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**RESPONSIBILITY OF STATES INTERFERING IN FOREIGN
ELECTIONS THROUGH CYBERSPACE UNDER
INTERNATIONAL LAW**

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For my parents, family, and friends

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*The best argument against democracy is a
five-minute conversation with the average voter.*

Winston Churchill

INTRODUCTION

In the recent international context, some States have intervened in foreign elections using new digital technologies in cyberspace, however, not all these interferences can be considered unlawful. Therefore, Public International Law needs to determine which are the methods of intervention in which States breach their international obligations towards others to make them accountable for this practice not to go unpunished.

Foreign interventions have always been present in international relations. On many occasions, what is been discussed and made in one State has repercussions in others. In democratic States, many of the decisions that are made will heavily depend on the persons that form part of the government, which are designated through an electoral process. Naturally, there will be candidates and parties with agendas more aligned with the interests of foreign States. That is why foreign States decide to meddle in electoral processes, to influence the outcome of the election to help candidates that with more probability will benefit foreign interests.

Electoral interferences are not new, they have existed since ancient Greece and Rome, the Middle Ages, with modern democracies, during the Cold War, and also in our current times. Great powers¹ are the most willing (and with the financial, and technological resources) to intervene in foreign elections. From 1946 to the year 2000, the United States and the Soviet Union/Russia intervened in 117 elections, 1 of every 9 that were made during this period.²

States have many methods to intervene in foreign elections. From threats, promises, declarations, and funding to disinformation campaigns, *fake news*, and cyber-attacks. Lately, digital media and cyberspace have obtained a protagonist role as the tool most employed by States to interfere in foreign elections, making it a new

¹ For the purpose of this work, a great power is a powerful State in terms of economic, political, and technological with the capacity to influence heavily on international relations. The number of these States will fluctuate over time and regions. As an example, we could include the States members of the United Nations Security Council or the G20, the group of the wealthiest 20 States in the world.

² LEVIN, Dov H. *When the Great Power Gets a Vote: The Effects of Great Power Electoral Interventions on Election Results*, *International Studies Quarterly*, Oxford Academic, February 14, 2016; From: <https://academic.oup.com/isq/article/60/2/189/1750842?login=true> (Accessed: September 4, 2021) p. 189

topic of study. Due to these new technologies, there exists a vacuum in Public International Law concerning the rules that outlaw the diverse methods States employ to meddle in foreign elections. There is no precision in the application of principles such as sovereignty and non-intervention to this matter.

Not every method that States use to meddle in elections can be considered illegal under Public International Law. There is no clarity in the law about which method should be banned from international relations and which should be allowed.

In a changing world towards democratization and the recognition of human rights, elections have become a subject of great concern for liberal democracies. Nowadays, the prominent role of social media to communicate and contact the voters with the public spectrum makes this space perfect for foreign States to try to influence the voters. The electorate uses social media as one of the main tools to stay up to date and informed about candidates and proposals.

One of the most discussed examples that put the subject in the eyes of the public is the alleged interference of Russia in the 2016 Presidential elections in the U.S. which supposedly used social media to influence the voters against Hillary Clinton. Also, Russia apparently conducted cyber-attacks against the Democrat political party and stole compromising emails that after were leaked to damage the image of the Democrat candidacy, eventually leading to her defeat in the ballot box.³

Moreover, States have the challenge to attribute the responsibility of an intervention to a State, which is very difficult due to the anonymous nature of cyberspace and the capacity to interfere remotely, outside the borders of the target State. The study will focus on the different ways States can attribute the performance of a wrongful act to a State and how to make it accountable for its wrongdoing.

³ INTELLIGENCE COMMUNITY ASSESSMENT, *Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution*, January 6, 2017; From: https://www.dni.gov/files/documents/ICA_2017_01.pdf (Accessed November 15, 2021)

This is a current problem among the international community that threatens to escalate quickly with elections more dependent on digital resources, with more technologies emerging each year, to be used as tools to interfere in elections.

This thesis will be focused on the State's international responsibility for interfering in foreign elections through digital means under the perspective of the rules of Public International Law. Concretely, it will show i.- which methods of intervention are banned under the actual rules of international law, ii.- how to attribute their performance to a State in particular, and finally, iii.- which are the mechanisms States should pursue to demand the fulfillment of others obligations under Public International Law.

This work will use real-life cases of cyberspace interference to study these concepts in light of international law, such as the 2016 U.S Presidential Election, the 2014 Ukrainian election, and the 2017 French Presidential Election. It will also study diverse international resources and the viability of several institutions, such as the International Court of Justice, the Security Council, and the General Assembly to make States accountable.

To do this, the research is divided into six topics that will be discussed throughout this work. First, it shall study the history of modern elections and the role of foreign interventions in them. Secondly, it will examine the importance of elections for democracy and the constitutional rule of law. Next, it shall focus on the content of the rules of Public International Law that could be violated by interfering in foreign elections. Immediately after, it will apply these rules to concrete methods of intervention that are being used nowadays by States. After that, it will study how a State can attribute an intervention to another, especially through cyberspace. Finally, it dedicates the last chapter to studying the different defense resources States may have in the international community to withstand interferences from other States and make them accountable.

This study intends therefore to be able to identify the rules of Public International Law States may use to hold others responsible for interfering in others' elections. Also, it will try to detect the challenges that the international community

has in this regard, and it shall make some proposals to approach these problems which in time could reduce or at least stop the growth of foreign interventions in elections through digital means, protecting the core values of liberal democratic States around the globe.

Several methodologies of investigation will be used by this study to achieve its purposes. The first will be the deductive method to apply general rules of law to particular cases and situations, to see if interventions in elections are conducts against international law. Also, the inductive method, employed to see if the general and particular practices of States may amount to international custom. The analytical method used to value the principles of international law and their characteristics. The historical method is fundamental to study the background and the conditions that have resulted in nowadays problems and challenges. And finally, the case study method will be used to compare past situations before international tribunals in nowadays context.

FIRST CHAPTER.- HISTORICAL BACKGROUND

1.1 Elections in modern States

Elections have an ancient history. We have evidence that this mechanism has been used since the time of ancient Athens (from 508 BC to 322 BC) for political purposes. The assembly of citizens (*ekklesia*) would gather in the *Pnyx* to discuss and vote to resolve the matters of the community. In these elections, the vote was reserved for adult men with citizenship, therefore most of the population of Athens was excluded to participate in the elections. This assembly had, for example, the faculty to banish politicians for 10 years (*ostrakismos*) when they had abused their office to the detriment of the city.⁴

Democracy was the result of a pragmatic arrangement, to order the government of the *Polis* through the power (*kratos*) of the people (*demos*). Foreigners, women, and slaves were excluded from the political discussion. The assembly of citizens was composed of around 5,000 to 6,000 citizens. Each day, politicians would need to approach the body and convince them to take decisions. To be a politician or an orator was the same.⁵

Although it was a pragmatic way of organizing power to avoid violence, democracy was also based on the principles of equality (*isonomia*) and liberty (*eleutheria*). Equality between all the citizens of Athens (with the limitations that have already been seen), and the liberty to choose according to their own conscience.⁶

Also in ancient Rome, especially during the Republic,⁷ there existed many assemblies that allowed the Romans to participate in the decisions concerning the government of the city, from electing magistrates to the creation of laws. Some of these were the *Curiate Assembly* or the *Centuriate Assembly*, which divided citizens

⁴ NOHLEN, Dieter, *Sistemas Electorales del Mundo*, R. Riper & Co. Madrid, Spain, 1981 p. 82

⁵ GONZALEZ SCHAML, Raúl, *Democracia Semidirecta y Participativa*, Instituto de Investigaciones Jurídicas de la UNAM, 2001; From: <https://archivos.juridicas.unam.mx/www/bjv/libros/1/93/5.pdf> (Accessed April 15, 2022) p. 90

⁶ *Ídem* p. 91

⁷ From the end of the Roman Monarchy in 509 BC to the ascension to power of Octavius as *Princeps* and *Augustus* in 27 BC, marking the beginning of the Roman Empire. BERNAL, Beatriz and LEDESMA, José, *Historia del derecho romano y de los derechos neorromanos*, Porrúa, Ciudad de México, 2011

into categories according to their social class and their wealth. The *plebs* had the attribution to choose a *Tribune of the plebs*, a magistrate that would protect their interests in front of the Senate, which was under the control of the *patricians*, the wealthiest families in Rome.⁸

From these examples it can be appreciated that in antiquity, where democracies were the exception, the right to vote was reserved for just a small number of citizens from these societies, mainly the elites, and that when this right was extended to more people, there still existed a quality in the vote, meaning that the vote of certain people had more weight than others. This is the case of the Roman *Centuriate Assembly*, where the value of the votes was divided into groups of citizens, and you belonged to a group relying upon your fortune. Like in Athenian democracy, women and foreigners had no right to participate in Roman elections. Still, if the foreigners lived in Rome, they had a separate status, they even had a different law to apply to them, the *ius commune*, instead of the *ius civilis*, exclusive to Roman citizens.⁹

During the Middle Ages, elections were reserved mainly to free cities and the Church. The election of the Pope and the Councils are some of these examples. In the Third Council of the Lateran in 1197, the principle *maior et sanior pars*¹⁰ was introduced, where the decisions required a qualified majority of 2/3 of the assembly to be approved. In the Holy Roman Empire, the emperor was appointed through an election organized since the 13th century. Seven prince-electors elected the emperor for life through a majority of four.¹¹ These elections were almost always won by the Habsburgs as Archdukes of Austria from 1440 to the dissolution of the empire by Napoleon in 1806. In the French General Estates, the composition of the chamber was divided into the *Estates of the realm*, with 3 main groups, the clergy, the French nobility, and the rest of the people. Although in the latter belonged almost 90% of the French society, the other two estates could form by themselves a majority in the

⁸ NOHLEN, Dieter, *op. cit.* p. 82

⁹ BERNAL, Beatriz and LEDESMA, José, *Historia del derecho romano y de los derechos neorromanistas*, Porrúa, Ciudad de México, México, 2011

¹⁰ Latin "Greater and sounder part"

¹¹ NOHLEN, Dieter, *op.cit.* p. 84

decisions of the assembly, because their vote had greater quality.¹² But the assembly was rarely summoned and just in times of turmoil, many kings passed without convoking the assembly even once. The last assembly was in 1789, which transformed into the National Assembly that led to the French Revolution that very same year.¹³

Gradually, the participation in elections evolved from an exercise of the elites to the whole people of a State. The ideas of the *Enlightenment*¹⁴ allowed that eventually, the right to vote would be invested in every citizen. We saw this process evolve rapidly at the end of the 18th century, with the American Independence and the French Revolution. From this moment on, the idea that decisions were made regarding the majority of the electorate body (composed by an elite), evolved to the idea of a majority of the people as a whole.¹⁵ But still normally discriminated against slaves, foreigners, poor, and women.

Elections became how citizens could reward or punish their governments by removing or bringing them to office. A government that does not satisfy the basic necessities of the people could expect to be removed in the next election. And the role of the opposition is to convince the public that with them in power, those needs will be fully satisfied. In States that are not democratic, bad governments still exist that do not fulfill the needs of their people. If the sole reasonable purpose of a State is to promote and achieve the common good, a government that does not only not reach such status but rather does not seek it and only privileges a few is clearly not a “good government”. However, even when bad governments are in place, there is usually no peaceful mechanism to remove them from charge, therefore many of

¹² *Ibidem* p. 83

¹³ Encyclopedia Britannica, *Estates-General*

¹⁴ It was a philosophical movement that dominated European thinking during the 17th and 18th centuries. It promoted ideals of liberty, tolerance, separation of Church and State, reason, equality, and fraternity.

¹⁵ Although, the idea that all the people had the right to vote, not every group was considered to be within this concept. For example, women did not have the right to vote until a century later. Norway was the first sovereign country to allow women to vote in 1913. Also, in the United States, black men could not vote until the end of the Civil War (1861-1865), and even then, in practice, it was difficult for these men to cast their vote. In Great Britain, it was only until the reforms of 1884 that industrial and countryside workers could vote. Before this, just landowners had this right.

these governments were stopped with the use of violence, like in the French Revolution (1789).¹⁶

Elections became a relatively peaceful tool to yield power to another group. This is possible because elections give the winner the legitimacy they need to rule since they were invested in a free election of the people. This legitimacy was found before in the divine right of the monarchs, who they thought to be appointed by God. While others found their legitimacy in their strength and capacity to use force.

A) Political parties

In the genesis of modern democracies,¹⁷ communities found a different way to organize and promote their interests outside their social status and wealth. This is the moment when national political parties were created to promote the interests of the whole nation, uniting people from various parts of the country to pursue common goals in the government. It must be specified that political parties were not the institutions we know today, they were organized and temporal groups of people that shared political opinions and gathered together to strengthen their voices. They made this in debate clubs, families, neighborhoods, and other social reunions.¹⁸ Political parties as we know them today began in the 1850s, with a permanent organized structure, statutes, committees, etc.¹⁹

In countries like the United Kingdom and the United States, political parties and their predecessors have participated in elections for a long time. In the U.K. for example, the two most important parties have old roots. The conservative party has its origins since the final of the Glorious Revolution (1688-1699) that eventually gave

¹⁶ In Mexican law, for example, we have the institution of “*revocación de mandato*” with the objective of removing bad governments without the use of violence. It gives the people the legal right to remove the head of the executive when it has lost confidence in its mandate. However, the Mexican Constitution puts a high threshold on the number of votes required for this removal (it requires the participation of at least 40% of Mexican voters), making it unlikely to happen. Article 35 CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, 1917

¹⁷ The United States, the first French Republic, and the English Parliament.

¹⁸ DUVERGER, Maurice, *Los Partidos Políticos*, Fondo de Cultura Económica, México, 1969, p. 15

¹⁹ GONZALEZ SCHMAL, Raúl, *Programa de derecho constitucional*, Universidad Iberoamericana, Ciudad de México, México, 2007, p. 83

birth to the *Tories*. And the Labor party exists since 1900, as a result of the labor reforms that for example gave workers the right to vote in 1884.²⁰

The main function of political parties in a democratic society is to win elections. They are the entities in most countries that appoint the persons running for office, this means that they are the ones that propose to the people the individuals that will be forming part of the government. Political parties are the mediators between the power and the people, they are nowadays indispensable to our democracies. They are the representatives of the cultural, economic, and social interests of our society. They represent the different conceptions the people have about the common good.²¹

Nowadays, political parties have a huge impact on elections, they are the protagonists. To appoint a candidate, they will verify a lot of factors: ideology, education, objectives, supporters, influence, experience, capacity, health, but most importantly, that the selected candidate can win the election for which he is running. There is clear also, that there are many interests involved in the appointment of one candidate, from domestic to foreign actors, who would prefer one candidate over another. The political parties must be the institution that achieves to amount all these interests in a common candidate.²²

Candidates and political parties will try to convince the electors that they are the best option for the government, they will achieve this through a campaign, where they will make promises, debates, intellectual papers, conferences, rallies, tours, or any kind of activity that would allow them to interact with the voters and bring their vote to their side.

B) Elections nowadays

With the appearance of social media in the 21st century, politicians also use the internet to reach the citizens easily, they can interact directly with them and

²⁰ NOHLEN, Dieter. *op. cit.* p. 84

²¹ GONZALEZ SCHMAL, Raúl, *Programa de derecho constitucional*, Universidad Iberoamericana, Ciudad de México, México, 2007, p. 84

²² DUVERGER, Maurice, *op. cit.* p. 155

provide them the news, and information or make promises without the need to travel to the voter when in many countries millions of voters are distributed in thousands of square miles.²³

Also, technology allowed electronic devices to be used in electoral processes to cast, count, or publish votes. Previously, in all democracies, the vote was cast on a paper that was deposited in a ballot box. Then, the electoral authorities would count the votes manually and publish the results on site. Later someone would bring the information to the headquarters of the election where the results of all ballot boxes around the country will be summed up to have a final winner of the election. This methodology is the most common electoral system nowadays.²⁴

To this day most of the elections around the globe continue to be this way. However, in many countries, the electoral institution uses computer systems to add up the votes to make the process more efficient. And in other countries like the U.S. machines are used by the citizens to cast their vote, instead of using paper and a traditional ballot box. Also, more countries allow electronic voting on the internet, like Estonia. Since 2005, this Baltic State allows its citizens to do many procedures on the internet, from paying taxes to voting in elections. Estonians can vote on election day from the security and commodity of their homes. However, many countries are reluctant to move to digital voting, due to the technical difficulties, the lack of confidence of the people in their electoral institutions, and the risk of suffering cyber-attacks, especially since the Russian intervention of 2016 in the US.²⁵

1.2 Foreign Interventions

Foreign electoral Interventions were born at the same moment that elections did. When there is a decision to be taken, there are people that may be affected in

²³ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 7

²⁴ LEVIN, Dov H. *When the Great Power Gets a Vote: The Effects of Great Power Electoral Interventions on Election Results*, International Studies Quarterly, Oxford Academic, February 14, 2016; From: <https://academic.oup.com/isq/article/60/2/189/1750842?login=true> (Accessed: September 4, 2021)

²⁵ FILLION, Stephanie, *If Estonia Figured Out Online Voting 15 Years Ago, Why Can't the U.S.?* Forbes, August 24, 2020; From: <https://www.forbes.com/sites/stephaniefillion/2020/08/24/if-estonia-figured-out-online-voting-15-years-ago-why-cant-the-us/?sh=7de0468915ab> (Accessed: March 4, 2022)

their interests by that decision, and they will put their influence, power, or money to be involved in the decision-making process. It is the same situation between States. Sometimes the decisions on policies that States make may affect the interests of foreign powers. They will impact global trade, foreign policy, security, international borders, foreign investments, and a long etcetera. These decisions are made by individuals in government positions. Around the globe, most high-ranking officials are appointed through an electoral process, even in the countries that we perceive as authoritarian or dictatorial. Therefore, States will be tempted to influence the decision to appoint in office the candidate that best suits their interests.²⁶

In this regard, it can be appreciated that States will have sometimes tendencies to intervene in the domestic affairs of other States in benefit of their own interests. This influence or even open coercion may take many forms: military, economic, cultural, and political interventions. An electoral intervention can be classified inside the latter category.

An electoral intervention is defined as *a situation in which one or more sovereign countries intentionally undertake specific actions to influence an upcoming election in another sovereign country in an overt or covert manner.*²⁷ An overt intervention is the one performed in plain sight, the State conducts activities in support of one candidate or political party openly and publicly. The opposite would be a covert intervention, in which the State decides to act anonymously.

Levin²⁸ says that there are two conditions in which a State may decide to intervene in a foreign election. The first condition is that the foreign State perceives that its interests are endangered by a particular candidate or political party within the target State. Also, it is important to say that the foreign State will only intervene because it considers that other mechanisms in influencing the elected candidate will

²⁶ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part I*, EJIL: Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/> (Accessed: September 3, 2021)

²⁷ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 50

²⁸ *Idem* p. 6

be ineffective or more costly because the candidate has a completely contrary position or because it is ideologically incompatible with the foreign power.

The second condition is that another candidate or a political party in the election is willing to receive the aid of the foreign State. If there is not another option that will help the interests of the foreign power it will rarely interfere, because these operations are costly, and the possibilities of success are reduced dramatically without the local support and a candidate aligned with the foreign State's interests. If all the candidates in an election are against the interests of the foreign State, it will have little incentive to intervene because nothing will be gained from the result, unless one candidate is worse than the other.

There are many ways in which a country may interfere in the elections of another. For mentioning some examples, the foreign State may support one side in an election with campaign funds, public threats or promises, giving advice and training to the campaign team on winning elections, exposing sensitive materials, conducting disinformation campaigns against a rival candidate, or changing the aid policy regarding the target State. More recently, States have been increasing their activities through cyberspace, targeting the country's electoral infrastructure, or directing disinformation campaigns through social media, as will be addressed in section 1.4 of this chapter.²⁹

Also, it must be established since this moment (although it will be further developed in chapter 3) that there are *degrees* in the gravity of an electoral intervention.³⁰ Some may be low degree interventions, such as giving statements on behalf of the foreign government on which candidate they are more attracted to, and more severe interventions, as could be an interference through a cyber-attack on the

²⁹ AKANDE, Dapo, et al. *The Oxford Statement on International Law Protections Against Foreign Electoral Interference through Digital Means*, EJIL: Talk! October 28, 2020; From: <https://www.ejiltalk.org/the-oxford-statement-on-international-law-protections-against-foreign-electoral-interference-through-digital-means/> (Accessed: September 4, 2021)

³⁰ *Infra*. The International Court of Justice as said in some judicial decisions that the difference between a legal and an illegal intervention is when the State employs methods of coercion against the targeted State. It will be defined when speaking about the non-intervention principle in chapter 3.

computing system of an electoral institution. Not all interventions are sanctioned by international law, as it will be developed in the aforementioned chapter.

Now some historical examples will be mentioned. These are examples of elections, but not necessarily in a democracy as we know it today. As it was stated previously, not democratic States also have electoral processes in some areas of government. Before modern democracies, elections were made by small elites, who were usually influenced by domestic and foreign powers. An example of this is the election of the Pope of Rome. In the XIII century, Gregory X created the conclave by locking up the cardinals in a single building, nowadays the Sixtine Chapel, to avoid the cardinals being reached by foreign influence. Nevertheless, this did not prevent Charles V, the Holy Roman Emperor, to impose Giulio de Medici on the papal throne in 1523.³¹ It was a frequent practice at the time that kings and nobles had a huge influence on the election of the head of the Catholic Church.

Another example would be the Polish Royal elections. During the XVI and XVIII centuries, the King of the Poland-Lithuanian Commonwealth (one of the biggest powers of Europe) was elected through an electoral process in which the nobles of the federation would elect the monarch. This election was always heavily intervened by other great powers like Russia, Austria, and France. In the 1697 election, Peter the Great of Russia threatened the polish nobility to declare war on Poland if the wrong candidate was chosen. Also, the envoys of Austria, Sweden, and Prussia send resources to bribe the nobles gathered in Wola for the election.³²

Until this moment, the examples that have been seen were of interventions in non-democratic societies. Now our study will move on to examples of interventions in modern democracies.

