interference; and second, the desire of non-aligned States to be as comprehensive as possible. Rather than coalesce stronger support through an incremental piecemeal approach, the non-aligned States alarmed other States who may have supported the Resolution if not for their disagreements with one or two of its provisions.

In context, the Quilt-work approach may find expression in a UNGA declaration that asserts that a State that engages in a disinformation campaign in the domestic elections of another State violates PNIVIF. The word “disinformation,” as opposed to “misinformation,” stresses the specific intent of spreading false information. The word “campaign” limits the prohibition to concerted and organized disinformation efforts taking place over a sufficiently long period of time. A “pattern of conduct” evidentiary standard, finding State responsibility even where the disinformation campaign was conducted through the organization of affiliated persons and entities, could round up the sub-norm regime.

Such a sub-norm would also be a legitimate manifestation of PNIVIF. Not only do electoral disinformation campaigns destabilize a fundamental process of

339. See Comments on Principles of International Law, *supra* note 249 at 11 (Bulg.), U.N. Doc. A/5725 (July 22, 1964); see also U.N. Secretary General, *Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: Comments Received from Governments*: Addendum, at 2 (Phil.), U.N. Doc. A/5725/Add.7 (Dec. 11, 1964).

340. See Declaration on Intervention and Interference, *supra* note 204, at annex ¶¶ 2(II)(c)–(d), 2(II)(f)–(g), 2(II)(m)–(n).

democratic States; their concerted and prolonged nature emphasizes their potential for fraudulent persuasion. When employed to sway votes, they distort peoples' choices. The defensibility of outlawing electoral disinformation campaigns is strengthened by other factors. A great majority of States have condemned and taken steps to combat disinformation campaigns, with some State actors characterizing them as violations of PNIVIF.³⁴¹ Two States that the United States has accused of electoral disinformation have themselves sponsored a Draft Code of Conduct for Information Security, condemning the use information technologies "to interfere in the internal affairs of other States or with the aim of undermining their political, economic and social stability"³⁴²—signifying that they stand opposed to electoral disinformation campaigns. Russia's response to allegations of interposition with the 2016 US presidential elections has been to deny "State-level" involvement.³⁴³ Such denial proves, rather than negates, the opprobrium of electoral disinformation campaigns.³⁴⁴ One may also speculate that a proposed sub-norm against electoral disinformation campaigns is likely to receive widespread support.³⁴⁵

It is noteworthy that the Quilt-work approach does not risk a sweeping expansion of PNIVIF. The proposed sub-norm is narrowly tailored to disinformation campaigns. This ensures States cannot rely on a broad redefinition of PNIVIF to justify the abrogation of speech rights or drastic countermeasures. A foreign media article critical of an incumbent government, for instance, would not qualify as unlawful interference since it is an isolated incident. Similarly, incumbents cannot disparage domestic dissidents as agents of foreign influence if there is no evidence of foreign coordination.

The Quilt-work approach does not see the failure of a particular sub-norm to receive general recognition by States as a failure of the process. Indeed, this is to be expected of certain sub-norms. Strong opposition to a particular sub-norm may be taken as evidence that the sub-norm is not an acceptable manifestation of PNIVIF. From the perspective of international law as a process, even sub-norms that receive tenuous acceptance have value insofar as they minimally promote discussion on specific manifestations of PNIVIF rather than platitudes on the

341. *See, e.g., Egan, supra* note 12 at 175.

342. Permanent Reps. of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan & Uzbekistan to the U.N., Letter dated Jan. 9, 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, at annex ¶ 2(3), U.N. Doc. A/69/723 (Jan. 13, 2015).

343. *See* ODNI REPORT, *supra* note 60 at 3.

344. *See* *Nicar. v. US*, 1986 I.C.J. ¶ 186.

345. The Oxford Internet Institute Computational Propaganda Research Project suggests that, as of 2019, there are seven States suspected of engaging in computational propaganda as part of foreign influence operations. *See* SAMANTHA BRADSHAW & PHILIP N. HOWARD, THE GLOBAL DISINFORMATION ORDER 2019: GLOBAL INVENTORY OF ORGANISED SOCIAL MEDIA MANIPULATION 2 (2019), <https://comprop.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>.

principle at large. The Quilt-work approach, breaking down PNIVIF into the parts of its sum, presents a credible path for reconstructing PNIVIF.