The phenomenon of interventions in elections was well known by the founding fathers of the United States. One of the reasons that lead to the establishment of the Electoral College in the United States is given to us by Alexander Hamilton, who

³¹ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 2

³² *Idem* p. 3

wrote in the Federalist 68, that “*the most deadly adversaries of a republican government... come chiefly from the desire of foreign powers to gain an improper ascendance in our councils*”.³³

This would soon be proven when the French republic openly decided to interfere first in the reelection of George Washington, and after his resignation, in the election of John Adams in 1796, because they refused to support France in their war with Great Britain. French Foreign Minister Charles Delacroix wrote: “*Washington must go... A friend of France should succeed him in that eminent office... I propose ... to send orders and instructions to our minister plenipotentiary at Philadelphia to use all means in his power in the United States to bring about... Washington replacement.*” Later that year, France imposed restrictions on trading with the United States by allowing its navy to board and search American merchant ships on the high seas.³⁴

Otto Von Bismarck, the Iron Chancellor of Imperial Germany, intervened in the 1877 French elections in support of the republican candidate because he considered that the return of the Monarchists will threaten a durable peace with Germany. Then he created a whole military crisis on the border with France and sent soldiers to the frontier (just 6 years aftermaths the Franco-Prussian war).³⁵

1.3 Interventions after the Second World War

Historically, great powers are the countries more attracted to interfere in a foreign election because they have the economic, technological, military, and political resources over States that lack of them, allowing them in many cases to avoid sanctions or retaliation from the objective States with an absent influence or the international leverage required to enforce them.

During the Cold War, the world was divided like a geopolitical chessboard, with one king-system on each side: capitalism and communism. The United States

³³ HAMILTON, Alexander, *The federalist papers*, Dutton/Signet, New York, United States, 2012

³⁴ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 4

³⁵ *Idem* p. 5

and the Soviet Union used their resources to bring pawn countries to their side of the chessboard. In this context, it was common that the two superpowers interfered in one way or another to put someone that shared (or at least did not threaten) their ideology as head of State in those countries.³⁶

The United States and Russia (previously the Soviet Union) intervened alone in 117 elections between 1946 and the 2000, this number *represents one of every nine competitive national-level executive elections during this period*.³⁷ The most targeted States were located in Europe, Latin America, and Asia.³⁸ For example, in Latin America, there was a policy by the United States not to allow countries to turn to communism.³⁹ This provoked the Eisenhower administration to intervene in the Guatemalan and Venezuelan elections of 1958.

The most common method to intervene in partisan elections was to provide campaign funds, this happened in around 60% of the interventions.⁴⁰ The second most popular method was to aid in the campaign by providing training to the candidate's team and teaching them on how to run elections. However, the Soviets never used this method, probably because they did not have any experience winning free democratic elections. Other methods consisted in making threats or promises, giving aid, or doing *dirty tricks* such as leaking information to damage a candidacy.⁴¹

Now cases where different methods were used to meddle in those elections by these great powers will be briefly studied.

³⁶ Encyclopedia Britannica, the Cold War.

³⁷ LEVIN, Dov H. *When the Great Power Gets a Vote: The Effects of Great Power Electoral Interventions on Election Results*, International Studies Quarterly, Oxford Academic, February 14, 2016; From: <https://academic.oup.com/isq/article/60/2/189/1750842?login=true> (Accessed: September 4, 2021) p. 189

³⁸ The United States intervened in 8 Italian elections, 5 in Japan, and 4 in Israel. The Soviets intervened 5 times in West Germany, 4 in Finland, and 4 in Italy according to the study made by Levin.

³⁹ Partisan electoral interventions were not the only activity by the US to fight communism. For example, the invasion of Grenada in 1983 or the Brazilian *coup d'état* of 1964. THE ASSOCIATED PRESS, *Before Venezuela, the US had a long involvement in Latin America*, AP, January 25, 2019; From: <https://apnews.com/article/north-america-caribbean-ap-top-news-venezuela-honduras-2ded14659982426c9b2552827734be83> (Accessed: September 4, 2021)

⁴⁰ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 160

⁴¹ For example, when the United States intervened in the Argentinian election of 1946 against Juan Domingo Peron, by releasing the "Bluebook" that related Peron with the Nazi regime. *Idem*, p. 109

A) West Germany, 1953

In 1953, West Germany was going to have an important election that could determine the future of a military alliance in Europe. The Eisenhower administration considered a fundamental interest to the security in Europe the consolidation of a military alliance between France, West Germany, and the Benelux countries. With this alliance, Europe will be safer against the Soviet Union, allowing the US to return the troops that remained on the continent after the Second World War.⁴²

The Christian Democratic Union (CDU) was the incumbent party, under the leadership of Konrad Adenauer. They were in favor of the military alliance. In the opposition, the Social Democratic Party (SPD) was against the alliance because they considered that it will damage the relations with the Soviets and make impossible the reunification of West Germany with the East. The SPD was gaining much popularity and from a moment this party was going to win the federal election.⁴³

In this context, Adenauer decided to ask President Eisenhower for support. With the future of the alliance at stake, the U.S. decided to help Adenauer to win the election and they did it in very different ways. In the months previous to the elections, the U.S. financed part of the Adenauer campaign, they signed the US-German Friendship, Commerce, and Consular relations treaty to show Adenauer as a leader that could achieve cooperation at the international level. Also, the U.S. convinced France and Britain to release many German war criminals from the Nazi regime, an extremely popular policy in West Germany, because they believed that many were unlawfully condemned. The U.S. financed a Food Aid program designed by Adenauer to feed East Germany during a famine to make him look like a humanitarian candidate. They even agreed to organize a Conference with the Soviets to convince the electorate that there were ongoing efforts to unify Germany (although no agreement was achieved at the summit). And finally, some days before the elections, the U.S. declared that a victory from the SPD will have disastrous

⁴² Letter from Dwight D. Eisenhower to Konrad Adenauer (23 July 1953) Department of State, United States

⁴³ BRADY, Steven, *Eisenhower and Adenauer, Alliance Maintenance under Pressure 1953–1960*, The Harvard Cold War Studies Book Series, 2009

effects on West Germany. The CDU had a decisive victory with 45.2% percent of the votes against 28.8% of the SPD. The intervention made what seemed like a tight match to be eventually a piece of cake.⁴⁴

B) Argentina, 1946

Another example of the time is the Argentinian election of 1946. This particular election was not against communism but an old phantom: fascism. The 40s Argentina, especially under the rule of Colonel Juan Domingo Peron, was perceived as a totalitarian regime with close ties to Nazi Germany. We must remember that many Nazis flew to Argentina after the war, as in the case of Adolf Eichmann. The U.S. feared that a Nazi regime could be reborn and be imported to other countries in America. At this time, Argentina was also the richest country in Latin America.⁴⁵

After different attempts to bring down Peron, which even included the encouragement of a failed *coup d'état*, the Truman administration decided to pursue a different method: intervene in the 1946 election. The opposition party requested the aid of the U.S. They used a different method from the 1953 intervention in West Germany, they used *dirty tricks*. The Truman administration began an investigation of Nazi documents captured during the war to expose the relations between Nazi Germany and the current administration in Argentina. 12 days before the election, the U.S. released the “Blue Book” which contained the names and the connections of Argentinian political figures with the Nazis, including Peron. However, the results were not expected by the U.S.⁴⁶

The intervention of the U.S. was not well perceived in Argentina, the government convinced Argentinians that the intervention was a violation of Argentinian sovereignty and that voting for the opposition was to vote for foreign interests. They even published the “Blue and White Book” which responded directly

⁴⁴ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 140

⁴⁵ MINSTER, Christopher, *Why Argentina Accepted Nazi War Criminals After World War II*, ThoughtCo. April 2021; From: <https://www.thoughtco.com/why-did-argentina-accept-nazi-criminals-2136579> (Accessed March 15, 2022)

⁴⁶ UNITED STATES GOVERNMENT, *Blue Book on Argentina*, Greenberg Publisher, Washington D.C., United States, 1946

to the allegations of the U.S. investigation. Peron won with 53.7% of the popular vote, remaining in power for the next nine years.⁴⁷

C) Other examples

For mentioning a few more cases, in the election of West Germany in 1980, the Soviets spread misinformation linking German officers with the Nazi Regime, similar to the method used by the Americans in the Argentinian election of 1946. In the Japanese election of 1958, the U.S. provided information about the Japanese socialist party gathered by the CIA to their main political rival. In the Nicaraguan election of 1990, the U.S. leaked information about the Sandinistas candidate, Daniel Ortega's corruption to newspapers.⁴⁸ In the 1958 Guatemalan election, the U.S. funded the Cruz Salazar campaign against the PR, a party with ties to communism. In the same year, the Soviets funded the official Venezuelan candidate Admiral Larrazabal, when he made a coalition with the PCV, the communist party.⁴⁹

In these examples, it must be seen that different methods can be used by foreign states to intervene in partisan elections. Although some can be considered coercive violations of the State's target sovereignty, not all methods of intervention can be considered unlawful under international law, as it will be shown in chapter 3. And not always, the results are the expected ones. In the Argentinian case, his handling of the intervention by Peron was one key factor in his victory.

Many of the cases here studied were pre-internet, so the methods of intervention have evolved significantly in the tools but not in nature. In the next section, our thesis will study more modern methods that used the tools of modern technologies to intervene in foreign elections.

⁴⁷ ALTRUDI, Soledad, *Of Personalities and Democratization in U.S. Public Diplomacy: The Case of the Blue Book on Argentina*, USC Center on Public Diplomacy at the Annenberg School, 2015; From: https://uscpublicdiplomacy.org/sites/uscpublicdiplomacy.org/files/useruploads/u25898/BestStudentPaper2015_1.pdf (Accessed March 15, 2022) p. 13

⁴⁸ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 163

⁴⁹ *Idem*, p. 142

1.4 Cyberspace and interventions

Cyberspace is defined in the Tallinn Manual as *the environment formed by physical and non-physical components, characterized by the use of computers and the electromagnetic spectrum, to store, modify, and exchange data using computer networks.*⁵⁰ It may also be defined as *an electronic system that allows computer users around the world to communicate with each other or to access information for any purpose.*⁵¹ Most of the electoral interventions nowadays happen in this place.

Electoral interventions, although not a new phenomenon, are in the eye of the hurricane since the 2016 election for the 45th President of the United States.⁵² The election of the U.S. President is the most mediatic and important election in the world. Many people have a profound interest in the person heading the executive branch of the most powerful State in the world.

According to American sources, the Russia of Vladimir Putin intervened in favor of the campaign of the Republican Donald J. Trump, or more precisely against the candidacy of the democrat Hillary Clinton. The whole operation attributed to the Kremlin was performed in cyberspace, in contrast with the interventions mentioned in the last section.⁵³

Hillary Clinton was perceived by the Kremlin as a threat to their foreign relations and national interests. Since she was Secretary of State under the Obama Administration, she declared on multiple occasions that she recognized Russia as an autocratic country, and Vladimir Putin as a dictator. It must be also remembered that the Obama administration was heavily involved in the Arab Spring that removed and killed Muammar Gaddafi, dictator of Libya, in 2011, among others. And also, the U.S. was tenacious in condemning the Russian occupation of Crimea in 2014 and

⁵⁰ SCHMITT, Michael, *Tallin Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021) p. 211

⁵¹ Cambridge Dictionary, cyberspace; From: <https://dictionary.cambridge.org/> (Accessed September 15, 2022)

⁵² RUSSELL, Martin, *Foreign interference in EU democratic processes*, At a Glance, European Parliament, March 2, 2022; From: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2022\)729271](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)729271) (Accessed September 15, 2022)

⁵³ INTELLIGENCE COMMUNITY ASSESSMENT, *Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution*, January 6, 2017; From: https://www.dni.gov/files/documents/ICA_2017_01.pdf (Accessed November 15, 2021)

the support of Russia to President Bashar al-Assad in Syria. In summary, the Kremlin had reasons to not want Hillary Clinton to take office. Instead, Donald Trump looked like a better option for the office, he even declared that he liked Putin, and a more sympathetic relationship was expected from the U.S. with him in the Oval.⁵⁴

In 2017, the Intelligence Community of the U.S. (the CIA, the FBI, and the NSA)⁵⁵ affirmed that according to their investigations they were sure about the influence of Moscow in the 2016 Presidential election.⁵⁶ They also considered that the Russian influence was to directly undermine the democratic institutions of the United States and the confidence of the American public in them. This intelligence community goes further and affirms that Vladimir Putin directly ordered the attack and that it was also revenge for the Panama Papers disclosure and the Olympic doping scandal that damaged the image of Russia.⁵⁷

The intelligence agencies assessed this intervention as *unprecedented*, however, from the facts studied in the last section, the methods of the Russian government can be considered to belong to the *dirty tricks* category, means used by the United States in the Argentinian election of 1946 and the Nicaraguan election of 1990. What can be considered unprecedented could be the use of cyberspace and the scale of the Russian influence, but not the nature of the practice itself.⁵⁸

The United States claims that Russia used overt and covert methods to influence the Presidential Election. The hacking of the Democrat National Committee that disclosed the mailbox of Hillary Clinton can be considered a covert method. The misinformation campaign conducted by Russian media such as Russia Today (RT) and Sputnik, as well as the social media *trolls*, must be considered an overt method.

⁵⁴ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 212

⁵⁵ The Central Intelligence Agency, the Federal Bureau of Investigations, and the National Security Agency.

⁵⁶ *Infra*. The joint communication of these American agencies is not enough to attribute responsibility to a State under international law. In any court of law, evidence of involvement is required to make any imputation, and in the present case, the evidence provided is mostly circumstantial. The topic of attribution and responsibility will be fully developed in chapter 4.

⁵⁷ INTELLIGENCE COMMUNITY ASSESSMENT, *op. cit.*

⁵⁸ *Idem*.

Regarding the obtention of e-mails from the democrat committee, the U.S. agencies say that it was performed by the Russian Intelligence Directorate (GRU). Then, the GRU used platforms such as WikiLeaks to make the information public. It is known that the Russian media, RT has collaborated since 2013 with WikiLeaks founder, Julian Assange.⁵⁹

They also assessed that Moscow orchestrated a campaign to offer negative coverage to Hillary Clinton, through the national Russian media and their international branches such as RT and Sputnik, both owned and controlled by the Russian administration. This coverage included declarations accusing Clinton of *corruption, poor physical and mental health, and ties to Islamic extremism*. In contrast, they described Trump as the conciliator of the White House with the Kremlin and an option against the corrupt political establishment of Washington.⁶⁰

In another paradigmatic case, it is said that Russia meddled with the 2014 Ukrainian Elections. It is not news that Vladimir Putin has big interests in Ukraine. Since 2014, he has maintained hybrid warfare with Ukraine which escalated recently into open warfare in February of 2022. In October 2014, Moscow used the *CyberBerkut* group to meddle with the Central Election Commission, the institution in charge of the Ukrainian elections.⁶¹

A few days before the election several files were deleted, and malware was introduced to show the pro-Russian candidate as the official winner of the election. Also, the webpage of the commission was shut down by a DDoS attack.⁶² Fortunately, the Commission counted with backups to restore the files and they corrected the results before they were available to the public, showing the real victor. This attack could have destabilized the Ukrainian government importantly. If

⁵⁹ STRANGER, Allison, *The Mueller report confirms it: Assange is not a whistleblower or a journalist*, The Washington Post, April 22, 2019; From: <https://www.washingtonpost.com/opinions/2019/04/22/mueller-report-confirms-it-assange-is-not-whistleblower-or-journalist/> (Accessed March 15, 2022)

⁶⁰ INTELLIGENCE COMMUNITY ASSESSMENT, *op. cit.*

⁶¹ CYBERLAW TOOLKIT, *Ukrainian parliamentary election interference (2014)*, July 6, 2021; From: [https://cyberlaw.ccdcoe.org/wiki/Ukrainian_parliamentary_election_interference_\(2014\)](https://cyberlaw.ccdcoe.org/wiki/Ukrainian_parliamentary_election_interference_(2014)) (Accessed March 17, 2022)

⁶² A Denial-of-Service (DoS) attack is an attack meant to shut down a machine or network, making it inaccessible to its intended users. DoS attacks accomplish this by flooding the target with traffic or sending it information that triggers a crash. In both instances, the DoS attack deprives legitimate users (i.e., employees, members, or account holders) of the service or resource they expected. Palo Alto Networks; From: <https://www.paloaltonetworks.com/cyberpedia/what-is-a-denial-of-service-attack-dos> (Accessed March 17, 2022)

successful, the legitimacy of the election would be in doubt when a foreign government can decide which candidate is the winner.⁶³

Another example of a modern intervention was the case of the French presidential election leak in 2017.⁶⁴ Once again, the Russian GRU conducted through a non-state actor an intervention against the candidacy of Emmanuel Macron according to American sources. Files were stolen from the personal accounts of the staff members of the Macron campaign. Those files were leaked to the public and fake documents were leaked with them at the same time. However, the leak did not change the public opinion on the *En Marche* candidate and Macron won the election with 66% of the votes. In this case, it must be recognized the same *modus operandi* as in the case of the 2016 U.S. presidential election.⁶⁵

In the 2020 U.S. Presidential Election, the American intelligence agencies considered once again that foreign nations intervened in the election. They believed with high confidence that Russia, Iran, Cuba, Venezuela, and the Lebanese Hezbollah tried to influence the outcome of the election.⁶⁶ According to a report by Microsoft, also China carried out activities in cyberspace to hack American devices, however, these agencies considered that Beijing finally decided not to influence the election.⁶⁷

The report concluded that Moscow influenced the election once again to the detriment of a democrat candidate Joe Biden. Russia, using proxies, conducted a misinformation campaign to reduce the confidence of the American people in the election and the capacity and moral quality of the democrat through social media and Russian-controlled media. In this case, the intelligence community did not find evidence that the Kremlin could infiltrate the electoral system. Also, a Ukrainian

⁶³ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 6

⁶⁴ RUSSELL, Martin, *Foreign interference in EU democratic processes*, At a Glance, European Parliament, March 2, 2022; From: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2022\)729271](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2022)729271) (Accessed September 15, 2022)

⁶⁵ CYBERLAW TOOLKIT, *French presidential election leak (2017)*, June 4, 2021; From: [https://cyberlaw.ccdcoe.org/wiki/French_presidential_election_leak_\(2017\)](https://cyberlaw.ccdcoe.org/wiki/French_presidential_election_leak_(2017)) (Accessed March 17, 2022)

⁶⁶ NATIONAL INTELLIGENCE COUNCIL, *Foreign Threats to the 2020 US Federal Elections*, March 10, 2021; From: <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf> (Accessed March 17, 2022)

⁶⁷ BURT, Tom, *New cyberattacks targeting U.S. elections*, Microsoft, September 10, 2020; From: <https://blogs.microsoft.com/on-the-issues/2020/09/10/cyberattacks-us-elections-trump-biden/> (Accessed: March 17, 2022)

parliamentary with ties to Russia leaked some phone calls to link candidate Biden and his family to a case of corruption in Ukraine.⁶⁸

On the other hand, Iran conducted overt and covert activities to influence the election against former President Donald Trump, who destroyed the Iran Nuclear Deal. Teheran focused social media and propaganda on the perceived vulnerabilities of Trump in the U.S. as the response to the COVID-19 pandemic, the economic recession, and the civil unrest during the Trump administration as the Black Lives Matter movement.⁶⁹

Most of these cases are about interventions against Western countries because we have more access to them through our institutions and media. However, Russia for example, also claims to have experienced on itself cyber-attacks against its electoral system. In 2018, Russia claimed that the Central Election Commission suffered a DDoS attack, shutting down the website of the Commission temporarily. The attack happened soon after voting began and originated in 15 different countries.⁷⁰

What is the big difference between these last interventions and the ones cited from the Cold War in the last section? That all these new attempts to affect the result of an election were carried out using new technologies that did not exist in the time of Eisenhower or Khrushchev.

All of the interventions aforementioned were cyber-attacks or cyber operations that could be conducted easily from the safety of one's own country's territory, without the requirement to travel to any hostile nation, from behind a desk.

The direct interferences in the electoral system, as in the example of the Ukrainian election of 2014 or the Russian election of 2018, did not happen frequently during the Cold War in democratic States, because it would be very difficult to rig an election organized using paper and pen. However, new elections conducted using

⁶⁸ SONNE, Paul, *Ukrainian lawmaker releases leaked phone calls of Biden and Poroshenko*, The Washington Post, May 19, 2020; From: https://www.washingtonpost.com/national-security/ukrainian-lawmaker-releases-leaked-phone-calls-of-biden-and-poroshenko/2020/05/19/cc1e6030-9a26-11ea-b60c-3be060a4f8e1_story.html

⁶⁹ NATIONAL INTELLIGENCE COUNCIL, *op. cit.* p. 5

⁷⁰ RT, *Russian Central Election Commission comes under cyberattack*, March 18, 2018; From: <https://www.rt.com/news/421622-russian-election-under-cyber-attack/> (Accessed March 17, 2022)

electronic devices through cyberspace open the door for these kinds of interferences to appear, each day more frequently and with multiple actors.

States have to expend a lot of resources to shield their elections, and even then, they are exposed to the numerous innovative technologies that are currently been developed to use in more evolved cyber-attacks.⁷¹

Here it is about the most coercive intervention: interfering directly against the electoral system. But there were also other cyber-attacks whose main purpose was to obtain information that could damage the targeted candidate, to later leak it to the public, as in the 2016 U.S. election and the 2017 French election.

It must be also remembered another and more extended use of cyberspace to meddle in elections. Although less coercive, social media and State-owned networks may influence the opinion of the voters. These means could be used to spread *fake news* among voters or conduct disinformation campaigns. This was the primary tool used by Russia in the 2016 U.S. election.

Digital media has allowed a more horizontal spread of information at a lower cost. Cyberspace is not limited by physical boundaries and State frontiers, so it is quite easy for information uploaded to the internet to become international breaking news. Also, there are no *gatekeepers* to news as in the traditional media, where journalists decided which information to publish and which not, making it now possible for anyone to upload any piece of information that, regardless of its authenticity, can become a trending topic on a global scale.⁷²

Another factor is that many websites can track the preferences of the users and give them personalized information on what will convince them concretely to vote for a candidate or to exacerbate their hate for another, as in the case of Cambridge Analytica in the 2016 U.S. election, which used the preferences of users

⁷¹ LIN, Herbert et KERR, Jaclyn, *On Cyber-Enabled Information Warfare and Information Operations*, SSRN, August 11, 2017; From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015680 (Accessed: September 4, 2021)

⁷² LAHMANN, Henning, *DOES FOREIGN ELECTORAL INTERFERENCE VIOLATE INTERNATIONAL LAW?* Israel Public Policy Institute, February 16, 2021; From: <https://www.ippi.org.il/electoral-interference-violate-international-law/> (Accessed: September 4, 2021)

in media like Facebook to provide them with news that would make them more likely to sympathize with the Republican candidate.⁷³

It was shown in the cases from the Cold War that financial aid was one of the preferred methods by States to influence the elections. However, in the interventions in this century, it can be appreciated more direct interferences to the electoral systems of States and the use of *dirty tricks* against a candidate, to affect his image among the voters. This does not mean that States are not giving campaign funds, just that the tools to do it are more untraceable and that is not easy to find evidence of these transactions, because many intermediaries may be employed, mainly from countries where the finance of political campaigns comes from the private sector.

The examples of interventions in this chapter are not exhaustive, these are just some cases where it can be realized extensively the use of different methods employed by great powers to meddle in elections.

From these examples, it can be understood that interventions in elections have been a widespread practice among States since the very beginning these exercises are being held. And in many cases, it is an inevitable consequence when there exists a huge amount of interest in the domestic and international game of politics. This does not mean that all kinds of interventions are allowed by international law, as it will be studied in chapter 3.

Also, the process to move elections entirely to electronic devices will occur gradually and slowly until the concerns around cybersecurity are resolved, like voting through the internet or using machines to cast the votes.

In the following chapter, our work will enter in the discussion of the importance of democracy and elections in our Constitutional States, and what are the values directly affected by foreign interventions.

⁷³ *Idem*

SECOND CHAPTER.- DEMOCRACY AND THE CONSTITUTIONAL RULE OF LAW

To understand the impact of foreign interference in local elections, it must be recognized the importance of elections for a democratic society and the constitutional rule of law. That is why the present chapter must be included, in which basic concepts such as democracy, elections, and the rule of law will be studied. And their significance to the international community.

2.1 Definition of democracy

As it was developed in the last chapter, the concept of democracy comes from the Greek words power (“*Kratos*”) and people (“*Demos*”).⁷⁴ But defining democracy is not an easy task, as it was a word employed for political systems in which slaves, foreigners, or even women did not have political rights.

The concept has evolved through time, but even nowadays we have societies that describe themselves as democratic, like Russia, China, or even North Korea,⁷⁵ when from the perspective of western societies this is far from the truth. For example, although in Cuba and in China elections are held periodically, they have a system in which just one political party can participate in the elections. Therefore, when citizens are left with only one option there is no real democracy, the freedom of choice is an illusion. This situation has led to a proliferation of adjectives like *popular democracy*, *sovereign democracy*, or *participative democracy* that are in fact concepts to hide an authoritarian regime.⁷⁶

The current development of the concept is the theory of the liberal-democratic State.⁷⁷ For the liberal State, the principles of equality and liberty are essential for

⁷⁴ GONZALEZ SCHMAL, Raúl, *Democracia Semidirecta y Participativa*, Instituto de Investigaciones Jurídicas de la UNAM, 2001; From: <https://archivos.juridicas.unam.mx/www/bjv/libros/1/93/5.pdf> (Accessed April 15, 2022) p. 90

⁷⁵ The official name of North Korea is the Democratic People's Republic of Korea. Other States use the term “popular” instead of democracy like the People's Republic of China, to mask totalitarian regimes. GONZALEZ SCHMAL, Raúl, *Programa de derecho constitucional*, Universidad Iberoamericana, Ciudad de México, México, 2007 p. 74

⁷⁶ RICOS MOTOS, Carlos, *¿Cantidad o calidad? El debate sobre la participación política a la luz de los modelos de democracia*, in BETANZOS TORRES, Eber. *Democracia participativa y los mecanismos desarrollados en el constitucionalismo occidental*, tirant lo blanch, Ciudad de México, 2020 p. 18

⁷⁷ SARTORI, Giovanni, *¿Qué es la democracia?* Alfaguara Editorial, Ciudad de México, México, 2008 p. 8

the existence of political democracy. All citizens have the same value and rights, a horizontal society, not vertical like before (at least on the political ground).⁷⁸

The Cambridge dictionary defines democracy as *the belief in freedom and equality between people, or a system of government based on this belief, in which power is either held by elected representatives or directly by the people themselves*.⁷⁹ We can rescue the ancient values of equality and liberty used to legitimate power in a representative democracy or participate directly in a participative democracy. Other authors refer also to the deliberative democracy, in which the decisions are made by the representatives but with the active discussion and dialogue with their bases.⁸⁰

The people do not actually rule in representative democracy, the role of the citizen is to determine the elected politician, the one that will in fact rule. To talk about democracy is to talk about legitimacy. Democratic legitimacy depends upon the will of the people to decide who will exercise power. It is a collective decision, many times at the hands of a majority.⁸¹

Democracy is a tool to legitimize the government by allowing the bases of society to decide which government will dictate the course society should take and if it has the confidence of the people to pursue the common good. Although there are sometimes difficulties to define the *people*, in a democracy (understood as a political system), the people would be a synonym for citizens equals before the law and in the enjoyment of their political rights.⁸²

Democracy should also aim to protect minority groups and not try to impose uniform rules in all areas of public life. Although minorities have a right to deliberate in the discussions and to be part of the decisions, they must have a constitutional

⁷⁸ GONZALEZ SCHMAL, Raúl, *Programa de derecho constitucional*, Universidad Iberoamericana, Ciudad de México, México, 2007 p. 76

⁷⁹ Cambridge Dictionary, *democracy*; From: <https://dictionary.cambridge.org/> (Accessed April 15, 2022)

⁸⁰ RICOS MOTOS, Carlos, *op. cit.* p. 20

⁸¹ WHEATLEY, Steven, *Deliberative Democracy and Minorities*, European Journal of International Law, Volume 14, June 2003; From: <https://academic.oup.com/ejil/article/14/3/507/440583?login=true> (Accessed April 15, 2022) p. 509

⁸² SARTORI, Giovanni, *Op.cit.* p. 28

arrangement to guarantee their cultural security.⁸³ A society that protects the rights of minorities will have a higher degree of legitimization, because its policies will be accepted by all, avoiding violent conflict.

Of all the classifications there can be of democracy, one divides the concept into participative democracy and representative democracy. Participative democracy is when all the citizens are summoned to take decisions regarding the community, for example, in ancient Athens. Nowadays we have instruments of participative democracy as referendums or the revocation of mandate.⁸⁴ These are mechanisms in which all the people are consulted about a topic to decide. On the other hand, representative democracy is when we choose representatives to make our decisions. For example, when we choose our representatives for parliament or Congress. Those representatives are going to take decisions aimed at the common good of the community. This is the most common system in liberal democracies.⁸⁵

Democracy is also a core principle of Western States. Constitutional instruments like the Organization of American States (OAS) and the European Union⁸⁶ consider that it is fundamental for a State to share democratic ideals to belong to their organizations. According to their charter, the OAS has an essential purpose to promote and consolidate representative democracy in the continent.⁸⁷ The OAS can suspend the rights of membership of a State when its democratic government has been overthrown.⁸⁸ In this same line, the Treaty of Lisbon establishes that the functioning of the European Union shall be based on representative democracy.⁸⁹

Also, the Council of Europe (a different organization from the European Union) created in 1948 includes in its core principles pluralistic democracy and the

⁸³ WHEATLEY, Steven, *Deliberative Democracy and Minorities*, European Journal of International Law, Volume 14, June 2003; From: <https://academic.oup.com/ejil/article/14/3/507/440583?login=true> (Accessed April 15, 2022) p. 509

⁸⁴ The Mexican Constitution provides different mechanisms of participative democracy as “*consultas populares*” and “*revocación de mandato*”. Article 35, CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, 1917

⁸⁵ SARTORI, Giovanni, *Op. cit.* p. 88

⁸⁶ The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. Article 1a, EUROPEAN UNION, *Treaty of Lisbon*, 2007

⁸⁷ Article 2, ORGANIZATION OF AMERICAN STATES, *Organization of American States Charter*, 1948

⁸⁸ Article 9, *Idem*.

⁸⁹ Article 8 a, EUROPEAN UNION, *op.cit.*

rule of law contained in article 3 of its statute.⁹⁰ The Council of Europe is an international and regional organization that promotes the values of democracy, rule of law and human rights in the continent.

2.2 Elections as a tool of democracy

In liberal States, an election is *a process of choosing by vote a member of a representative body*.⁹¹ This is in opposition to other methods to design governments, such as a hereditary system, cooptation, or the use of violence which are the autocratic methods.⁹² A representative body could be a presidential position, parliamentary, judges, local authorities, etcetera. Elections are the main tool a democracy can use to reflect the will of the people.

Dahl says that democracy by western standards is composed of five elements: effective participation of the voters, equal opportunity and value in their vote, enough time to make a reasoned opinion, having control of the agenda and that includes the participation of all adults in a nation.⁹³

Elections cannot be limited to elite groups in our society. The election of our representatives must be pluralistic, this means that all the voices within a society must be represented in our legislative bodies, or that the election of the head of state or head of government (especially in parliamentary monarchies) represents all citizens. This is a result of believing that all men are equal. If we do not follow these principles, our representatives could be biased by only one way of thinking, and the decisions could be taken partially in favor of just one elite group controlling the public debate.⁹⁴

Elections are nowadays employed in most countries of the world. Therefore, interference in foreign elections is a practice that can affect a lot of States, and it is

⁹⁰ SHAW, Malcolm, *International Law*, 6th Edition, Cambridge University Press, New York, United States, 2008 p. 359

⁹¹ *Oxford Dictionary of Law*, 7 edition, Oxford University Press, 2009; From: <https://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248> (Accessed: January 09, 2022)

⁹² DUVERGER, Maurice, *Instituciones políticas y derecho constitucional*, Ariel, Barcelona, Spain, 1970, p. 115

⁹³ DAHL, Robert. *On democracy*, Yale University, United States, 2020 p. 35

⁹⁴ LASALLE, Ferdinand, *¿Qué es una constitución?* Elaleph.com, 1999; From: https://norcolombia.ucoz.com/libros/Lassalle_Ferdinand-Que_Es_Una_Constitucion.pdf (Accessed: May 19, 2022) p. 36

not a problem circumscribed to a limited number of nations. Also, other instruments of participative democracy have acquired a huge relevance in contemporary times. Following the principles of democracy, States are increasingly adopting tools through which the will of the population can be ascertained on specific issues. Decisions that used to be limited to representatives are now extended to the bulk of the population.⁹⁵

Moreover, the introduction of new technologies such as the internet has enabled the general population to participate in political issues in an organized manner. Previously this was impossible, and representatives were the most practical option for decision-making. However, nowadays we have a connected population with access to a lot of information, which allows them to not be alienated from politics. People who previously had no information about national discussions now have political opinions. This has allowed the instruments of participatory democracy to be revitalized and to include the bulk of the population in more and more political decisions. We can appreciate this situation with the proliferation of referendums like the terms of the economic rescue in Greece, Brexit, or the peace accords in Colombia.⁹⁶

2.3 Definition of the constitutional rule of law

The constitutional rule of law is the evolution of the simple rule of law. It refers not only to the fact that public power is organized by a formal source of law, but also that these powers are limited by the constitution as to their content, such as the division of powers or fundamental rights.⁹⁷

The constitutional state of law or the constitutional democratic state as Alexy calls it is based on six fundamental principles: human dignity, liberty, equality, rule of law, democracy, and social rights.⁹⁸

⁹⁵ For example, the Brexit referendum in 2016 in which British citizens decided if the United Kingdom should remain as a member of the European Union, was one of the most relevant political and social events of the last decade in Europe, with huge repercussions to the United Kingdom and the whole European community.

⁹⁶ RICOS MOTOS, Carlos, *Op. cit.* p. 17

⁹⁷ FERRAJOLI, Luigi, *Op. cit.* p. 15

⁹⁸ ALEXY, Robert, *Los derechos fundamentales en el estado constitucional democrático*, in CARBONELL, Miguel, *Neoconstitucionalismo(s)*, Trotta, Madrid, Spain, 2005 p. 37

The constitution of States acquires supremacy over the other powers, even the majority of the people. This means that the branches of government and the decisions of the majority of citizens expressed through the popular vote must be ruled by the Constitution and its guarantees of protection to fundamental rights, the rights of minorities, and other core principles that are the State's foundation.⁹⁹

In a constitutional rule of law, legality is subordinated to the constitution itself, from it derives its validity and legitimacy. The law is not only required to comply with the formal requirements of creation, but also to comply harmoniously with other principles contained in the constitution. This means that a law created by formal and ordinary means may be invalid in substance when the content is contrary to the constitution.¹⁰⁰

This has important implications for democracy, as it both limits and complements it. Constitutional principles entail prohibitions on decisions that could be adopted by the power of the majority, yet they exist to safeguard minority rights that could otherwise be overridden by an abuse of power from the majority. In essence, limiting democracy protects it by allowing the majority and minorities to coexist.¹⁰¹

In the same way that we can say that elections are the tool used by the people to limit the power of the government, the Constitution becomes the tool to moderate the power of the majorities, that even if democratic, can result in the detriment of the State and the common good.¹⁰²

For example, in Mexico citizens have the constitutional right to participate in constitutionally regulated democratic procedures to vote on certain decisions other than elections, referred to as *consultas populares*, Mexicans can be asked about which direction the State must take in a determined topic. However, *consultas*

⁹⁹ GONZALEZ SCHMAL, Raúl, *Programa de derecho constitucional*, Universidad Iberoamericana, Ciudad de México, México, 2007 p. 42

¹⁰⁰ FERRAJOLI, Luigi, *Op. cit.* p. 18

¹⁰¹ *Idem* p. 19

¹⁰² GONZALEZ SCHMAL, Raúl, *Democracia Semidirecta y Participativa*, Instituto de Investigaciones Jurídicas de la UNAM, 2001; From: <https://archivos.juridicas.unam.mx/www/bjv/libros/1/93/5.pdf> (Accessed April 15, 2022) p. 92

populares are limited by the Mexican Constitution, and cannot be conducted to ask people about fundamental issues such as national security or the application of human rights.¹⁰³ This means that although democracy is a fundamental right of the citizens, even this right is limited by Constitutional restrictions and therefore some topics cannot be left to the decision of the bulk.

There are issues that cannot be modified even by a democratic process because they are considered foundational and part of the essence of the state. as it has already been seen, respect for human rights is not up for discussion, nor is the administration of the armed forces or the collection of taxes. It is understood that many of these issues should be resolved by experts in the field, and not by majorities.

This situation has led some authors to affirm that fundamental rights and many other principles of democracy can be profoundly undemocratic. If we understand democracy as the government of the majority this would be true. Even when a law is approved by the majority in Congress (an exercise of representative democracy) it could become invalid in Court, if it affects human rights.¹⁰⁴

The bedrock of a constitution and our modern democracies is not the consensus of the majority, it finds its root and legitimacy in the equality of all in fundamental liberties and social rights, even when in opposition to other laws and acts of government.¹⁰⁵

The constitutional rule of law has 3 directions. The first is to protect the fundamental rights of the citizens, individual rights, and social rights. Secondly, to protect these rights from all powers and forces, not just public but private, even from majorities. In third place, it pursues to protect all rights, domestic rights, and those embodied in international instruments.¹⁰⁶

¹⁰³ Article 35, CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, 1917

¹⁰⁴ ALEXY, Robert, *Op. cit.* p. 38

¹⁰⁵ FERRAJOLI, Luigi, *Op. cit.* p. 28

¹⁰⁶ GONZALEZ SCHMAL, Raúl, *Programa de derecho constitucional*, Universidad Iberoamericana, Ciudad de México, México, 2007 p. 43

Therefore, in the liberal nations of today, the adoption of a constitutional democratic state is fundamental to respecting human rights, which is a core principle of modern societies. Constitutions are instruments that order power so that its exercise is efficient, and the State can fulfill its objectives, but at the same time, they limit power so that it does not violate the rights of individuals.

2.4 Importance of elections to the constitutional rule of law

The constitutional rule of law cannot be understood without a political democracy as a system of government.¹⁰⁷ As it was previously stated, democracy is now a core principle in many modern nations. Democracy has also changed the way States conduct their international relations.¹⁰⁸ The Inter-American Democratic Charter, approved by the OAS in 2001, declares that all the people in America have the right to democracy, and it's the government's duty to promote and defend it. It goes further by saying that representative democracy is the foundation of the rule of law and of constitutional regimes of States. Although this resolution is non-binding, it has relevance in interpreting the OAS Charter, which is binding for member States.¹⁰⁹

The United Nations General Assembly has also issued several resolutions regarding the importance of democracy in modern States.¹¹⁰ Because States rely completely upon elections to order state power and decide the State's representatives, they are also heavily concerned about their security. Therefore, States have been making declarations and resolutions against foreign interference in domestic elections.¹¹¹

¹⁰⁷ COM(2018) 236 final, European Commission; From:

<https://mail.google.com/mail/u/0/?tab=rm&ogbl#inbox/QgrcJHrnvsGrvIWcZIVXVFZkKcTShXZlgQ?projector=1&messageParId=0.3> (Accessed September 15, 2022)

¹⁰⁸ SHAW, Malcolm, *International Law*, 6th Edition. Cambridge University Press, New York, United States, 2008 p. 27

¹⁰⁹ Articles 1 and 2, ORGANIZATION OF AMERICAN STATES, *Inter-American Democratic Charter*, Lima, Peru, 2005

¹¹⁰ For example, resolution for Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in Electoral Processes, UN Docs. A/RES/44/147 (1989), A/RES/45/151 (1990), A/RES/46/130 (1991), A/RES/47/130 (1992), A/RES/48/124 (1993), A/RES/50/172 (1995), A/Res/52/119 (1997), A/RES/54/168 (1999); and Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in Electoral Processes as an Important Element for the Promotion and Protection of Human Rights, UN Doc. A/Res/56/154 (2001).

¹¹¹ JAMNEJAD, Maziar et WOOD, Michael, *The Principle of Non-intervention*, Leiden Journal of International Law, 22, pp 345-381, June 2009; From: http://journals.cambridge.org/abstract_S0922156509005858 (Accessed: September 4, 2021) p. 369

In Europe, the Council of Europe created the Venice Commission as an advisory body on constitutional matters in 1990. The role of this institution is to provide legal advice in the fields of democracy, human rights, and the rule of law. It provides States in transition to democracy with legal advice and training in electoral administration. They have issued several recommendations to member States to implement in their domestic elections to protect democracy.¹¹²

Another example is the the Copenhagen criteria from 1993 containing the requirements a State must fulfill before becoming a member of the European Union. The main of them is that the nation wishing to join must have *stable institutions guaranteeing democracy, the rule of law, human rights, and respect for and protection of minorities*.¹¹³

Even more, the European Community adopted the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union on 16 December 1991, in which they declared that for a new State to be recognized by the European community it needed to practice democracy, the exercise of the rule of law and mentions specifically the requirement for guarantees for the rights of minorities. The importance of democracy and the rule of law in this and the aforementioned resources can be easily appreciated. If absent, it could even imply the denial of recognition from the international community.¹¹⁴

Sometimes, the absence of democracy and the rule of law may imply sanctions from other States like the United States, which see itself as a protector of democracy, as in the case of the Cuban Democracy Act of 1992 which imposed sanctions on the Castro regime.¹¹⁵

¹¹² Like the Guidelines on Political Party Regulation and the Opinion on the prohibition of financial contributions to political parties from foreign sources. HOFFMANN-RIEM, Wolfgang, The Venice Commission of the Council of Europe – Standards and Impact, The European Journal of International Law, Vol.25, 2014; From: <https://watermark.silverchair.com> (Accessed April 15, 2022)

¹¹³ European Commission, *Conditions for membership*; From: https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/conditions-membership_en (Accessed July 15, 2022)

¹¹⁴ SHAW, Malcolm, *Op. cit.* p. 207

¹¹⁵ *Idem* p. 693

As it can be appreciated in these examples, several organizations of States consider the importance of electoral processes to the consolidation of the constitutional rule of law, considering democracy a core principle that if absent could even result in the suspension of membership of one State to these organizations.

Recently in 2020, a group of experts in Public International Law met at Oxford University to discuss the main challenges the international community is facing with regard to foreign incursions through cyberspace. The three main concerns of the experts were cyber operations targeting the healthcare sector, cyber operations against vaccine research (the meeting was in the middle of the Covid-19 pandemic), and foreign electoral interference through digital means.¹¹⁶ Their work reflects the topics that are currently been discussed in public and in private by States, international organizations, and international lawyers.

One of the most discussed methods of intervention is the propagation of false information through social media, better known as *fake news* because it attempts to the liberty of voters to decide based on reliable information.

If elections are targeted, their legitimacy could be in question, if there is no legitimacy, there cannot be a stable government. Elections interference can be a concern of national security for many States because their constitutional legal system is founded on the free choices of the people. Meddling with elections could break the confidence citizens have in their institutions, like the Russian interference in the 2014 Ukrainian election or the interventions in the 2020 US Presidential election that was studied in the previous chapter.

In conclusion, the protection of elections is imperative to protect the liberal-democratic States around the globe. To intervene in a foreign election will more than probably provoke the rejection of the targeted State, which will see the operation as an attack on its more elemental essence.

¹¹⁶ AKANDE, Dapo, et al. *op. cit.*

Until now our study has studied the history of elections and of foreign interventions. It has also highlighted the importance that elections have the modern liberal States. In the following chapter, it shall study the rules of Public International Law that States could employ to legally protect their elections from foreign interference, especially through digital means.

THIRD CHAPTER.- RULES OF PUBLIC INTERNATIONAL LAW IN FOREIGN INTERVENTIONS

So far, the study has analyzed that electoral interventions have been a common practice in international relations since elections are organized. States intervene in foreign elections when they perceive that their interests concerning other States are in jeopardy. Also, States will be best disposed to intervene when a domestic actor has asked for their support against the country's internal opposition.

External interventions in the electoral process of a State may peril the democratic State of law and attempt against the very essence of the State and the rule of law (which implies of course separation of powers through checks and balances, human rights recognized with legal instruments to enforce their protection, and preferably, democracy). It is not new that elections are considered the fundamental instrument in which the people of a country express their will to elect their leaders and, on some occasions, decide on fundamental issues regarding their entire society, such as the referendums for independence.