CONCLUSION

In 1984, Rosalyn Higgins wrote on intervention and interference:

[T]he task of the international lawyer over the next few years is surely not to go on repeating the rhetoric of dead events which no longer accord with reality, but to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion.³⁴⁶

This Article responds to Higgins's call with an unprecedented viewpoint. Not only does it challenge the definition of PNIVIF as coercion; it argues that all attempts at defining the principle are likely to be counterproductive and proposes the Quilt-work approach as an alternative. In so doing, it works with, rather than against, the chaotic enterprise of international law to reinvigorate a principle that has too often languished in a conceptual fog.

On a micro-level, this Article complements existing efforts to address disinformation. A prohibition on State-led electoral disinformation campaigns as a manifestation of PNIVIF is narrowly tailored toward one of the most disruptive forms of IOs. A "pattern of conduct" evidentiary standard circumvents the thorny problems of attribution. Yet, the prohibition does not attempt to regulate all kinds of disinformation or misinformation. By targeting State behavior, it avoids excessive intrusions into individual speech freedoms. Of course, international law is never a panacea. A prohibition on electoral disinformation campaigns may disincentivize would-be perpetrators but rules can be broken. States would therefore do well to strengthen hybrid-deterrence policies and build citizen resilience, such as through media literacy programs.

On the macro-level, the Quilt-work approach sketches a way forward for PNIVIF to be seriously capitalized on as a practical response to regulate other dangerous forms of interstate interpositions. PNIVIF may be relied on as a starting point to lay down sub-norms against specific manifestations of hybrid, cyber, and other tactics gaining prevalence in interstate conflicts.³⁴⁷ These sub-norms may eventually develop into their own niche doctrines, holding out the promise of helping States construct specific rules of engagement and deescalate tense situations.

In this regard, it may be too idealistic to expect an absolute prohibition on all methods of hybrid tactics. As Michael Glennon noted in the field of cyber ops,

346. Higgins, *supra* note 29, at 42.

347. See Tomáš Čížik, *Baltic States - How to React to "New Warfare" in the Context of the Article V?*, 17 SLOVAK J. POL. SCI. 184, 184 (2017); Charles Bartles, *Getting Gerasimov Right*, 96 MIL. REV. 30, 34 (2016); Sascha Dov Bachmann & Hhkan Gunneriusson, *Russia's Hybrid Warfare in the East: The Integral Nature of the Information Sphere*, 16 GEO. J. INT'L L. 198, 200 (2012).

State reliance on these new capabilities may optimistically be regarded as “merely the most recent in a long history of efforts by States to fight at a greater distance, to afford greater protection to non-combatants (and combatants), to enhance proportionality-in effect, to pursue many of the ends of humanitarian law.”³⁴⁸ The goal, therefore, is to develop new legal frameworks that can be used to realistically manage such non-force conflicts.

Another far-reaching implication of this Article is that it invites a rethinking of how other international legal concepts can be similarly revitalized. The due regard obligation and general duty to cooperate are boilerplate clauses in most international agreements and declarations.³⁴⁹ Sovereign equality is a precept of international law. Yet, the contours of these concepts are not always well sketched out. A Quilt-work approach may pave the way for an incremental clarification of these principles. Earlier, it was suggested that the Quilt-work approach can circumvent attribution difficulties by *lex specialis* modification of the evidentiary standard required to prove a specific manifestation of intervention or interference. One may see how a similar approach could be applied to introduce granularity in State responsibility in other fields of international law, thereby establishing an attribution framework “malleable enough to provide a legal basis when needed, technological certainty when required, and reliable evidence when warranted.”³⁵⁰

Seeking definitions and creating workable tests are persisting preoccupations of the legal mind and not without reason. They afford States certainty and predictability in the conduct of their international relations and set clear standards to guide State behavior. Yet, it seems equally clear that definitional tests are incapable of grasping principles that are inherently expansive and fluid. It is my hope that this Article, pioneering a Quilt-work approach premised on international law as process, carves a future direction for rejuvenating a cardinal principle of international law.

348. Michael J. Glennon, *The Road Ahead: Gaps, Leaks and Drips*, 89 INT’L L. STUD. 362, 384–385 (2013).

349. *See, e.g.*, Convention on the Law of the Sea arts. 87(2), 197, Dec. 10, 1982, 1833 U.N.T.S. 397.

350. Mudrinich, *supra* note 319 at 204.