It was reviewed in chapter 1 that there exist a variety of methods on which a State can rely to intervene in a foreign election. From promises and threats to financial aid and *dirty tricks*¹¹⁷ against the target State. Nevertheless, not all methods of intervention can be considered contrary to international law. Some methods such as simple promises or an opinion on the character of a candidate by another State may not be considered an illegal intervention, while a military operation or a cyber-attack will easily amount to a violation. However, other methods such as campaigns of disinformation or giving financial aid to a political party are not instruments easily classified as violations of international law. As in many other areas of laws and morality, there are clear examples of what is good, bad, and what is consistent with

¹¹⁷ Dov H. Levin considers *dirty tricks* as all those methods employed by states that involve campaigns of disinformation, meaning: "deliberately misleading or biased information; manipulated narrative or facts; propaganda." LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 122

international law and what is in breach thereof. However, there is also a broad spectrum of “gray areas” that should be regulated by Public International Law.

This chapter aims to study the rules of international law that could be violated by these practices of States and apply the law to some relevant cases that were studied previously. In the next pages, it will be discussed the content of the law and its application to some of these methods, especially the ones that involve the use of cyberspace.

3.1 Rules of international law

It is easy to say that election interventions are violations of international law. But once you look into the sources of international law you can see that there is no specific rule against interventions in an election. Our work must look into more general rules of international law as the principle of sovereignty, which is very abstract. It can be found the sources of international law in article 38 of the Statute of the International Court of justice.¹¹⁸ These sources are international treaties, international customs, and general principles of international law. Also, this article provides that the judicial decisions of courts and doctrine will be considered as subsidiary means to determine the law, this means that these are not rules by themselves but can bring light to the interpretation of one of the three main sources in Article 38.¹¹⁹

Now shall begin the study of the main rules that may be violated by a State by interfering in a foreign election. The prohibition on the use of force, State sovereignty, the non-intervention principle, the right to self-determination, the

¹¹⁸ Article 38, 1. *The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.* UNITED NATIONS, *Statute of the International Court of Justice*, 1945

¹¹⁹ SHAW, Malcolm, *Op. cit.* p. 70

Budapest Convention,¹²⁰ the Tallinn Manual,¹²¹ and the Broadcasting Convention.¹²² But first, some little remarks on the application of international law in cyberspace.

Reality is always in motion, and the law must adapt and evolve to society's new reality to rule these new tendencies and technologies that were not regulated before because they did not exist. The best example of this is cyberspace. When the UN Charter was drafted in 1945, digital computers did not have today's presence and scale. The diplomats in San Francisco could just dream that something like the internet could exist in a few decades. Therefore, the UN Charter and its principles are not expressly designed to rule cyberspace. However, a group of experts commissioned by the General Assembly has said that those principles and rules apply to cyberspace. States had serious concerns about the application of international rules to cyberspace and decided to form a group of experts to draft a report on the subject, which was later adopted in a resolution by the General Assembly of the UN in 2015.¹²³

According to their report: *In their use of ICTs,¹²⁴ States must observe, among other principles of international law, State sovereignty, sovereign equality, the settlement of disputes by peaceful means, and non-intervention in the internal affairs of other States.*¹²⁵ In other words, the groups considered that for the UN Charter principles to be fully secured and guaranteed, the observance of these rules applies to cyberspace. Therefore, although this work is soft law and not binding, this thesis is confident to share the opinion of the group of experts that States are obliged to observe the principles of the Charter and international law in their relations with other

¹²⁰ The Budapest Convention on Cybercrime is an international treaty that aims to outlaw illegal operations in cyberspace. COUNCIL OF EUROPE, *Convention on Cybercrime*, Budapest, 2001; From: <https://rm.coe.int/1680081561> (Accessed: September 15, 2021)

¹²¹ The Tallinn Manual is not an international treaty, but a document elaborated by experts in cyber warfare and international law. It must be considered as a subsidiary means of international law according to article 38 of the Statute. SCHMITT, Michael, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

¹²² The International Convention on the Use of Broadcasting in the Cause of Peace is an international treaty aimed to outlaw false information and propaganda that sponsors violence or war between States. LEAGUE OF NATIONS, *International Convention concerning the Use of Broadcasting in the Cause of Peace*, Geneva, 1936, Treaty Series, Vol. CLXXXVI, 1938, p. 301

¹²³ UNITED NATIONS, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN Doc. A/70/174, 22 July 2015

¹²⁴ According to the report ICTs means *Information and communications technologies*, which refers to the whole system used in telecommunications for the exchange of data, especially the devices used to enter cyberspace.

¹²⁵ UNITED NATIONS, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN Doc. A/70/174, 22 July 2015 para. 28(b)

States when carrying out cyber activities. It must be considered that since States are obliged to respect the principles of the Charter in their relations with other States, it is not specified by what means they must do so, so it must be understood it is by all of them.

Now starts the analysis of 3 heavily interconnected rules of international law, and in many cases, one same act can be a breach of the three of them, but although they share the bases they differ in the content and the application. These rules are the prohibition on the use of force, respect of national State sovereignty, and the non-intervention principle.

A) The prohibition on the use of force

This is one of the most important principles of international law. The best place to find it is in Article 2(4) of the UN Charter, which establishes that: *All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations.*

the subject of the use of force will not be fully developed, just in the area that could be applied to interference in a foreign election through digital means. At glance, it sounds difficult to consider that meddling in an election could amount to using force, and it was perceived this way for a long time. However, the use of cyber-attacks against elections has opened the debate that indeed, a violation of the use of force could be updated.

Now the obliged question would be, *what is force?* For a long time, the use of force was conceived of just as an armed attack. The UN Charter refers to armed attacks in the preamble and Article 51 about self-defense, however, now the use of force is a broader concept. Since the Advisory Opinion¹²⁶ on the *Legality of the Threat or Use of Nuclear Weapons*,¹²⁷ the International Court of Justice stated that

¹²⁶ In addition to the faculty resolving contentious cases between States, the ICJ has also the faculty to offer legal advice in the form of Advisory Opinions when requested by the General Assembly or the Security Council on any legal question. SHAW, Malcolm, *International Law*, 6th Edition, Cambridge University Press, New York, United States, 2008 p. 1108

¹²⁷ LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS, Advisory Opinion, ICJ Reports 1996, p. 226

a threat to use force is also illegal under the cited rule. The use of force has even taken distance from the traditional concept of an armed attack to contain other fields and methods of coercion as stated in the 1970 Declaration on Principles of International Law that recalled the: *duty of States to refrain... from the military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State.*¹²⁸

However, there are still many voices that consider that the use of force as embodied in the UN Charter should be compatible solely with armed attacks, and that contrary to the sayings of the Group of experts in the report of 2015, the use of force cannot at this moment apply to cyber activities as other States could say and that it is still possible to find gaps in the law of cyber conflict, which is a work in progress.¹²⁹

Despite this position, the debate is open to considering cyber-attacks as a use of force. Some States have considered that a cyber operation is not *per se* a use of force. However, they contend there are cases when cyber activities may violate this prohibition.¹³⁰ France has stated that *in digital space, crossing the threshold of the use of force depends not on the digital means employed but on the effects of the cyber operation.*¹³¹ A cyber-attack will be considered illegal under this rule when it produces the same effects as other kinds of attacks, like firing a missile. In general, a cyber-attack will be considered as the use of force when it produces physical damage to property, human injury, or loss of life. Also, if the effects are not physical harm, they could still be considered a use of force when they involve the use of military personnel or military infrastructure of one of the States.¹³²

¹²⁸ SHAW, Malcolm, *Op. cit.* p. 1124

¹²⁹ GLENNON, Michael, *The Road Ahead: Gaps, Leaks and Drips*, International Law Studies, Volume 89, U.S. Naval War College, 2013; From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245776 (Accessed March 29, 2022)

¹³⁰ Australia, Brazil, Estonia, Germany, Italy, the United Kingdom, the United States, and France are some of the States that considered that a cyber-attack can be illegal use of force when some conditions are met. CYBERLAW TOOLKIT, *Use of force*, November 16, 2021; From: https://cyberlaw.ccdcoe.org/wiki/Use_of_force#cite_note-17 (Accessed March 25, 2022)

¹³¹ Ministry of Defense of France, *International Law Applied to Operations in Cyberspace*, 9 September 2019, p. 7

¹³² CYBERLAW TOOLKIT, *Use of force*, November 16, 2021; From: https://cyberlaw.ccdcoe.org/wiki/Use_of_force#cite_note-17 (Accessed March 25, 2022)

The *Tallinn Manual* also considers that cyber operations may be considered an illegal use of force. It gives some factors that should be taken into consideration when classifying cyber activity as a use of force.¹³³

- a) *Severity*.- This is the most significant factor in the analysis. It involves the cyber operation resulting in any kind of damage, injury, or death.
- b) *Immediacy*.- That the consequences of the operation occurred immediately after its realization.
- c) *Directness*.- The effects are a direct consequence of the operation.
- d) *Invasiveness*.- The operation is carried out without the consent of the target State and against its interests.
- e) Other factors are measurability of effects, the military character of the subjects, State attribution and that the act is presumptively illegal.

Stuxnet¹³⁴ in 2010 was the first case of a cyber-attack that resulted in material damages and raised the topic of the use of force in cyberspace. In this case, the US and Israel (they have never recognized responsibility) designed a computer virus that targeted the industrial control systems of a nuclear power plant in Iran where the Iranian uranium enrichment program was being developed. This attack provoked that around 1,000 centrifuges in the plant were forced to spin too quickly or too slowly, eventually breaking apart.

Under the criteria seen previously, the Stuxnet attack could violate the prohibition to use force against Iran. The attack destroyed hundreds of devices inside the nuclear facility. American officers concluded that this action had delayed for several years the Iranian nuclear program.

Coming back to our matter of study, interfering in foreign elections could violate the prohibition to use force against another State in very limited situations. The inference would need to produce physical damages to the electoral

¹³³ SCHMITT, Michael, *Tallin Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021) p. 49-52

¹³⁴ BROAD, William et. Al. *Israeli Test on Worm Called Crucial in Iran Nuclear Delay*, The New York Times, New York, United States, January 15, 2011; From: <https://www.nytimes.com/2011/01/16/world/middleeast/16stuxnet.html> (Accessed March 28, 2022)

infrastructure or personnel of a State. For example, it could be reflected in the destruction of voting machines, the counting system, or the electronic devices of one of the political parties.

However, this kind of interference is in our opinion less likely to occur because it will not satisfy the motives that States have to meddle in other countries' elections. When a foreign State interferes, it is usually to influence the outcome of the election. The destruction of the electoral infrastructure will only invalidate or delegitimize the election. In the end, there are other more effective methods to expect better results from an intervention.

Eventually, the prohibition on the use of force is not the best legal institution to hold a State responsible for interfering in an election. Mainly because this rule will apply to very limited situations that do not include the majority of the cases. The rules of international law that follow suit better for this purpose.

B) State sovereignty

If the last rule can be labeled as limited, State Sovereignty may be considered the opposite, too broad.

There is an ongoing debate on which rule applies best to outlaw interventions in foreign elections. On one hand, we have the State sovereignty principle and on the other the non-intervention principle. The latter, (and also the prohibition on the use of force) derives from the sovereignty principle, which is a broader concept. States and doctrines differ in which of these figures is more accurate. This debate is not surprising, because both rules tend to overlap each other, and in many cases, a violation of one is a violation of both because the principle of non-intervention protects sovereignty, and intervention violates sovereignty.¹³⁵ This debate will be developed in the following pages, starting with the State sovereignty principle.

¹³⁵ MOYNIHAN, Harriet, *The Application of International Law to State Cyberattacks: Sovereignty and Non-intervention*, Chatham House: The Royal Institute of International Affairs, December 2019; From: <https://www.chathamhouse.org/sites/default/files/publications/research/2019-11-29-Intl-Law-Cyberattacks.pdf> (Accessed: January 14, 2022) pp. 150

There is not enough state practice or binding language in international treaties to determine which rule is more accurately breached by interfering in cyberspace. The United Kingdom has expressed that interference is a violation of the non-intervention principle, but other states such as Iran, China, France, and the Netherlands consider that it is a violation of sovereignty (considering that sovereignty includes the prohibition on intervention). This appears also to be the position of the Tallinn Manual.¹³⁶

Sovereignty was defined in the *Island of Palmas*¹³⁷ arbitration as: *Sovereignty in the relations between States signifies independence. Independence regarding a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.*¹³⁸ This means that states have exclusive rights over their territory and some functions inherent to a State, therefore sovereignty could be violated in two senses: by violating the territory of a State, or by interfering in the functions of a State.

Oppenheim, one of the most renowned authors in international law¹³⁹ wrote about sovereignty:

*Since it excludes subjection to any other authority, and in particular the authority of another state, sovereignty is independence. It is external independence with regard to the liberty of action outside its borders. It is internal independence with regard to the liberty of action of a state inside its borders. As comprising the power of a state to exercise supreme authority over all persons and things within its territory, sovereignty involves territorial authority.*¹⁴⁰

In cyberspace, this principle applies differently. Although cyberspace has no physical borders as the limitations between States, cyberspace has a physical aspect. Cyber activities need physical components to operate, require computers,

¹³⁶ *Idem* pp. 22-27

¹³⁷ This was a dispute between the US and the Netherlands for sovereignty over the Island of Palmas, which nowadays belongs to Indonesia. The case was resolved in 1928 by the Permanent Court of Arbitration. SHAW, Malcolm, *International Law*, 6th Edition, Cambridge University Press, New York, United States, 2008 p. 499

¹³⁸ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part II*, EJIL: Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-ii/> (Accessed: September 3, 2021)

¹³⁹ Oppenheim made his work in international law before and during the Great War of 1914-1918, a time of great turmoil in international relations.

¹⁴⁰ OPPENHEIM, L. *Oppenheim's International Law, Vol. 1: Peace*, 9th edn, Jennings, R. Y. and Watts, A. (eds), London; New York: Longmans, 1996 p. 382

cables, satellites, and servers to operate, and things that are physically located in States or that belong to the State that puts them there (as in the case of satellites and submarine communications cables in the high seas).¹⁴¹ Also, there are people responsible for accessing web pages, making transactions, and posting on social media, people of flesh and bone with a (or several) nationalities.¹⁴² Therefore, many experts, such as the UN group of experts and the makers of the Tallinn Manual consider that the principle of sovereignty applies to cyberspace.

The International Court of Justice held in *the Corfu Channel*,¹⁴³ *Military and Paramilitary Activities in and against Nicaragua*, and in the *Certain Activities carried out by Nicaragua in the Border Area*¹⁴⁴ cases that exercising authority in the territory of another state is a violation of the sovereignty principle. In those cases, the offending States carried out activities within the territory of the violated States without their consent.¹⁴⁵

Under this criterion, in cyberspace, a violation of the sovereignty principle will be updated by the mere intrusion of a State into the devices under the jurisdiction of another, without the latter's consent. The threshold to violate this principle is very low, without other requirements as to produce physical damage as in the case of the prohibition to use force, or without employing methods of coercion as in the non-intervention rule.¹⁴⁶

However, other scholars consider that the point of consent should not be the sole parameter to configure the threshold of sovereignty. For example, this would mean that criticisms of a foreign government could update a violation under this principle or activities of espionage that is not outlawed *per se* in international law.

¹⁴¹ According to the Montego Bay Convention, States have a right to lay submarine cables and pipelines on the high seas, with the only condition of not obstructing other States to do so. UNITED NATIONS, *Convention on the Law of the Sea*, December 1982, article 112

¹⁴² MOYNIHAN, Harriet, *Op. cit.* pp. 43-46

¹⁴³ CORFU CHANNEL CASE, Judgment of April 9th, 1949: ICJ Reports 1949, P. 4, pp. 69-70

¹⁴⁴ *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2015 pp. 93, 223

¹⁴⁵ In the *Corfu Channel* case the United Kingdom entered territorial waters of Albania without their consent to swipe out sea mines. In the *Military activities in Nicaragua* case, the United States laid mines in the territorial waters of Nicaragua and blockaded some of its ports. And in the *Nicaragua Border* case, Nicaragua entered with its army the territory of Costa Rica and started the construction of a channel. All these actions were considered violations of sovereignty by the Court.

¹⁴⁶ *Infra*. Methods of coercion will be further developed in the following section when studying the non-intervention rule.

Therefore, the rule of sovereignty will be useful when approaching cyber activities that did not use methods of coercion but produced an affectation on the territorial sovereignty or the inherent functions of the State. An example of this could be financing an opposition political party or a misinformation campaign. The line between lawful and unlawful activity is very thin and must be observed on a case-by-case basis.¹⁴⁷

As in the use of force, States are considering an effect-based criterion to classify an interference as a breach of sovereignty. This is the same approach of the Tallinn Manual in Rule 4,¹⁴⁸ which entails that a significant degree of interference will be needed, by producing physical damage or by reducing or losing the functionality of cyberinfrastructure. Another criterion would be that the intervention prohibits the State to exercise its independent State powers over society. In practice, when using this last approach, the threshold employed here could be very similar to the non-intervention rule.¹⁴⁹ However, at this point, we only have isolated declarations by States that have not resulted in serious efforts to prepare a treaty on the matter in question. The absence is probably caused by the lack of will to denounce an activity that is been probably carried out by many of the concerned States, like espionage.

In a nutshell, the first approach to sovereignty (territoriality) will be violated when a State counts cyber activities that produce damage or injury to the target State. France and some scholars consider that a loss in operability has the same effect. On the other hand, the second approach of sovereignty (inherent functions of the State) will be violated when a State conducts cyber operations against the functioning of the target State, even if it does not cause damage or injury.¹⁵⁰

In the realm of elections interference, a violation of the first approach will be to damage the electoral infrastructure of the target State, damaging computers,

¹⁴⁷ MOYNIHAN, Harriet, *Op. cit.* pp. 51-54

¹⁴⁸ SCHMITT, Michael, *Tallin Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

¹⁴⁹ MOYNIHAN, Harriet, *Op.cit.* pp. 72

¹⁵⁰ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part II*, EJIL:Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-ii/> (Accessed: September 3, 2021)

paper ballots, the electrical network etcetera. In the second approach, a violation includes temporarily disrupting the proper functioning of election hardware and software, blocking access to online government information about the election, and altering that information.¹⁵¹ This was the case with the interference of Russia in the 2014 Ukrainian election against the electoral commission, showing a false winner on the web page of the institution.¹⁵²

Now, it is somehow clear that attacking the cyberinfrastructure of the State is a violation of sovereignty, but what about cyber activities that do not target the government directly? For example, a State could post on social media false information about the time and location of the polling places, or they could leak information that damages the reputation of a candidate, some may say that this is prohibiting the State from correctly conducting its inherent function to organize elections, but it is not clear, it is a bit hasty to come to that conclusion.

In our opinion, this rule of international law is not the most adequate to adjudicate responsibility against a State for interfering in another State's democratic processes. The concept of sovereignty is too broad, and there is not enough state practice to establish the threshold of violations of sovereignty. Under the conditions established by some States, a violation of this principle could consist of a mere declaration of foreign heads of government about the elections, a common practice of many governments with interests abroad. This could also be the case of foreign governments making promises or warnings if one candidate is elected over another.¹⁵³ In general, this cannot amount to a violation of sovereignty, there is no violation of the territorial integrity of the State or the functions of the government.

¹⁵¹ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part II*, EJIL:Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-ii/> (Accessed: September 3, 2021)

¹⁵² CyberLaw Toolkit, *Ukrainian parliamentary election interference (2014)*, July 6, 2021; From: [https://cyberlaw.ccdcoe.org/wiki/Ukrainian_parliamentary_election_interference_\(2014\)](https://cyberlaw.ccdcoe.org/wiki/Ukrainian_parliamentary_election_interference_(2014)) (Accessed March 17, 2022)

¹⁵³ There are promises or threats that could amount to coercion, and in those cases, they should be considered a breach of state's sovereignty. For example, from the cases, seen in chapter one, in the 1953 West Germany election, the US threatened that if the opposition candidate won, it would bring disastrous effects for the country. An open and abstract statement that does not say that the US will act against West Germany from the decision made. On the other hand, we have the case of the Poland royal election of 1697, where Peter the Great threatened with declaring war on Poland if his candidate was not chosen, a clear violation of sovereignty that can even be considered a violation of the prohibition of the use of force with nowadays standards.

C) Non-intervention principle

Now it is time to study another rule of international law that emanates from the sovereignty principle and has been frequently mentioned in the previous pages. The prohibition of intervention is an old rule of customary international law. More recently it is defined in the 1970 Friendly Relations Declaration in the terms that *Every State has an inalienable right to choose its political, economic, social, and cultural systems, without interference in any form by another State.*¹⁵⁴ As a mirror to that right, *No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.*¹⁵⁵

This Declaration, as a resolution of the General Assembly, is not binding to States, although due to the consensus it provoked, it is considered by the Court as an instrument to reflect the *opinio iuris* of States on the principle of non-intervention.¹⁵⁶

The UN group of experts that mentioned at the beginning of this chapter confirmed in their report that the Prohibition on intervention applies to the context of cyberspace.¹⁵⁷ Some States that consider the prohibition on intervention to apply to electoral interferences are the United States, the Netherlands, Australia, and the United Kingdom.¹⁵⁸ However there is not enough state practice or *opinion iuris* to say that there exist specific elements when dealing with a violation of this principle in cyberspace and with elections, so we are left with the classic formulation made by the ICJ in 1986: *Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.*

In the *Military and Paramilitary Activities in and against Nicaragua* case above mentioned, the ICJ established that for an intervention to be unlawful it must update

¹⁵⁴ UNITED NATIONS, *Declaration on principles of international law friendly relations and co-operation among states in accordance with the charter of the United Nations*, A/RES/2625(XXV), 24 October 1970 p. 7

¹⁵⁵ *Idem*

¹⁵⁶ MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (Nicaragua v. the United States of America), Merits, Judgment. I.C.J. Reports 1986, p. 14. pp. 205

¹⁵⁷ UNITED NATIONS, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN Doc. A/70/174, 22 July 2015

¹⁵⁸ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021)

two elements. The first is that the intervention affects another State's *domaine réservé*, i.e., their internal affairs. According to the 1970 Declaration, the internal affairs of a State would consist of its *political, economic, social, and cultural systems*. The second element is that the State employed methods of coercion during the operation.

The *domaine réservé* of the States is a concept left to them to decide, is the state practice the one that will define the scope of the idea. Instruments like the UN Charter are silent to define it. That is why the Court adopted in the *Nicaragua* case the scope of the Friendly relations declaration of 1970, specifically the “choice of the political system” to illustrate the concept. This means that an election is part of the *domaine réservé* of democratic States, which is by nature a political exercise to choose the representatives of the State, heads of government, or in some cases fundamental decisions about the essence of the State as in a referendum.¹⁵⁹

The ICJ further developed in the aforementioned case that an *intervention is wrongful when it uses methods of coercion*.¹⁶⁰ Coercion is to compel a State to take a course of action that it would not otherwise voluntarily pursue. The goal of the intervention must be to effect change in the behavior of the target State.¹⁶¹ The Tallinn Manual 2.0 defines coercion as *an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act involuntarily or involuntarily refrain from acting in a particular way*.¹⁶² This could be achieved through the use of threats, force, or manipulation.¹⁶³

In other words, not all interventions are unlawful, because not all of them are coercive. Therefore, it must be distinguished between interventions in foreign elections that are merely influential or persuasive from the ones that deprive the

¹⁵⁹ The 2014 referendum for the independence of Scotland and the 2016 United Kingdom European Union membership referendum are two great examples of these exercises.

¹⁶⁰ MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (*Nicaragua v. the United States of America*), Merits, Judgment. I.C.J. Reports 1986, p. 14. pp. 205

¹⁶¹ Letter of 5 July 2019 on the international legal order in cyberspace, Government of the Netherlands.

¹⁶² SCHMITT, Michael, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

¹⁶³ WHEATLEY, Steven, *Cyber and Influence Operations Targeting Elections: Back to the Principle of Non-Intervention*, EJIL: Talk! October 26, 2020; From: <https://www.ejiltalk.org/cyber-and-influence-operations-targeting-elections-back-to-the-principle-of-non-intervention/> (Accessed: September 4, 2021)

State of its freedom of choice. This is the main difference with the principle of sovereignty, which only requires the first of the elements outlined in the *Nicaragua* case: to intervene (within the scope of Public International Law) in an inherent function of the State. But the non-intervention rule requires this element and the use of coercive methods. In the sovereignty rule, all interventions may be unlawful when they are without the consent of the target State, in the prohibition of intervention just the interferences that deprive the State of its freedom of choice.

Now the three main conducts that can be considered methods of coercion in the actual development of international law will be further developed. These are coercive threats, force, and manipulation.

A coercive threat is understood as “Your money or your life”.¹⁶⁴ A country is compelled by another in a way that it will not voluntarily pursue just because they are under a threat of severe consequences by the other State. The victim State is for example under threat of invasion, or a blockade if the demands of the coercive State are not met. This means that without the factor of the threat the State will make different decisions, but because of the threat is not free to do so. Not all threats will be considered to be unlawful, just those that definitively deprive a State of its freedom to choose and make them take a conscious unwilling act. This will have to be studied on a case-to-case basis.¹⁶⁵

Coercive force is to exercise power over a victim State to force it to do something in another way it will not do. It is the equivalent of taking one’s hand and forcing him to sign a contract. Is an action that forces, not just with threats but with actions to a State to do something that in other circumstances it will not do. This could be the example of an embargo, a declaration of war, a cyber-attack, or a violation of the territorial sovereignty of another State.¹⁶⁶

¹⁶⁴ We must remember that the ICJ equated the use of force and the *threat* to use force in the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion.

¹⁶⁵ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about “Coercion”*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 15

¹⁶⁶ LIN, Herbert et KERR, Jaclyn, *Op.cit.*

These two methods are accepted as coercive by customary law. It is the approach made by the ICJ in their judicial decisions. However, there is a third method accepted by some scholars to integrate this portfolio, and that is necessary to outlaw disinformation campaigns and fake news, the main tool of foreign powers to meddle in elections nowadays.

This third method is coercive manipulation. Manipulation consists in making false statements, the construction of an erroneous context so the victim will decide to follow that fake reality, constructed by the manipulator. A liar is someone that does not believe in his lie but even then, decides to expose the victim with false information to make him take a decision he will not voluntarily do so. Manipulation is wrongful because as Hugo Grotius said *it undermines the right of the target to "liberty of judgment," which is the State's right to come to its own conclusion, based on a proper understanding of the facts.*¹⁶⁷ This is what *fake news* does to the voters in an election. For example, voters will be less disposed to vote for a candidate after they have seen a video on social media (false) that declares that the candidate has severe health issues that undermine his capacity to run for office. It is important to say that manipulation to exist, must be based on false statements. To provide someone with facts, even if that knowledge of the facts will make the target take a different decision is not coercion, it can be considered persuasion or simply providing the proper facts which are not illegal.

These methods will be illustrated with an example. A does not want B to cross through the door. There are different methods A could perform to avoid B from crossing. For example, A could invite B not to cross the door, A could tell B that it is too cold outside, or A could tell B that if he stays, he will pay him. These methods are not coercive, because B maintains his freedom to decide whether to cross the door or not. But A could use other methods. A could lock the door, A could threaten B with killing him if it crosses or A could tell B that outside is C waiting for him to kill him (even when A knows this is not true). In these three last examples, A used force,

¹⁶⁷ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 17

threats, and manipulation to avoid B from crossing the door, A used coercive methods against B, which deprived B of taking a free decision.

Speaking again about manipulation, it must be made clear that although it can be considered as a coercive method under the elements provided by some scholars such as Wheatley, there is no state practice or judicial decision to support this affirmation. The Court leaves the door open in the *Nicaragua case* by not defining methods of coercion, however, there are still doubts to consider manipulation as coercive in international relations. For example, in the case of a disinformation campaign during an election, the targets are the voters, not the government of the State.

Certain cyber operations are targeted to affect the ability of the State to conduct an election and others are directed against the voters. An example of the former would be an attack against the electoral system to display the wrong winner or to miscount the votes. This is a method of coercion; the State uses force to alter the behavior of the target State. An example of cyber operations that could indirectly affect the ability of the State is to target the voters, for example by posting on social media fake voting places or by deceiving the voters by telling them they can vote by other means as in the 2016 US presidential election when the voters were convinced by some posts in social media that they could cast their vote through a simple phone message, and therefore they did not go to vote the day of the election.¹⁶⁸

As it was previously mentioned, some authors such as Wheatley and Schmitt consider that these indirect operations must be considered coercive by nature and therefore outlawed by the prohibition on intervention. This study shares the view that they are coercive in the form of manipulation, however, there is not enough state practice to sustain this position. There are questions if these cyber operations affect the ability of States to run the election. Here a discrepancy between Wheatley and Schmitt can be found.

¹⁶⁸ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part I*, EJIL:Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/> (Accessed: September 3, 2021)

On one hand, Wheatley sustains that the intention of the State to intervene in another's election is enough to be considered coercive and therefore unlawful. For example, to even try to meddle with the electoral digital system of a State is enough to sustain coercive behavior and therefore a violation.¹⁶⁹ Schmitt on the other side considers that a cyber operation must be effective to be coercive, this means that the proportion of the voters tricked in the 2016 election on how to cast their vote must be substantial, if not, the principle is not violated.¹⁷⁰ That is why he has doubts about considering disinformation campaigns of *fake news* as coercive because it is very difficult to measure its effectiveness if not impossible, how to know how many voters decided against Hillary Clinton because they saw a post describing her as the antichrist? Or how many people did not go to vote because they saw on the internet that the polling places were closing hours after the actual time? We can probably know how many people saw the false information, but not how many of them were affected in their behavior by this.

As it can be appreciated it is not clear if manipulation is proscribed by the prohibition on intervention. We need clear rules about this and more state practice to see it. With the rules as they are it would seem that only force and threats are unlawful methods of coercion.

D) Right to self-determination

Now this study shall move to another rule that emanates from the principle of sovereignty. The right to self-determination can be found nominally in Article 1 of the UN Charter and Article 1 of the International Covenant on Civil and Political Rights. It is a human right. The latter defines self-determination as the right of peoples to *determine freely and without external interference their political status and to pursue freely their economic, social, and cultural development*.¹⁷¹

¹⁶⁹ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 19

¹⁷⁰ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part I*, EJIL: Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/> (Accessed: September 3, 2021)

¹⁷¹ UNITED NATIONS, *International Covenant on Civil and Political Rights*, 1976. Article 1

At glance, this definition has been seen before, it looks like the same definition of the non-intervention principle and the sovereignty principle which is the base of both. However, they differ in their focus. The Prohibition on intervention is centered on the State and its representative: the government. Self-determination is focused on the population and is a right of the people.¹⁷²

It can be perceived the importance of this rule of international law by finding it in the first Article of both the Charter and the Covenant. It is usually associated with the right of the people to decide about their independent statehood, association, or integration with another State or some other political status.¹⁷³ But the content remains unclear in many aspects, for example, if this principle includes the right to secession from the State.¹⁷⁴

Another question that arises is who the people are. If it refers to the total population of a State or if it can be represented by minorities inside that State. If so, they should have the right to decide their political status, even against the will of the government or the majority. That is why in practice this principle is usually used just in the context of decolonization.¹⁷⁵ In general, with its current development self-determination does not allow secession from States.

When moving to the field of human rights other problems emerge. As for self-determination, it could be argued that an electoral interference could also violate other human rights such as the right to vote, liberty of expression, or the right to privacy, depending on the method of intervention employed. However, there is the issue of *extraterritoriality*, because a State meddling in an election is violating the right of people under the jurisdiction of other States. There are arguments to say that States must respect human rights outside their borders. The mechanisms to enforce

¹⁷² TSAGOURIAS, Nicolas, *Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace*, SSRN, August 20, 2019; From: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438567 (Accessed: September 4, 2021) p. 13

¹⁷³ KLABBERS, Jan, *International Law*, 3rd Edition, Cambridge University Press, Cambridge, United Kingdom, 2021 p. 311

¹⁷⁴ For example, the case of Catalunya. The principle of self-determination is questioned if it allows separating Catalunya from Spain.

¹⁷⁵ The right to self-determination is the basis used by former colonies to get independence from the imperialist states in the last century, especially in Africa and Asia.

human rights are complicated and would deserve a full thesis by themselves, which results in the study of just the principle of self-determination and not all human rights.

From the context of this principle, it can be seen that it was designed to allow colonies to become independent. The Trusteeship Council of the UN was created precisely as a mechanism to enforce self-determination rights around the globe with outstanding results. However, decolonization is not the same as an election, maybe just in particular cases when the democratic exercise is about this topic, as a referendum for independence. If there are doubts about who the people are, there will be even more doubts about the way the people will manifest their will. For example, Vladimir Putin used the right to self-determination as an excuse to annex Crimea in 2014 and to support the separatists in the Donbas region, in Ukraine.

Self-determination is seen as a collective right; therefore, it cannot be considered violated when some voters are targeted by a disinformation campaign. However, it is arguable if it may be violated when it happens systematically and on a bigger scale.

There is no state practice or *opinion iuris*, nor conventional law that supports the idea that interfering with an election violates the right to self-determination. In the mind of the States sovereignty and the Prohibition on intervention are the rules that best suit this purpose.

E) Instruments of international law

Now this work will briefly study some international instruments that regulate cyberspace and can be considered to be violated by a State interfering in a foreign election through digital means. Our work follows with the study the Budapest Convention on Cybercrime and the Broadcasting Convention, both international treaties binding to the parties. It will also mention the Tallinn Manual, which is a non-binding instrument.

(i) Budapest Convention¹⁷⁶

The Budapest Convention on Cybercrime is an international treaty from 2001 that entered into force in 2004. It was drafted by the Council of Europe and has been signed and ratified by almost all European countries and some abroad as the United States, Japan, and Canada. By 2020, 65 States are parties to this treaty.¹⁷⁷

This Convention was created to outlaw cybercrime and prosecute it internationally. It obliges the States to take steps to legislate and ban from their domestic laws the crimes in cyberspace proscribed by the treaty. It also has an obligation to cooperate between the parties to fight cybercrime and provide mutual assistance, such as sharing information and keeping cyberspace under surveillance.

It has the purpose to outlaw cybercrimes performed by individuals, not States, that in many cases can perform a cyberattack from the territory of a foreign State, having effects on another State. This Convention aims for States to help each other to fight cybercrime even when they are not the target, but the hacker is using infrastructure in that State to conduct its illegal conduct.

In the case of meddling in a foreign election, the Budapest Convention will outlaw any attempt by hackers to intervene in the electoral digital system, by accessing illegally, intercepting data, misusing devices, digital fraud, or stealing information.¹⁷⁸ However, it does not oblige States not to perform these conducts.

This does not mean that the Convention is useless. A State could violate the treaty under its duty of *due diligence*, if the State allows a group of hackers to use its territory and infrastructure to commit cybercrimes against another State, the former will have international responsibility.¹⁷⁹ Because of this international treaty,

¹⁷⁶ COUNCIL OF EUROPE, *Convention on Cybercrime*, Budapest, 2001; From: <https://rm.coe.int/1680081561> (Accessed: September 15, 2021)

¹⁷⁷ Mexico has been invited to ratify the treaty by the Council of Europe, but it has not.

¹⁷⁸ For example, when Russian hackers allegedly stole Hillary Clinton's and the Democratic National Committee's emails, which showed collusion against the other aspirant for the democratic candidacy, Bernie Sanders, damaging the Democrat candidate's campaign.

¹⁷⁹ *Infra*. The topic of *due diligence* will be further developed in the chapter about the responsibility of States.

the State is responsible for the cyber activities that are performed on its territory and must stop them when recognized.

Despite this, the Convention on Cybercrime was not drafted to regulate cyber operations conducted by States and therefore is not the best instrument to make a State accountable for interfering in a foreign election. Moreover, it just forbids specific conducts embodied in the treaty, it says nothing about other methods of intervention such as threats, disinformation campaigns, or declarations of public officers.

(ii) Tallinn Manual

The Tallinn Manual has been studied in other sections of this work. Now some general information about this instrument will be included.

The Tallinn Manual is a non-binding study published in 2013 by a group of international experts promoted by NATO to explain how international law applies to cyberspace, especially to cyberwarfare, in the context of *jus ad bellum* and *jus in bello*.¹⁸⁰ This means that this work provides an interpretation of the rules of humanitarian law and some general principles of law. For example, it interprets the rules of sovereignty, use of force, and the prohibition on intervention in cyberspace as it was seen in the last sections.

According to its *soft law* nature, States are not bound to comply with the Manual, this study just provides light on the interpretation of the rules of international law as *teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*.¹⁸¹ Therefore, States cannot *per se* violate the Tallinn Manual, but rules of international law that can be interpreted with the parameters of the Manual.

¹⁸⁰ SCHMITT, Michael, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

¹⁸¹ Article 38, UNITED NATIONS, *Statute of the International Court of Justice*, 1945

(iii) International Convention on the Use of Broadcasting in the Cause of Peace

The Broadcasting Convention is an international treaty from 1936, created in the context before the Second World War when States used radio transmissions to disseminate false information on the territory of other countries. States were worried that the propagation of this *fake news* could provoke unrest in the population and endanger peace and security or even incite war. Bolsheviks and fascists used the communications infrastructure to propagate their ideology throughout Europe.

The Convention specifically prohibits transmissions that could incite the population against the internal order of a State,¹⁸² war propaganda,¹⁸³ and false information. Article 3 of the Convention says:

The High Contracting Parties mutually undertake to prohibit and, if the occasion arises, to stop without delay within their respective territories any transmission likely to harm good international understanding by statements the incorrectness of which is or ought to be known to the persons responsible for the broadcast.

They further mutually undertake to ensure that any transmission likely to harm good international understanding by incorrect statements shall be rectified at the earliest possible moment by the most effective means, even if the incorrectness has become apparent only after the broadcast has taken place.

There could be some problems with the application of this Convention. In the first place, it was created to regulate the broadcasting of radio and television, not the internet, which did not exist at that time. Nevertheless, it could be argued that according to the rules of interpretation in international law,¹⁸⁴ the purpose at the time was to include all existing and future platforms to disseminate information, and therefore it should apply to cyberspace.

¹⁸² Article 1, LEAGUE OF NATIONS, *International Convention concerning the Use of Broadcasting in the Cause of Peace*, Geneva, 1936, Treaty Series, Vol. CLXXXVI, 1938, p. 301

¹⁸³ Article 2, *Idem*.

¹⁸⁴ The rules of interpretation can be found in Article 31 of the Law of Treaties which says in its first paragraph that "A treaty shall be interpreted in good faith under the ordinary meaning to be given to the terms of the treaty in their context and the light of its object and purpose." UNITED NATIONS, *Vienna Convention on the Law of Treaties*, 1969

Another obstacle is the number of States parties to the Convention.¹⁸⁵ Despite being a treaty more than 80 years old, it is in force to just 29 States, and many more have denounced it in the 80s, including important States such as the United Kingdom, France, the Netherlands, and Australia. The United States has never been part of it. This avalanche of denunciations happened because the Soviet Union and other socialist States ratified the Convention and started to interpret the meaning of false information very broadly, on their point of view all the information against socialism was considered to violate “*good international understanding*” and started to claim responsibility to the Western countries on this ground. However, all socialist States made at the same time a reservation not to allow the jurisdiction of the ICJ. When they saw that the board was not fair anymore, the western states cited above decided to leave the Broadcasting Convention. In other words, this Convention applies just to a few States and does not include the big players of the international chessboard nowadays.¹⁸⁶

Also, is important to say that under this rule, States are only responsible for the false information transmitted from within their borders. Therefore, even if some companies that make *fake news* are under the control of a State, this State will not be responsible for them if they operate from outside the country. This is the case for many communications companies that usually have offices operating worldwide. For example, RT which is one of the most important Russian TV networks operates in Latin America from Mexico City.

It is also important to notice that the purpose of the Convention is to forbid false information that could damage the relations between two or more States, therefore if the content of the news does not have an international component it is less likely that it will be considered to violate the treaty.¹⁸⁷

For all these reasons this thesis would say that the Broadcasting Convention could be used to claim responsibility for disseminating *fake news* in cyberspace, but

¹⁸⁵ Mexico has not signed nor ratified the Convention.

¹⁸⁶ BAADE, Bjornstjern, *Fake News and International Law*, The European Journal of International Law, February 14, 2019; From: <https://academic.oup.com/ejil/article/29/4/1357/5320172> (Accessed: September 4, 2021) p. 1368

¹⁸⁷ *Ibidem* p. 1369

only when they damage international relations. The main problem is the number of parties to the Convention, it is a very small number that does not include the main actors in foreign elections interventions such as Russia¹⁸⁸, China, Iran, France, Ukraine, the United Kingdom, or the United States.

In the next chapter, it will be studied the application of these rules of international law to the different methods that could be employed by States to meddle in foreign elections.

¹⁸⁸ Like said earlier, Russia is part of the Convention, but it has a reservation denying the jurisdiction of the Court, so if the Convention is violated, Russia will go on trial only if it wishes, a situation not likely to occur.

FOURTH CHAPTER.- ILLEGALITY OF INTERVENTIONS IN FOREIGN ELECTIONS

4.2 Methods of intervention and their lawfulness

Now the lawfulness of the different methods of interventions that the States use to meddle with foreign elections will be analyzed. This study uses the methods described by Levin¹⁸⁹, cited in chapter 1 of this thesis. These are campaign funding, *dirty tricks*, campaigning assistance, threats or promises, and cyberattacks must be added to the list, which is the most recent tool and also the one that is becoming more relevant and of greater concern to the States. To determine the legality of these methods the work will study them in the light of the rules of international law that were seen in the last section.

A) Campaign funding

One of the most common and easiest ways to intervene in foreign elections is by funding the campaign and activities of one of the candidates or one of the political parties. This is a common practice in foreign interventions and domestic interventions. Domestic funding is perfectly legal in some states, like in the United States where political campaigns are mainly sponsored by private contributors. And on the other hand, we have States where the funding is restricted to public resources, or where private funding is limited.

However, in international relations, there is no specific rule to prohibit campaign funding, and according to the general principle of law that we can find in the *Lotus case*¹⁹⁰ *in the absence of a rule in international law to the contrary, a state may do whatever it pleases.*¹⁹¹ This means that if some conduct is not prohibited, then it is permitted. It is our position that there is no existing rule of international law

¹⁸⁹ LEVIN, Dov H. *Partisan electoral interventions by great powers: Introducing the PEIG Dataset*, cmps, 2019; From: <https://journals.sagepub.com/doi/pdf/10.1177/0738894216661190> (Accessed: September 4, 2021)

¹⁹⁰ This was a case resolved by the Permanent Court of International Justice, the judicial branch of the League of Nations, between France and Turkey to establish who had jurisdiction over a collision between ships of both States on the high seas in 1926.

¹⁹¹ CRAWFORD, James, *Brownlie's Principles of Public International Law*, 8th Edition, Oxford University Press, New York, United States, 2012 p. 477

that prohibits campaign funding by foreign States as it will be explained in the following paragraphs.

First, there is no international treaty that prohibits campaign funding by foreign powers. We must then move to the rules of customary international law. There is not enough state practice and *opinion iuris* to establish that this activity is illegal under international law. Although many States prohibit this practice, even if that practice is illegal under domestic law, it does not apply to foreign States. It must be remembered that in general, States cannot use internal law to oblige a foreign State to act in a certain way. Therefore, even if the conduct is not permitted nationally, it does not apply to foreign actors.

The big exception to this case can be found in the 1961 Vienna Convention on diplomatic relations¹⁹² and in its sister 1963 treaty regarding consular relations¹⁹³, where the envoys or representatives of the sending State are obliged to respect the laws of the receiving State, including the prohibition to fund political campaigns. Therefore, if the funding can be directly linked to the activity of the Embassy or the Consulate in the receiving State, then we will be in contact with a violation of these treaties. However, this prohibition will not apply to other authorities of the sending State.¹⁹⁴

Although many States ban campaign funding by foreign powers,¹⁹⁵ this is not a rule that we can find in international law. For example, the Venice Commission¹⁹⁶ has adopted guidelines recommending the States of the Council of Europe ban the funding of political parties by foreign interests.¹⁹⁷ However, this is a rule of *soft law*

¹⁹² Article 41. 1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State. UNITED NATIONS, *Vienna Convention on Diplomatic Relations*, 1961

¹⁹³ Article 55 of the convention provides the same rule about not interfering in the internal affairs of the receiving State but now for the consular body. UNITED NATIONS, *Vienna Convention on Consular Relations*, 1963

¹⁹⁴ CRAWFORD, James, *Op.cit.* p. 838

¹⁹⁵ According to the Institute for Democracy and Electoral Assistance 126 States worldwide have a ban on donations from foreign interests to political parties. INTERNATIONAL IDEA, *Political Finance Database*, 2022; From: <https://www.idea.int/data-tools/data/political-finance-database> (Accessed: April 20, 2022)

¹⁹⁶ The Venice Commission is a consultative organ of the Council of Europe formed by experts on constitutional law.

¹⁹⁷ *Political parties may receive private financial donations. Donations from foreign States or enterprises must however be prohibited. This prohibition should not prevent financial donations from nationals living abroad.* VENICE COMMISSION, *Guidelines and report on the financing of political parties*, adopted by the Commission at its 46th Plenary Meeting, (Venice, 9-10 March 2001)

and has no binding character on any State. Therefore, in the current situation of its development, funding foreign political parties is not yet prohibited by an express rule of customary law.

Now our study will move on to the other more general rules that were seen in the first part of this chapter. It will be difficult to say that we are in front of a violation of the non-intervention principle because there is no method of coercion employed by the State that funds a campaign in another State. Giving money to one of the candidates or political parties is not *to force that State to act involuntarily or involuntarily refrain from acting in a particular way*.¹⁹⁸ If the non-intervention rule does not apply, even less the prohibition on the use of force. Some authors consider that depending on the circumstances, funding a campaign may lead to coercion when the number of resources is such that they will go a long way toward defining the outcome of the election.¹⁹⁹

The rule that could be violated is the state's sovereignty. Because, unquestionably, an election is a matter exclusively under the *domaine réservé* of a State. Foreign powers have an obligation not to meddle with the internal affairs of other States without their consent. If foreign funding is prohibited under domestic law, it is obvious that the State does not consent to that kind of intervention in its elections. However, depending on what position we take on understanding the threshold to violate the principle of sovereignty we will know if a violation could take place.

It is clear that there is no consent to fund the election, but we should also study the effects of that intromission if it has produced an affectation on the territorial sovereignty or the inherent functions of the State. The standard of proof will be high in this regard. That is, it would be difficult to demonstrate that the outcome of the election was affected by the donation and that if it had not existed, the result would have been different.

¹⁹⁸ SCHMITT, Michael, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

¹⁹⁹ JAMNEJAD, Maziar et WOOD, Michael, *Op.cit.*

Under this approach, it is our position that the best way to claim responsibility from a foreign State by funding a political campaign is the sovereignty principle, but even then, the standard of proof will be very high if an effects-based criterion is used.

B) Dirty tricks

The portfolio of dirty tricks is quite large. The study will focus on the disinformation campaigns performed by foreign States to influence the opinion of the voters to favor or despise one of the options in an election. This was a method allegedly employed by Russia in the French election of 2017, and the elections for the President of the United States in 2016 and 2020. The most important aspect and basis of our work are that it is performed through digital means and in cyberspace. Although there could be other means of dissemination as public TV, radio, or traditional newspapers, the same rules would apply in principle.

Fake news is defined as *lies – that is, deliberately false factual statements, distributed via news channels.*²⁰⁰ This is a strict definition of the term, but in a wider sense it will include distorted news, this is accurate information that is framed and presented in such a way as to make its recipients likely to draw certain (false) conclusions. For example, if the media just reports the crimes committed by migrants (true information because they happen), it will make their audience reach the false conclusion that all crimes are committed by migrants, changing their attitude towards them.

This *fake news* may be distributed by a campaign of misinformation or disinformation. Both are based on false information, the difference is that the latter is distributed deliberately, in the knowledge that the facts are wrong.²⁰¹ Therefore, misinformation is not illegal, because it has no malice in distributing information that you do not know is false.

²⁰⁰ BAADE, Bjornstjern, *Op.cit.* p. 1358

²⁰¹ Misinformation is defined as *the act of giving wrong information about something; the wrong information that is given*. While disinformation is defined as *false information that is given deliberately*. Oxford Learner's Dictionaries.

There is a consensus that providing factual information is not an illegal conduct *per se*, at least of the principle of non-intervention, because *in the same way that attempting to influence another person by “just providing the facts” is not wrongful, efforts by one state to influence the population of another by providing factual information and commenting on news stories is not prohibited under international law.*²⁰²

It is understood that providing factual information will only allow the voters to make more reasoned use of their right to select the option they think is best based on reality. It is thought to empower the voter to make better decisions.

This may be done through the practice known as *doxfare* which *involves the hacking of private computer systems and putting any sensitive information obtained into the public domain, with the intention of influencing the internal affairs of another State.*²⁰³ This was the case with the emails of Hillary Clinton leaked in 2016 and the messages of Emmanuel Macron leaked in 2017. The distribution of the leaked information is not illegal, the cyberattack and the hacking of the computer system is a different matter that will be developed in another section. In the 2016 election, for example, the illegally obtained information was made public by WikiLeaks, this action is not a violation of international law, maybe just the hacking allegedly performed by Russian hackers.

However, there is an exemption according to Wheatley. He considers that providing factual information will be wrongful when it displays a singular narrative. This means that it will be wrong when it presents voters with only one perspective, but with such an overwhelming amount of information that it silences other voices and opinions. This is very difficult in countries where there is freedom of speech and press, however, it has been seen how sometimes the algorithms of social networks, for example, present only one narrative to users, which could cause them a wrong or partial perspective of reality. For example, in the 2018 local elections in Taiwan,

²⁰² WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about “Coercion”*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 23

²⁰³ *Idem*

voters were bombarded with propaganda through Facebook, Twitter, and WhatsApp by the government of China to undermine the reputation of the governing Democratic Progressive Party, which supports Taiwanese independence from mainland China.²⁰⁴

Another example of providing factual information is the US intervention in the Argentinian election of 1946 when they revealed the connections of Juan Domingo Peron and his collaborators with the Nazi regime. This action by the US could be considered legal because it displayed accurate information to the Argentinian people. Despite all this, providing factual information could still be considered a violation of sovereignty, because it is meddling in the internal affairs of the State, even when there is no coercion. That is the reason Peron won the election, he changed the public conversation from his ties with the Nazis to the fact that a foreign power was trying to undermine him and his project for a better Argentina. In the end, it is considered that the intervention of the US improved his chances to win.

In another article, it is said that *whether a broadcast contravenes the non-intervention principle depends on all the circumstances. If it is deliberately false and intended to produce dissent or encourage insurgents, the non-intervention principle is likely to be breached. If factual and neutral, it is doubtful that the broadcast will constitute intervention, regardless of the effect it may in fact have.*²⁰⁵ Therefore, the effects do not matter, providing accurate information is not a coercive behavior and therefore not considered an illegal intervention.

Now, providing false information is a different matter, it is considered to be coercion as manipulation. This is because *the projection of a different set of facts constrains one's freedom to act by making certain options and conclusions no longer seem viable or making others seem mandatory.*²⁰⁶ This is, decisions are made upon facts, if you change the facts, you will alter the decision-making process and produce a different conclusion, in this case, more align with the interests of the foreign power.

²⁰⁴ *Ibidem*

²⁰⁵ JAMNEJAD, Maziar et WOOD, Michael, *Op.cit.*

²⁰⁶ BAADE, Bjornstjern, *Op.cit.* p. 1364

For example, if a couple of days before the election a fake video is released displaying one of the candidates having sexual relations with a minor it is clear that it will severely damage his image and will most probably lose the election. Voters are left without any other choice but to vote for the other candidate because they will not vote for a child molester, even when before the video they had a clear preference for that candidate. Releasing the video a few days earlier does not give the candidate's team time to deny it.

During the 2016 US Presidential election, there was a campaign on social media to show Hillary Clinton with medical problems, making many voters think that he was unfit to lead a country. If attributable to a foreign State, this campaign could have violated the principle of non-intervention. However, it must be remembered that there are some issues concerning the application of this principle, for example, that the target left without meaningful choice is not the government of the State but the voters. Also, considering manipulation as coercion is an idea found in doctrine but not in customary law or treaties.

Another tool employed by people distributing *fake news* is called *sock puppets*. This is a *pseudonym adopted by someone who has made a posting to some social media forum and then follows it up with a supportive posting using the pseudonym*.²⁰⁷ In other words, fake accounts of people and media use a constructed base to launch false information. For example, in the 2016 US Presidential election, it is believed that the Russians created fake accounts pretending to be Americans to spread false information or to disseminate truthful but biased information, always aimed at damaging the image of the Democratic candidate. In these cases, even when the information is factual it can be perceived as coercive because lying about the source can change the perspective of the audience. In the case of the Argentinian election of 1946, it would have probably ended very differently if the source of the *Bluebook* was not known by the voters.

²⁰⁷ WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 28

In a nutshell, providing accurate information by itself is not a violation of the principle of non-intervention. However, it could still be considered a violation of sovereignty but it is not reasonable that state practice will take this approach because there is a western tendency to defend democracy globally and to inform the voters to empower their right to vote, basing their decisions on facts. This also applies to distorted news, because although the conclusion made by the voter may be biased when the information provided is partial or tendentious, in essence, the information provided is factual.

On the other hand, providing fake news in its strict sense will violate the Prohibition on intervention but just if the premise that manipulation is a form of coercion under international law is accepted. But it could be perfectly considered a violation of sovereignty because it is meddling in internal affairs of the State without its consent and may affect the outcome of the election if performed on large scale.²⁰⁸ But also here must be remembered that using a different threshold, *fake news* must interfere in attributions of the State, for example, to conduct the elections if the lies are about the time and place of where to vote.²⁰⁹

Under the current development of custom, there are no clear grounds to affirm that disinformation campaigns are a violation of sovereignty or the Prohibition on intervention. more development and more declarations from States are needed to reach this conclusion.

On the other hand, a *fake news* campaign (in the strict sense) is a violation of the Broadcasting Convention. To disseminate false information from its territory is a violation of the Convention, even if it is performed by a private entity by the due diligence obligation contained in article 4. However, it carries other problems it was seen when talking about this Convention. If the fake news is distributed from within the State, even under the direction of the foreign State will make the Convention inapplicable. Also, if it fails to update other formal requirements as to affect the *good*

²⁰⁸ *Ibidem* p. 28

²⁰⁹ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part II*, EJIL: Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-ii/> (Accessed: September 3, 2021)

understanding between the States. And the biggest obstacle is that the Convention has been ratified by a small number of States, not including many important countries, only Russia, but with a reserve in the jurisdiction of the Court to apply it.²¹⁰

C) Campaigning assistance

To aid is to simply share the *know-how* to run a better campaign. This was an activity often employed by the US during the Cold War. Some States, interested in a candidate could send a team of experts to prepare him to display a better image to the voters. Nowadays this activity is often performed by private companies. Candidates hire these companies to spruce up their image and teach them how to present themselves in public, what to say and what to project. They are usually hired from local companies but there are consultants with a high reputation worldwide and are in demand in different countries.

In our opinion, this activity does not violate international law, even if performed by a foreign State, in the end, it leads to better political campaigns and a better exercise of democracy. There is no use of coercion nor intervention in the attribution of the State.

D) Threats or promises

Mere criticism of the internal politics of another state is not prohibited intervention. Usually, world leaders would make declarations concerning the internal affairs of a State. And on some occasions, those manifestations may influence the electorate of a State.²¹¹ For example in the US intervention in the West German election of 1953 seen in chapter 1, officers of the US publicly declared that voting for the opposition of the incumbent candidate will result in heavy consequences to the future of the country. More recently, in 2016 Barack Obama asked the British people to vote against Brexit because it could difficult future commercial relations with the

²¹⁰ BAADE, Bjornstjern, *Op.cit.* p. 1368

²¹¹ *Idem* p. 1365

United States.²¹² Both declarations are clear interventions in the internal affairs of States, however, they are not considered to be violations of international law.

This study believes that the correct rule to approach this kind of method is the principle of non-intervention, it is clear that these declarations in many cases will be about the *domaine réservé* of States, the question would be if the declaration amounts to coercion. Here it must be remembered that one coercion is the use of threats. Not every threat, but *warnings that could not reasonably be ignored, because they create a forced-choice situation, where the target is required to make the decision preordained by the foreign power.*²¹³ For example, a declaration that if a candidate is not chosen, an invasion will take place, like in the Poland royal election of 1697.

The threat or promise must be of such dimension that the voters will be left with no other choice but to vote for one option. This must be constructed on a case-to-case basis. Although many States usually condemn when other States say something about them that they do not like, on many occasions, these same States criticize others' internal affairs, or welcome them with open arms when foreign opinions are in favor of their internal politics. In this scenario is difficult to affirm that all outside criticism or even threats will amount to violations of the threshold of the Prohibition on intervention.

E) Cyber-attacks

Finally, cyber-attacks can easily be considered a violation of sovereignty and unlawful interventions. On some occasions, they may even amount to illegal use of force. Using cyberspace to disable or alter the electoral system of a State is an illegal intervention. It is a coercive behavior because it obliges the target State in a manner it would not voluntarily pursue.

²¹² WHEATLEY, Steven, *Foreign Interference in Elections under the Non-Intervention Principle: We need to Talk about "Coercion"*, Duke Journal of Comparative & International Law, 2020; https://eprints.lancs.ac.uk/id/eprint/142784/4/WHEATLEY_Duke_08_21.pdf (Accessed: September 4, 2021) p. 20

²¹³ *Idem* p. 30

*Where a state cyber operation takes control of or disables the functioning of, the ICTs that underpin the holding of elections, to ensure that the target acts as intended by the foreign power, this involves the coercive use of cyber power and constitutes a prohibited intervention.*²¹⁴

Taking as an example the Ukrainian election of 2014, the Russian GRU violated the prohibition on intervention because it was responsible for hacking the Ukrainian electoral system to display the wrong winner of the election. This is also a violation of sovereignty by intruding on one attribution that belongs to the State solely. In another case in 2016, the website of Ghana's Central Election Commission was hacked, and false results were announced from the Commission's Twitter account while votes were still being counted.²¹⁵

Cyberattacks could even amount to unlawful use of force if, for example, the effect of the attack is the destruction of the computer systems of the election. Or if for some reason the attack produces damages or even loss of life of electoral personnel.

There could be cyber-attacks not directed to the electoral system but others, like the hacking of the Democrat Committee to obtain the emails of Hillary Clinton. In that case, if attributable to a State, it may be a violation of the Budapest Convention or the sovereignty principle, because it has a big impact on the future of the elections. That without entering the realm of human rights like the right to privacy.

Now that it has been shown that the rules of international law that are violated when foreign States interfere in the electoral processes of other States, this work shall study how those wrongful acts are attributable to the State in the following chapter, as a prerequisite to making it accountable before the international community in terms of law, as will be seen in the last chapter.

²¹⁴ *Ibidem* p. 30

²¹⁵ MOYNIHAN, Harriet, *Op.cit.* p. 40

FIFTH CHAPTER.- INTERNATIONAL RESPONSIBILITY OF STATES

State responsibility is a principle of international law. Professor Malcolm Shaw²¹⁶ considers this principle as the legal requirement to repair from one State to another when the former has committed an internationally wrongful act against the latter. Any wrongful act committed by a State, whatever its origin, creates the duty to repair the victim State. Jan Klabbbers puts it in other words, that responsibility is “to denote the idea that some entity (a State) can be blamed for undesirable behavior”.²¹⁷

This means that responsibility is how a State may demand reparation in any of its forms to another State when it has violated an international obligation. This way, international law can be effective, because there is a real consequence to a State that violates it. Without responsibility, international law would consist of only a list of recommendations that States will follow at pleasure.

Klabbbers²¹⁸ highlights that the rules of responsibility are secondary because they exist to determine how primary rules (see Third Chapter) are created, interpreted, or in this case enforced.

According to Shaw, to configure the responsibility of a State, three requirements must be met. First, the existence of an international obligation between the two States from any source of international law;²¹⁹ Secondly, an act or omission attributable to the State against this obligation, and finally that this act or omission results in detriment to the State to which the obligation is owed.²²⁰ The damage does not need to be material, it could be moral or just the violation of a right from the other State, for example, the illegal entrance into the territorial waters of a State.

To clarify these requirements the *Corfu Channel* case will be briefly used.²²¹ In this case, the first to be resolved by the International Court of Justice (ICJ), British

²¹⁶ SHAW, Malcolm, *Op.cit.* p. 778

²¹⁷ KLABBERS, Jan, *Op.cit.* p. 329

²¹⁸ *Idem* p. 331

²¹⁹ The sources of international law can be mainly found in Article 38, paragraph 1, of the Statute of the International Court of Justice, which are international treaties, international custom, and general principles of law. THOMAS, Buergenthal, *Public international law in a nutshell*, 2nd edition. West Publishing Co; Minnesota, 1990, p. 20

²²⁰ SHAW, Malcolm, *Op. cit.* p. 781

²²¹ *Corfu Channel case*, Judgment of April 9th, 1949: I.C.J. Reports 1949, P. 4.

warships were damaged by sea mines when they were going through the Channel,²²² the existence of these mines was known by the government of Albania because the strait of Corfu was an area under constant surveillance and tensions between Albania and the United Kingdom were on rising, therefore they decided not to warn the vessels. By doing this the Court found Albania responsible for the damage to the warships and obligated Albania to repair the United Kingdom.

The first requirement would be the existence of an international obligation, in this case, the Court Stated that Albania had an obligation under several principles, mainly: elementary considerations of humanity, the principle of maritime communication, and the obligation to not allow the use of its territory for acts contrary to the rights of other States.²²³ A second requirement is an act or omission attributable to the State. In this case, although it could not be proven that Albania lay the mines on the channel, it was proven that it knew about the existence of the mines and did not notify the British vessels when it had the opportunity, resulting in an omission to act. The third requirement is loss or damage. In this case, the damages consisted of two war vessels damaged by the mines (one beyond repair) and more than 40 sailors killed.

This is how responsibility works, these are the set of rules to make a State accountable for violating international law, and not to leave a wrongful act in impunity.

5.1 Responsibility of States for Internationally Wrongful Acts (2001)

The International Law Commission²²⁴ (ILC) prepared the draft articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) to provide a single document that will work to amount to the international rules regarding State

²²² The Corfu channel is an important strait for maritime commerce and transit located along the coasts of Albania and the Greek island of Corfu. Albania's government was not in good relations with the United Kingdom at that time, and they prohibited the British to use their territorial waters. On their part, the British claimed they were exercising their right of innocent passage.

²²³ Corfu Channel case, Judgment of April 9th, 1949: I.C.J. Reports 1949, P. 4. P. 22

²²⁴ This institution was created in 1947 by the General Assembly with the object of promoting and codifying international law. This is achieved by being an authority highly considered by international courts in their judgments and by promoting the draft of bodies of law that in the future could become binding treaties, as the Vienna Convention of 1961, or the Law of the Sea in 1958. SHAW, Malcolm, *Op.cit.* p. 119

responsibility.²²⁵ The General Assembly of the United Nations adopted the work of the Commission in 2001, in resolution 56/83.²²⁶ Although the resolutions of the General Assembly are not binding to States, these articles are thought to reflect customs regarding State responsibility and are considered for this reason highly authoritative.²²⁷

According to the ILC, for a State to be held responsible it is required that it commits an internationally wrongful act. An International wrongful act has 2 main elements: (1) it must be attributable to the State, and (2) it must constitute an international obligation of that State.²²⁸ It is important to take into consideration that an internationally wrongful act is determined by international law, not domestic law. This principle is entailed in article 3 of the document.²²⁹ Most of the authors in international law maintain the principle of objective responsibility, which means that the State will be responsible for any damage it may cause as a consequence of its wrongful act, in contrast to the subjective responsibility or *fault theory*, which requires intention or negligence from the State to be liable for.²³⁰

The State is an entity, like any legal entity, which cannot act by itself, it acts through others, like its political organs and government employees. International law signals some rules in which the wrongful conduct of other entities can be imputable to a State. Chapter two of the ARSIWA highlights how conduct, act, or omission could be attributable to a State. Now this study will concentrate on the persons or institutions whose conduct may end in responsibility to the State.

According to article 4, the conduct of any organ of a State must be considered an act of the State. The function of the organ is not relevant, only the position of the organ within the organization of the State. This includes law enforcement authorities,

²²⁵ These articles were created as soft law, which means that they are not actually law because the ILC works do not have a binding character, international law is created solely by States. The intention of the ILC was to present the draft with the hope of it becoming a treaty, an instrument of law, a situation that has not materialized. SHAW, Malcolm, *Op.cit.* p. 118

²²⁶ *Idem* p. 781

²²⁷ KLABBERS, Jan, *Op.cit.* p. 331

²²⁸ Article 2, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1; From: <https://www.refworld.org/docid/3ddb8f804.html> (Accessed: September 4, 2021)

²²⁹ Article 3, *Idem*

²³⁰ SHAW, Malcolm, *Op. cit.* p. 783

military forces, diplomatic personnel, migratory authorities, regulatory agencies, or the executive, legislative or judicial branches of the State.²³¹ Any person or institution acting as part of the body of the government. This attribution tool will be on most occasions very clear to determine because most of the State organ's actions are of public knowledge and every conduct executed by them will be considered as an act of a State automatically.

Moreover, if the act is performed by a person who belongs to or is considered to be an organ of a State, its conduct can be only attributable to the State if it is acting in his official capacity. This means that the acts of persons who make a wrongful act in their private capacity may not be attributable to the State. But let us be careful not to confuse acts under a private capacity and acts performed in an abusive way of such person's official capacity, known as acts *ultra vires*. The latter is attributable to the State under article 7 of ARSIWA.²³²

Article 5 of ARSIWA considers as an act of the State the conduct of persons or entities exercising governmental authority. This means that even if these entities are not officially part of any organ of the State, they perform an activity that corresponds to the government by the law of the State, and therefore their conduct should be considered a state act. This rule is applicable among other entities, to para-statal entities that perform government authority or former State corporations that have been privatized but retain some public functions.²³³ For example, in countries where some law enforcement functions are performed by private corporations or when a private company is in charge of the customs in an airport.²³⁴

There is not a clear definition of what governmental authority is. However, it can be inferred that it is an activity regulated by internal law that in essence belongs to the State's government but for a reason may have been delegated to entities that

²³¹ INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 87; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021)

²³² *Idem* p. 91

²³³ *Idem* p. 92

²³⁴ As examples: the PPA police in South Africa, Port Police forces in the United Kingdom that belong to the private companies responsible for the ports, or the San Francisco Patrol Specials.

are not *de iure* part of the government. These activities must be studied in each circumstance because they can vary in each society.²³⁵

Article 6 of ARSIWA provides that the conduct performed by an organ of a State at the disposal of another State will entail the former responsibility when it is exercising governmental authority. Even if the organ does not form part of the State, it is carrying out an activity on behalf of that State, and therefore its activity is attributable to the State that uses such organ. For this rule to be effective, it is necessary that the organ is handed over completely to the authority of the receiving State and stops being under the control of the sending State (at least temporarily). An example of this is when rescuers or army personnel are handed to another State to face a natural disaster or to assist them when attacked by another power, and they pass to be under the control or instructions of the receiving State.²³⁶ Another example of this is the role of the Judicial Committee of the Privy Council of the United Kingdom, which is the final court of appeal in many independent States within the Commonwealth, and in those cases, it is considered to act on behalf of the latter.²³⁷

Article 7 of ARSIWA embodies the question of fault. It considers that any conduct performed by an organ of the State, person, or entity exercising governmental authority will be considered an act of the State, even if it exceeds its authority or contravenes instructions. These acts are known as *ultra vires*²³⁸ by doctrine.²³⁹ Going back to the objective principle, the important aspect of responsibility is to restore the order damaged by a wrongful act, therefore if the latter exists, then someone has to pay.

²³⁵ INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 94; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021)

²³⁶ *Idem* p. 98

²³⁷ *Idem*

²³⁸ According to the Oxford Dictionary of Law it means *beyond the powers*, and it is defined as *an act by a public authority, company, or other body that goes beyond the limits*. Also defined by the Black's Law Dictionary as *a body exercising an invalid excess or power of authority*. Oxford Dictionary of Law, 7 edition, Oxford University Press, 2009; From: <https://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248> (Accessed: January 09, 2022)

Black's Law Dictionary Online, 2nd edition; From: <https://thelawdictionary.org/ultra-vires/> (Accessed: January 09, 2022)

²³⁹ INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 99; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021)

Sometimes entities exercising governmental authority may act in excess or against their domestic law, however, this is not sufficient to avoid international responsibility because it is understood that a State must have the power to control its agents. In a public manifestation where brutality is used by some law enforcement agents against a clear order from their superiors not to do so, it will still entail the responsibility of the institution, because the police department should control its police officers.

Another way to attribute responsibility is when a State controls the conduct of a person or group of persons. Article 8 of ARSIWA sets forth that the State is responsible for conduct when others are acting under its instructions or direct control. It is important to prove the existence of a link between the group that performs the conduct and the State. The ICJ used the term “effective control” in the *Nicaragua*²⁴⁰ case to explain how the conduct of the *contras* in Nicaragua could be considered an act of the United States when their performance could be understood under the direction of the U.S. government, and not just supporting or financing. This means that the State must be the one giving the orders and directing the conduct of these groups. The Court concluded that it is not enough to direct, plan or support, the group under control must have a total dependency on the State in all fields to recognize all their activities as on behalf of the State.

The Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia applied another control test in the *Prosecutor v. Tadić* case.²⁴¹ The Chamber applied a “general control test”, stating that it will be enough to exercise overall control over the private group to attribute their acts to the State, and not an absolute approach as the ICJ held in the *Nicaragua* case. The Chamber considered that it was not enough to prove an overall control based only on finance and equipment, but it also required involved participation in the planning and supervision

²⁴⁰ MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (Nicaragua v. the United States of America), Merits, Judgment. I.C.J. Reports 1986, p. 14. Para. 116

²⁴¹ *Case IT-94-1, Prosecutor v. Tadić*, (1999) I.L.M., vol. 38, p. 1518. For the judgment of the Trial Chamber (1997), see I.L.R., vol. 112, p. 1.

of military operations.²⁴² Therefore, if a private group is under the control of a State under one of these tests, their conduct may be attributable to the State exercising control.

Another way to attribute responsibility under Article 9 of ARSIWA is when the act is performed by a person or group in the absence of the official authorities. This may happen in the context where the government is absent in a region and has no organs to exercise authority and in consequence, another group starts to exercise that governmental authority which will be attributable to the State. These are rare occasions but may include mobs, revolutions, insurrections, or civil wars²⁴³ where the authority of the government and its capacity to fulfill all its functions is in question. Three conditions are required to consider the activities of these groups as a responsibility of the State: the conduct must be of governmental authority nature, the official authorities must be absent, and the circumstances must have made necessary the exercise of that authority, a requirement of law enforcement for example.²⁴⁴

Also, the conduct of an insurrectional movement that becomes a new government will be considered to be an act of the State under international law.²⁴⁵

Finally, even if conduct may not be attributed to a State under these rules, it will be considered an act of a State when that State adopts the conduct as its own.²⁴⁶

Another important point that must be highlighted is that electoral interventions can be in support of an incumbent candidate (a candidate in office) or support of a challenger (from the opposition). 52.2% of the interventions during the Cold War were in favor of an incumbent candidate.²⁴⁷ For example, the US intervention in West

²⁴² INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 106; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021)

²⁴³ SHAW, Malcolm, *Op. cit.* p. 791

²⁴⁴ INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.2, p. 110; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021)

²⁴⁵ Article 10, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1; From: <https://www.refworld.org/docid/3ddb8f804.html> (Accessed: September 4, 2021)

²⁴⁶ Article 11. *Idem*

²⁴⁷ LEVIN, Dov H. *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions*, Oxford University Press, New York, United States, 2020 p. 157

Germany in 1953 was at the request of Konrad Adenauer, chancellor of West Germany at the time. Article 20 of ARSIWA says that preclusion of wrongfulness exists when the conduct was performed with the consent of the State for the commission of a given act. Therefore, it could be said that interventions are not wrongful when they come with the consent of the State, in this case, at the request of an incumbent candidate, but not at the request of a challenger, because they do not have the authority to give such consent on behalf of their State.

Once the responsibility of a State is established, the victim State or States may ask for some kind of accountability to the State acting against its international obligations. Part 2 of the ARSIWA establishes some of the legal actions that these States may demand.

The first and most obvious action is that the State acting wrongfully must cease to keep performing the act if it is continuing and must offer guarantees that it will not perform it again.²⁴⁸ In the context of an intervention in a foreign election, once responsibility is established by financing a local party in the election, for example, the action must cease immediately.

A State responsible for an internationally wrongful act is obliged to repair the damage, whether it is material or moral. The articles consider three ways of reparation: restitution, compensation, and satisfaction. Restitution is to re-establish the situation as it existed before the breach. When restitution is not possible the State must compensate for the damage as payment. When the two previous options are not possible, the State must concede satisfaction, this is to acknowledge the breach and to apologize to the injured State.²⁴⁹

Therefore, to hold a State liable, it is necessary that it could be attributed to it from one of the ways highlighted previously, however, this is not always easy to do, as will be seen in section 5.3.

²⁴⁸ Article 30, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1; From: <https://www.refworld.org/docid/3ddb8f804.html> (Accessed: September 4, 2021)

²⁴⁹ Article 34, *Forms of reparation, Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation, and satisfaction, either singly or in combination, in accordance with the provisions of this chapter. Idem*

5.2 Due diligence

Another tool that could be used to attribute responsibility to a State is the principle of due diligence. The ICJ defined this obligation in the *Corfu Channel* case cited above as an “*obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*”.²⁵⁰ This obligation was brought to the realm of cyberspace in Rule 5 of the *Tallinn Manual* which entails that “*A State shall not knowingly allow the cyberinfrastructure located in its territory or under its exclusive governmental control to be used for acts that adversely and unlawfully affect other States*.”²⁵¹

Due diligence is a way of protecting the sovereignty of other States.²⁵² The ICJ held in the *Nicaragua* case that “*between independent States, respect for territorial sovereignty is an essential foundation of international relations*”.²⁵³ Therefore a State has a duty to procure that within its own capabilities, its territory will not be used by non-State actors to perform acts to the detriment of the rights of other States. This was exactly the reasoning in the *Corfu Channel*²⁵⁴ case, where sea mines were deployed in the Albanian territorial waters by an unknown group, but even when Albania knew about the location of the mines did nothing to deactivate the mines that would violate the right of innocent passage of foreign vessels, or at least warn the vessels of the dangers of passing by the mined channel.

In the context of cyber-attacks, States have a due diligence obligation not to allow activities in their territory that would constitute a violation of the legal rights of other States. For this rule to be effective, it is necessary that the State knows or at least should have known (although it would be very difficult to prove) that its territory is being used to violate other States’ rights. These would depend on the

²⁵⁰ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part III*, EJIL:Talk! October 19, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-iii/> (Accessed: September 3, 2021)

²⁵¹ SCHMITT, Michael, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013, p. 32; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

²⁵² SCHMITT, Michael, *In Defense of Due Diligence in Cyberspace*, 125 YALE L.J. F. 68, 2015; From: <http://www.yalelawjournal.org/forum/in-defense-of-due-diligence-in-cyberspace> (Accessed: November 15, 2021)

²⁵³ MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (*Nicaragua v. United States of America*), Merits, Judgment. I.C.J. Reports 1986, p. 14. Para. 202

²⁵⁴ *Corfu Channel* case, Judgment of April 9th, 1949: I.C.J. Reports 1949, P. 4. P. 22

circumstances and the capacity of each State to detect this kind of activity, as a general rule, more developed countries will have a higher standard to comply with this obligation.²⁵⁵ Also, a State will fail to comply with due diligence when another State notifies that its territory is being used to the detriment of its rights and the former State fails to take reasonable measures to terminate the conduct.²⁵⁶

If the intelligence agencies of the State detect that infrastructure in their territory is being used to perform cyberattacks against other States, they must terminate it. The *Tallinn Manual* considers that when a State fails to perform its due diligence obligations the victim State would be allowed to take appropriate countermeasures or to use force in self-defense.²⁵⁷

However, it is not very clear to experts how the due diligence rule applies to cyberspace, and although the *Tallin Manual* tries to respond to these questions, we must not forget this document does not constitute international law by itself, because it is soft law.

5.3 Difficulties to attribute international responsibility

As it has already been said, to claim international responsibility from a State it is necessary that an act or omission could be attributed to the State and that the act itself is a violation of an international obligation of that State. Sometimes the attribution of the act to the State is clear and the discussion relies on if the act consists of a violation of the law. In other cases, the existence of the wrongful act is evident but there are not sufficient grounds to attribute the act to the State. And in other occasions, it is difficult to do both things, as in the case of interfering in a foreign election through digital means.

The easiest way to attribute a cyber operation to a State is when it is performed by an organ of that State, in agreement with article 4 of the ARSIWA.²⁵⁸

²⁵⁵ SCHMITT, Michael, *In Defense of Due Diligence in Cyberspace*, 125 YALE L.J. F. 68, 2015, p. 75; From: <http://www.yalelawjournal.org/forum/in-defense-of-due-diligence-in-cyberspace> (Accessed: November 15, 2021)

²⁵⁶ SCHMITT, Michael, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, United States, 2013, p. 34; From: <http://csef.ru/media/articles/3990/3990.pdf> (Accessed: September 4, 2021)

²⁵⁷ *Idem* p. 35

²⁵⁸ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part I*, EJIL: Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/> (Accessed: September 3, 2021)

When the operation can be traced to the facilities of an office of the government of the State, responsibility can be attributed to it. The State will also be held responsible when the cyber operation was committed by an organization that lacks organ status *de iure*, but *de facto* is engaging in cyber operations under the direction of the State, in conformity with article 8 of the ARSIWA.

But attribution is not always that simple, and even less in the realm of cyber operations. Because of the coercive nature of these activities, most of them are performed undercover, and States prefer to leave their intervention in anonymity. For example, Russia denies any implication in the elections for the Presidency of the United States in 2020, contrary to the investigations and reports of American intelligence.²⁵⁹ Even when the operations are performed by organs of the State or under its control, many tools can be used to avoid the identification of the origin.

And when the conduct is performed by a group that does not belong to the State, the real problem relies on proving that a private group is under the control and direction of the State by applying the effective control test in *Nicaragua* or the general control test in *Tadic*²⁶⁰. It will be necessary to have sufficient evidence (which is either non-existent or hard to find) such as the existence of a written contract or communications between both entities that would amount to considering the actions of that group to be under the direction of the State. If this situation is not proven the group could be considered *patriotic hackers* acting without any involvement of a State and therefore without State responsibility.²⁶¹

In a few words, the problem does not rely on the clarity of the rules to attribute responsibility to the State, but on the difficulties to amount enough evidence to prove the connection between the actors of the cyber operation and the State. If no link can be established between the State and a non-state actor, the actions of the latter may not constitute a violation of international law.

²⁵⁹ Russia Rejects U.S. Report That Putin Authorized Election Meddling, But Braces For More Sanctions, March 17, 2021, Radio Free Europe/Radio Liberty; From: <https://www.rferl.org/a/russia-denies-meddling-election-biden-trump/31155278.html> (Accessed: November 15, 2021)

²⁶⁰ *Supra*. See the last section.

²⁶¹ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part I*, EJIL: Talk! October 16, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-i/> (Accessed: September 3, 2021)

It is true, that technology in the detection of this kind of cyber operations is increasing, however many of these procedures are maintained in secret by the intelligence agencies for reasons of national security, and when they claim that a breach of international law has happened, they only disclose a report where they declare with “*high confidence*” that the breach occurred as they say but without revealing the details to the public, and as a consequence without the necessary evidence to prove their claims.²⁶²

According to the declarations of several States, to attribute responsibility to another State publicly is a national sovereign prerogative, this means that each State is entitled to make or not public the existence of a cyberattack and to provide or not the evidence to support its claim. A State may decide to attribute the wrongful act for many considerations of technical, legal, political, or diplomatic nature. This could result in abuses of unilateral actions against the alleged aggressor State, like countermeasures, without making public the evidence that supports the attribution. Although they recognize that there is no obligation in international law to reveal the evidence an attribution is made, countries like the United States and Italy consider that it would be good in a spirit of transparency and to legitimize its actions vis-à-vis the international community.²⁶³

However, as it was previously said, the circumstances to establish attribution will eventually have to be made public when required in an international court and/or arbitration proceeding in case it is initiated.

States would have to increase their cybersecurity infrastructure to detect promptly this kind of attack on their systems. They also would have to detect the origin of these attacks and be capable to explain in a court of law how this process was achieved because disclosures based on *high confidence* material but confidential will not be sufficient before any court. It is a game about who has the

²⁶² INTELLIGENCE COMMUNITY ASSESSMENT, *Op. cit.*

²⁶³ CYBERLAW TOOLKIT, *Attribution*, September 12, 2022; From: https://cyberlaw.ccdcoe.org/wiki/Attribution#cite_ref-17 (Accessed October 04, 2022)

most advanced technology, with one party trying to act more furtively and the other party increasing its tools to detect these intrusions.

Now that this study has seen the laws of Public International Law that outlaw interventions in elections and the rules to attribute a wrongful act to a State, it will focus on its last chapter to the options that States have to make offending States accountable in international law for unlawfully interfering in foreign elections.

SIXTH CHAPTER.- DEFENSE RESOURCES IN INTERNATIONAL LAW

At this point of our study, it has been seen which conducts realized by States in the context of meddling in foreign elections are considered to be violations of Public International Law but that there are other actions that are not considered as violations, but rather, ordinary activities within the scope of the legitimate States` activities. Also, the rules to attribute those conducts to the States have already been seen, many of which are performed in anonymity. Now in this chapter, this work will try to understand the mechanisms that States have to make aggressor States accountable for violating international law. Without these resources, States would be defenseless against the aggressions from other States, and Public International Law would be inefficient.

Here this work will refer to the legal institutions that it considers to be the best ones to hold another state accountable for wrongful conduct, especially seeing the nature of the rules that are violated when interfering in foreign elections. Among these, it can be found the International Court of Justice, the Security Council, the General Assembly, and the use of countermeasures. They will be developed further in the following pages.

6.1 International Court of Justice

The International Court of Justice (hereinafter the ICJ) is the principal judicial organ of the United Nations. It was founded in 1946 after the Second World War, as the successor body of the Permanent Court of International Justice, the judicial organ of the League of Nations. It has virtually the same statute, the same cases, and even the same headquarters in the Peace Palace in The Hague. This organ was created as a mechanism States could use to resolve their disputes peacefully and without violence. The ICJ is composed of 15 judges representing all the legal traditions in the world, elected by the General Assembly and the Security Council of the United Nations.²⁶⁴

²⁶⁴ CRAWFORD, James, *Op.cit.* p. 722

The big difference between the ICJ and others is that this Court is first universal and second and most importantly it has general jurisdiction. This means that in principle the ICJ can resolve disputes in all topics of international law. Of course, it has some limitations. It can only resolve disputes between States when they have accepted the Court's jurisdiction. In addition, to resolve contentious cases between States, the ICJ can also give advisory opinions concerning legal topics at the request of the Security Council or the General Assembly.²⁶⁵

The ICJ is no legislative organ, which means that it will state and apply just existing international law. The rules of Public International Law on which the Court will rely can be found in article 38 of the Statute. These are international treaties, like the Budapest Convention or the Broadcasting Convention referred to in chapter 3; international custom, such as the Prohibition on intervention; and general principles of international law, such as the principle of sovereignty. The job of the ICJ is to resolve legal disputes (when States have not been able to resolve them diplomatically), following existing rules and principles of international law.²⁶⁶

The problems of the Court start precisely in the question of jurisdiction. There is no international organ, like the police or a prosecutor's office to enforce international law between States. There is no universal compulsory jurisdiction. That is why States have to accept to submit their disputes to international tribunals like the ICJ. The international system functions with the premise that States are acting in good faith and that when they submit their disputes to the Court, they are willing to accept the ruling and act under it. The only way to enforce a judgment of the ICJ is through the Security Council, but it has its own difficulties as will be seen in the next section. This is one of the limits of Public International Law today.

In order to submit a dispute to the Court, it is necessary that the States being part of it have previously accepted the regime of the Court and consented to its jurisdiction.²⁶⁷

²⁶⁵ KLABBERS, Jan, *Op.cit.* p. 373

²⁶⁶ SHAW, Malcolm, *Op.cit.* p. 1066

²⁶⁷ KLABBERS, Jan, *Op.cit.* p. 375

There are 4 different ways in which a State can consent to the jurisdiction of the Court for a legal dispute. These options can be found in article 36 of the Statute.²⁶⁸ These are in the cases the parties refer to it, compromissory clauses in treaties, the compulsory jurisdiction clause, and the rare institution of *forum prorogatum*. Now they will be seen in more detail.

Firstly, the parties consent that a legal dispute is brought before the ICJ by submitting a special agreement,²⁶⁹ in which the parties will specify the terms of the dispute and the framework in which the ICJ would operate. This is probably the simplest option because it complies perfectly with the premise that the Court may exercise jurisdiction only upon the consent of the parties. A special agreement will only be submitted once a dispute has already arisen. This means that the parties will give their consent to resolve a dispute that already exists.²⁷⁰

This is the preferable way to trigger the Court's jurisdiction because States that are giving voluntary and indisputable consent will be more inclined to respect the judgment of the Court. If not, the Court will not resolve the dispute because it is better to not have a judgment than to have a judgment that will be disrespected.²⁷¹

Coming back to the topic of this thesis, for example, the ICJ may exercise jurisdiction over the alleged interference of Russia in the 2016 US Presidential election only if both the United States and Russia decided to do so.²⁷² This is unlikely

²⁶⁸ Article 36 reads as follows. 1. *The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.*

2. *The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; the nature or extent of the reparation to be made for the breach of an international obligation.*

3. *The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.*

4. *Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.*

5. *Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.*

6. *In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.* UNITED NATIONS, *Statute of the International Court of Justice*, 1945

²⁶⁹ Special agreement is the term used to name a document in which the parties of a legal dispute decide to bring it before the Court. The word *compromis* is used to describe the same document but in French. KLABBERS, Jan, *Op. cit.* p. 376

²⁷⁰ SHAW, Malcolm, *Op.cit.* p. 1075

²⁷¹ KLABBERS, Jan, *Op.cit.* p. 376

²⁷² INTELLIGENCE COMMUNITY ASSESSMENT, *Op. cit.*

to happen, especially because Russia denies any implication in any kind of intervention. This approach would be more likely used when the parties to a dispute are indeed looking for a legal solution to the conflict, one that will provide legal certainty and settle the matter. If the States are not sure of the legality of their acts, they will be reluctant to appear before a court of law and will try by all means to claim the lack of jurisdiction of the Court.

The second option to trigger the Court's jurisdiction is when a treaty or convention provides that when a dispute arises concerning the interpretation or application of the treaty, the dispute should be resolved by the ICJ. This means that the parties of a dispute gave their consent *ex-ante* or before the dispute arises.²⁷³ When this provision is used, the Court will have jurisdiction to resolve disputes related to the treaty or convention that contains the *compromissory clause*.²⁷⁴ This means that if the treaty is the Montego Bay Convention on the Law of the Seas the topic of the dispute cannot be an issue about the violations of the immunities of the premises of an embassy. In this case, the Court will declare its lack of jurisdiction.

The *compromissory clause* will usually be in the text of the treaty, but sometimes it can be found in an optional protocol. It is the case of the 1963 Convention on Consular Relations, which protocol contains a jurisdictional clause that directs to the ICJ.²⁷⁵

The ICJ would also be embodied to resolve disputes when the treaty in force provides a reference to the Permanent Court of International Justice, according to article 37 of the Statute. This provision exists to provide continuity between the extinct Permanent Court and the new ICJ. This is precisely the case of the Use of Broadcasting Convention studied in chapter 3. This convention of 1936 which prohibits the use of broadcasting for propaganda or the spreading of false news, contained a *compromissory clause* that referred to the Permanent Court.²⁷⁶ But now

²⁷³ CRAWFORD, James, *Op.cit.* p. 726

²⁷⁴ SHAW, Malcolm, *Op.cit.* p. 1079

²⁷⁵ KLABBERS, Jan, *Op.cit.* p. 378.

²⁷⁶ Article 7, LEAGUE OF NATIONS, *Op. cit.* p. 301

in virtue of article 37 of the new Statute, the disputes that arise from it would be under the jurisdiction of the ICJ.

The Budapest Convention on Cybercrime also contains a clause that refers to disputes to the ICJ, however, it just provides it as an option and the parties must agree to choose this method to resolve their dispute, so in practice, it is not automatic and needs an agreement with more resemblance to the special agreement approach seen previously.²⁷⁷

Another problem with *compromissory clauses* in treaties is the one concerning reservations. Although a State can be part of a treaty or convention it could use a reservation to not be bound to a specific provision of the treaty. It is very common for States to use this institution to deny the settlement of disputes provision in treaties, not giving consent to the jurisdiction of the Court. Therefore, although States are legally bound to the content of the treaty, they refused to give an *ex-ante* consent to the ICJ jurisdiction, and therefore there is no mechanism inside the treaty to make a State accountable for violating the treaty.²⁷⁸

This is the problem to enforce the 1936 Use of Broadcasting Convention because article 7 of the Convention which refers to the dispute settling mechanism was reserved by the Soviet Union and most communist States. Therefore, although in theory the conduct of *fake news* could be considered to be illegal under this Convention, there is no practical way to enforce the treaty, because many States refused to accept the *compromissory clause* and many more denounced the Convention after this, as seen in chapter 3. Nowadays, this Convention is in force for only 28 States, many of which have reserved against the automatic jurisdiction of the ICJ, under article 7.²⁷⁹

The third approach for the Court to exercise jurisdiction on a dispute is the optional clause contained in article 36(2) of the ICJ Statute. It provides that States

²⁷⁷ Article 45, COUNCIL OF EUROPE, *Convention on Cybercrime*, Budapest, 2001; From: <https://rm.coe.int/1680081561> (Accessed: September 15, 2021)

²⁷⁸ KLABBERS, Jan, *Op.cit.* p. 377

²⁷⁹ BAADE, Bjornstjern, *Op.cit.*

can make unilateral *ex-ante* declarations in which they recognize the compulsory jurisdiction of the Court without the need for a special agreement to settle all their legal disputes with States that have made the same declaration.

At the start, the idea was that many States would make these declarations, and, in the end, most States would have accepted the compulsory jurisdiction of the ICJ for all legal disputes, like a national tribunal that has jurisdiction in all the territory, the idea was to give the ICJ jurisdiction all around the globe.²⁸⁰ However, this did not result in the way expected. In December of 2018, there were only 73 declarations from States, 73 States in the 75 Courts years of history, almost one every year.²⁸¹

Nevertheless, the number of States that have made the declaration (a third of all States parties to the United Nations) is not the only problem. 55 out of 73 have made it with reservations to limit the scope of the Court's jurisdiction. For example, 5 States have made what is known as the Connally Reservation²⁸², first used by the United States which denied the jurisdiction of the Court in "*disputes about matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America*".²⁸³

Ten States originally employed such reservations. For many academics this reservation is contrary to the Statute and the purpose of the optional clause because in practice it will leave the ICJ without jurisdiction, in any case, a State would want to, with the sole need of that State declaring that the matter of the dispute falls within its domestic jurisdiction. The other States decided to exclude the jurisdiction of certain topics like territorial and maritime disputes, disputes concerning armed forces, or disputes concerning certain States.²⁸⁴

²⁸⁰ CRAWFORD, James, *Op.cit.* p. 727

²⁸¹ INTERNATIONAL COURT OF JUSTICE, *Handbook*, Maubeuge, France, 2018 p. 43

²⁸² Mexico is unfortunately one of the five States that still has a declaration in force with the Connally Reservation. In practice, this means that Mexico has not really accepted the compulsory jurisdiction of the ICJ. The Mexican declaration was made in 1947 by the Mexican foreign secretary Jaime Torres Bodet. INTERNATIONAL COURT OF JUSTICE, *Declarations recognizing the jurisdiction of the Court as compulsory*, Mexico, 1947; From: <https://www.icj-cij.org/en/declarations/mx> (Accessed February 10, 2022)

²⁸³ CRAWFORD, James, *Op.cit.* p. 728

²⁸⁴ *Idem* p. 729

This becomes more important in terms of the principle of reciprocity. According to this disposition, the limits and reservations inserted in a declaration will also apply to the other States in the dispute. This means that if a State like Mexico uses its declaration to bring a dispute before the Court, the other State would be allowed to use the Connally Clause that Mexico has in its declaration to escape from the Court's jurisdiction. In other words, the Court's jurisdiction over the case is restricted to those classes of disputes that have not been excluded by any of them.²⁸⁵

The only member of the Big Five²⁸⁶ that has in force a declaration accepting the compulsory jurisdiction of the Court is the United Kingdom. France and the United States withdrew after it was used by other States to bring them before the ICJ and lose. Russia and China have never made this declaration.²⁸⁷

Moving again to the subject of our thesis, any target State by foreign intervention in its election will be allowed to bring a dispute before the Court if several conditions are met. First that both States have made declarations accepting the compulsory jurisdiction of the ICJ and second that the matter of the dispute (elections, cyberspace) is not excluded by the reservations contained in the declaration of both States. This is unlikely because it has been seen that only 73 States have made such declaration, 55 of which have made it with reservations. Moreover, the big players frequently involved in foreign interferences as stated in previous chapters (Russia, the United States, Iran, France, China, and Ukraine) have no declaration in force today, so this way of bringing them before the Court is discharged.

Nevertheless, if the stars align and the States involved in a foreign election intervention fulfill the aforementioned conditions, then the case can be resolved by the ICJ, regarding all rules of international law seen in chapter 3 (prohibition on intervention, principle of sovereignty, prohibition to use force, international treaties, etcetera).

²⁸⁵ INTERNATIONAL COURT OF JUSTICE, *Handbook*, Maubeuge, France, 2018 p. 43

²⁸⁶ An informal way to call the Permanent members of the United Nations Security Council.

²⁸⁷ INTERNATIONAL COURT OF JUSTICE, *Handbook*, Maubeuge, France, 2018 p. 42

The last approach a State can use to bring a dispute before the ICJ is the *forum prorogatum* principle. This resource highlights that the Court will have jurisdiction when the parties to the dispute have implicitly, not expressly, given consent to the ICJ's jurisdiction. It must be remembered that the Court requires consent to operate, but there is no rule regarding the formalities such consent must have. Consent is present in a special agreement because it is written in an express manner, which is voluntary and indisputable.²⁸⁸

However, there are cases when a party may consent without expressly doing so. For example, when the applicant State brings a dispute against another State that lacks jurisdiction. If the respondent State decides to answer and continue with the proceedings without demanding the admissibility of the case for lack of jurisdiction it will be understood that the State has consented to continue the proceedings. This consent must be clear and real, the Court will not accept only a merely apparent consent.²⁸⁹

This was the case of the *Corfu Channel* which studied in other parts of this study. In this case, Albania was not part of the United Nations nor the ICJ, nevertheless, the United Kingdom started proceedings against it. Albania decided to go along, it filed memorials and even appointed an *ad hoc* judge. The Court said that Albania's behavior was equivalent to consent.²⁹⁰

The ICJ is the natural option for States to resolve their disputes and make other States accountable for committing wrongful acts. Still, it is used as a last resort option because in many cases bringing a dispute before the Court may be seen as unfriendly.²⁹¹

However, as seen in the last pages, there are many conditions for States to submit a dispute before the ICJ. It is not news that no alleged interference in foreign elections has been decided by the Court. States are very careful with the treaties

²⁸⁸ SHAW, Malcolm, *Op. cit.* p. 1076

²⁸⁹ CRAWFORD, James, *Op.cit.* p. 728

²⁹⁰ KLABBERS, Jan, *Op.cit.* p. 384

²⁹¹ CRAWFORD, James, *Op.cit.* p. 732

and declarations they sign, and it is unlikely that a State that practices digital interferences will accept the jurisdiction of the Court in that regard. I am including in this category both Russia and the United States, among others.

We must also recall that one of the main problems of digital interferences is the matter of attribution. It is very difficult for States to offer evidence (that can be used in a court of law) that another State acted wrongfully when many digital operations are untraceable or do not link directly with the government of one State. In this context, it would be comprehensible that no State would sue another before the ICJ when it knows it lacks sufficient evidence to attribute the wrongful act.

For these reasons, this study considers that the ICJ would be an inefficient institution to resolve most disputes concerning meddling in foreign elections by digital means. But if the conditions to exercise jurisdiction were fulfilled, the ICJ would be a viable option for those few cases.

6.2 The Security Council

The Security Council of the United Nations (hereinafter the Council) is the executive organ responsible for maintaining international peace and security. It is composed of 15 members, including the Big Five, the five victorious and most powerful States in 1945 after the Second World war. These are the only members that have a permanent seat on the Council and the right to veto any resolution made by the organ. This means that for any resolution to pass it needs the approval (or in practice, an abstention, insofar as no vote against the resolution is issued) of the United States, Russia, Great Britain, France, and China. The remaining members of the Council rotate over periods of two years.²⁹²

The Council takes its decisions on behalf of all the members of the United Nations, and its decisions are binding to all of them. It is the only organ in the United Nations with that power, the resolutions of the General Assembly are not binding *prima facie* (more will be developed about this in the next section) and the judgments

²⁹² KLABBERS, Jan, *Op. cit.* p. 236

of the ICJ are binding just to the parties to the disputes, and even then, it needs the Council to enforce its judgment. It has two main functions: the peaceful settlement of disputes and the faculty to adopt enforcement measures.²⁹³

However, the Council has historically failed in its purpose to maintain peace. During the Cold War, the world was divided, but also the Council, and since each Permanent member has a veto right, no resolution can be taken, making the Council ineffective. One of the only exceptions during this time was the resolution adopted to restore peace in Korea because the Soviet Union abstained in its vote.²⁹⁴ After the fall of the Soviet Union, some resolutions have been made with the consensus of the Council, such as the condemnation of international terrorism. However, the division continues to this day, and the Council has failed to stop the invasion of Iraq in 2003 or the invasion of Georgia by Russia in 2008, and currently Ukraine in 2022, along with other examples.²⁹⁵

Among the powers of the Council is to investigate any situation that may arise in an international dispute endangering peace and security. It can call the parties involved to a peaceful settlement of the dispute and deliver other recommendations to solve the friction. Still, if nothing works, the Council has the monopoly in international law to use coercive methods under Chapter VII of the UN to stop the breach of the peace.²⁹⁶ These powers are:

Article 41.- The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

²⁹³ SHAW, Malcolm, *Op. cit.* p. 1208

²⁹⁴ These events lead to the adoption of the Uniting for Peace resolution by the General Assembly, in which the Assembly would take powers towards maintaining international peace and security when the Council has been unable as a consequence of the lack of unanimity of its members (when a Permanent member uses its right to veto). The Assembly has been summoned around ten times to act against a threat to international peace when the Council has been reluctant to do it. TOMUSCHAT, Christian, *Uniting for Peace, General Assembly resolution 377(V), New York, 3 November 1950, Introductory Note*, Audiovisual Library of International Law, 2022; From: <https://legal.un.org/avl/ha/ufp/ufp.html> (Accessed: 4 May 2022)

²⁹⁵ SHAW, *Op. cit.* p. 1209

²⁹⁶ *Idem* p. 1218

Article 42.- Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Interfering in other State's elections can easily amount to a conflict that will bitter international relations. In some cases, it could become a real threat to international security with antagonizing States accusing each other of cyber-attacks that could escalate quickly. There is no doubt that the subject can be studied by the Council.

Nevertheless, the Council is a political organ, and its decisions are not determined by law but by the interests of the nation's part of the organ, especially the 5 permanent members. In the historical background chapter of this thesis, diverse examples of foreign interventions in elections were mentioned.²⁹⁷ All the Big Five were involved in at least one of the cases we referred to, all of which have the power to veto any resolution of the Council. When the main States that are responsible for meddling in foreign elections are seated at the table, any resolution to make a State accountable seems impossible or at least, highly unlikely.

For this reason, this study considers the Council not to be a viable option to make aggressor States accountable for interfering in others' elections. Any resolution in that regard is more than likely to be met with a veto. If any action can be taken it would be in the form of a recommendation or any other non-binding instrument. The Council's failures do not appear to dissipate for this matter.

6.3 The General Assembly

The General Assembly (hereinafter the Assembly) is the plenary of the 193 member States of the United Nations. The Assembly is essentially a debating chamber of the world issues, and its resolutions are not legally binding, however, they are highly authoritative because they can reflect the *opinion iuris* of most states

²⁹⁷ *Supra*. See again section 1.4 Cyberspace and interventions, in the first chapter.

in the world, an important element of the international custom, which is binding. An example is the Universal Declaration of Human Rights, although it is non-binding, it marked the beginning of a titanic work to legislate human rights in several treaties.²⁹⁸

The recommendations on international peace and security are taken by a two-thirds majority of the Assembly, this means that when one is made, it has the backup of a huge portion of the world nations. Moreover, the Assembly is the perfect space for new treaties and conventions to emerge, once a topic is discussed and agreements are reached, those points could become an instrument of international law. This was the case with the Universal Declaration, which led to the future adoption of the 1966 International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights in the same year.²⁹⁹

The ICJ can use the individual and collective statements of States made through the UN General Assembly as evidence of state practice and *opinion iuris*. For example, the Court took the definition of the principle of non-intervention from the text of the Declaration on principles of international law friendly relations and cooperation among states under the charter of the United Nations, A/RES/2625(XXV) to resolve the *Nicaragua* case, as seen in chapter three.³⁰⁰

The Assembly has made resolutions condemning the interference in foreign elections and has called on States to refrain from this practice. For example, the Non-interference in the Internal Affairs of States resolution, UN Doc. A/Res/31/91 (1976 Declaration); the Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in Electoral Processes resolution, UN Docs. A/RES/44/147 (1989); and the Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in Electoral Processes as an Important Element for the Promotion and Protection of Human Rights resolution, UN Doc. A/Res/56/154 (2001).³⁰¹

²⁹⁸ KLABBERS, Jan, *Op. cit.* p. 236

²⁹⁹ SHAW, Malcolm, *Op. cit.* p. 1211

³⁰⁰ MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA (*Nicaragua v. the United States of America*), Merits, Judgment. I.C.J. Reports 1986, p. 14. pp. 205

³⁰¹ JAMNEJAD, Maziar et WOOD, Michael, *Op. cit.* p. 351

The matters covered by the Assembly include multiple fields, such as the maintaining of peace and security which in theory is the job of the Council. However, as a result of the power of veto of some of its members, the Assembly has acquired an active role in discussing these topics and sometimes has overshadowed the work of the Council.³⁰²

It could be recalled the recent example of the Russian invasion of Ukraine, the resolution of the Council condemning Russia for violating Article 2(4) of the UN Charter was vetoed by Russia (not a surprise), then the discussion moved to an extraordinary session of the Assembly which condemned the invasion with 141 votes in favor, 5 against and 35 abstentions. Although it is not binding, it sends a powerful message about *opinion iuris* regarding this subject, and in case of trial, the ICJ would take it as evidence of international custom.³⁰³

In conclusion, this study considers that the Assembly is a good institution to start a campaign against foreign interventions in elections. Although its resolutions will not be binding, the collective voice of the States could give solid grounds around topics such as cyberspace, in which the rules are not yet clear, and could provide international tribunals with solid evidence to condemn a State for meddling in elections in violation of the principle of non-intervention or sovereignty.

Also, the Assembly could be used as a forum to give the aggressor State bad publicity in the international community, using the tribune of the institution as a speaker to point out the intervention and condemn the State before the public.

In the best of cases, the discussions promoted in the Assembly could lead to the future adoption of an international treaty expressly prohibiting some of the methods used by States to intervene in other elections, some of them which the legality is not clear. For example, although many States condemn and prohibit in their domestic laws their political parties to be financed by foreign agents, it is not

³⁰² SHAW, Malcolm, *Op. cit.* p. 1222

³⁰³ BESHEER, Margaret, *UN General Assembly Overwhelmingly Condemns Russia's Invasion of Ukraine*, VOA, March 2, 2022; From: <https://www.voanews.com/a/un-general-assembly-overwhelmingly-condemns-russia-s-invasion-of-ukraine-/6467348.html> (Accessed May 15, 2022)

clear that this rule applies also for international subjects, especially because there is no state practice surrounding the subject, as seen in chapter four.³⁰⁴

That is why this work considers the Assembly as a great tool to make a State accountable before the public opinion and it could be the forum headed to create legal evidence for a future trial in an international court or a new treaty.

6.4 Countermeasures

Countermeasures are not a method to make another State accountable for committing a wrongful act in international law. It is more like an immediate response as a way of defense against a wrongful act from another State. In literature, countermeasures are often used as a synonym for *sanctions*, *reprisals*, or *reactions* to a previous international wrongful act. Still, the term countermeasure is preferred because the other words have been used to describe actions that involve the use of force, like the ones under Chapter VII of the UN Charter.³⁰⁵

In a few words, countermeasures are the possibility for a State to resort to private justice when it is a victim of illegal conduct from another State. In principle, these measures would be illegal, but wrongfulness will be precluded because they are intended to stop illegal conduct.³⁰⁶ Like the institution of self-defense in criminal law. Another way of putting it is that *countermeasures are in themselves illegal acts that become justified by being a response to an earlier violation by the other side.*³⁰⁷ Also, *Countermeasures are not intended as a form of punishment for wrongful conduct but as an instrument for achieving compliance with the obligations of the responsible State.*³⁰⁸

This means that States can take justice into their own hands to make other States comply with their international obligations to that State. Before the 20th

³⁰⁴ *Supra*. See again 4.2 Methods of intervention and their lawfulness: A) Campaign funding, in chapter 4.

³⁰⁵ INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021) p. 320

³⁰⁶ CRAWFORD, James, *Op. cit.* p. 585

³⁰⁷ KLABBERS, Jan, *Op. cit.* p. 419

³⁰⁸ INTERNATIONAL LAW COMMISSION, *Commentaries to the draft articles on Responsibility of States for Internationally Wrongful Acts*, 2001, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), chp.IV.E.2; From: http://www.eydner.org/dokumente/darsiwa_comm_e.pdf (Accessed: November 14, 2021) p. 329

century, it was even permitted for States to use force for the recovery of contract debts.³⁰⁹ Later, the use of force was made an exclusive power of the Security Council of the UN. States can still use force (only in self-defense under Article 51 of the UN Charter) and other countermeasures concerning their relations with other States but with several restrictions. The limitations are intended to avoid an escalation of the conflict headed to a bigger threat to international peace and security.³¹⁰

The 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)³¹¹ have codified the limitations and restrictions to the use of countermeasures in chapter II of part three. Article 49 of ARSIWA limits a countermeasure only to the extent that it is intended to make another State comply with its obligations, this means that any action must be limited to reestablish the compliance between the States, if the violation has ceased, the countermeasure is not required and its continued use after the violation ceased, would be illegal.³¹²

Countermeasures are also limited to non-performance for the time being of international obligations. Article 50 forbids States to use force as a countermeasure. It also prohibits actions against human rights, humanitarian laws, and other peremptory norms of international law.³¹³ Moreover, countermeasures can only be temporary and cease once the wrongful act has ended.

Another central requirement of countermeasures is that they must be proportional to the wrongful conduct. The reaction must be of the same degree as the action suffered. If the Court finds out that the proportionality principle is not respected, it could lead to the invalidity of the countermeasures.

³⁰⁹ An example of this is the military alliance between Spain, France, and the United Kingdom in 1861, in which these nations agreed to ally with the objective of obtaining loan repayments from Mexico. The alliance took by force the Mexican port of Veracruz in December 1861. MARLEY, David, *Wars of the Americas: A Chronology of Armed Conflict in the New World, 1492 to the Present*, ABC-CLIO, Santa Barbara, California, 1998

³¹⁰ CRAWFORD, James, *Op. cit.* p. 587

³¹¹ *Supra*. The legal nature and the history of this document will be discussed in section 5.1 Responsibility of States for Internationally Wrongful Acts (2001), chapter five, of this thesis.

³¹² Article 49. INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1; From: <https://www.refworld.org/docid/3ddb8f804.html> (Accessed: September 4, 2021)

³¹³ Peremptory norm of general international law is defined as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Article 53, UNITED NATIONS, *Vienna Convention on the Law of Treaties*, 1969

In the 1978 *Air service agreement* arbitration, France and the United States had an agreement to allow commercial flights between the countries. Suddenly, France decided to prohibit an American airline to use the airport of Paris. The US retaliated by prohibiting certain French airlines to land in the US. In this case, the arbitration tribunal decided that there was a proportion between the wrongful act of France and the retaliation of the US. Proportionality cannot be measured just economically, but in the nature and the essence of the action taken.³¹⁴

According to article 52 of the ARSIWA, before implementing countermeasures, States must call responsible States to cease their wrongful acts and notify them that if the situation does not change, countermeasures will be adopted. Also, negotiation and a peaceful settlement of the dispute must be offered to the State. Again, this provision is to avoid escalation in the conflict and make the offending State aware that its conduct is considered to be illegal, and that actions will be taken.³¹⁵

In this order of ideas, this study considers that countermeasures could be taken when a foreign State is meddling in local elections. The obvious example is to disable remotely cyberinfrastructure being used to meddle with the election (although this could be a use of force under the rules of self-defense in article 51 of the UN Charter).³¹⁶ If the financial system is being used to finance foreign political parties, accounts could be frozen. Not all countermeasures must be in cyberspace, the offending State could use other means to achieve compliance but always under the limits set in the rules already been seen.

It must be also remembered that the wrongful act must be attributable to the State before any countermeasure can be taken against it. As discussed in chapter 5, this is very difficult in the realm of cyberspace and would complicate any action in

³¹⁴ KLABBERS, Jan, *Op. cit.* p. 421

³¹⁵ Article 52, INTERNATIONAL LAW COMMISSION, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1; From: <https://www.refworld.org/docid/3ddb8f804.html> (Accessed: September 4, 2021)

³¹⁶ SCHMITT, Michael, *Foreign Cyber Interference in Elections: An International Law Primer, Part III*, EJIL: Talk! October 19, 2020; From: <https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-iii/> (Accessed: September 3, 2021)

this regard. Even more, a countermeasure can be only a reaction to a wrongful act, but many of the methods to interfere in an election are not clearly unlawful under international law, therefore any countermeasure would be apparently illegal.

Finally, this thesis considers that countermeasures can be an immediate and temporary tool to fight interference in foreign elections, but it is not recommended. It has always the risk of escalating the conflict and avoiding a peaceful settlement of the dispute in the long term. If countermeasures are implemented, they should be only to disable cyberinfrastructure in an ongoing operation to meddle in the elections once a breach of international law is very likely to have occurred.

PROPOSALS

There is no clear set of rules in Public International Law to outlaw interventions in foreign elections through digital means. The rules that could fit are general abstract rules of international law like the non-intervention principle and the sovereignty principle. There is an ongoing debate between diplomats and academics on which of these two principles is more accurate to ban this practice.

In our opinion, the principle of non-intervention is the best one to use before an international tribunal because it already has determined elements that could be used by tribunals to make a State responsible for interfering in foreign elections: these are that the activity in question was against a matter reserved to the internal affairs of the State and that methods of coercion were used during the intervention. If the interference breaches internal affairs must be studied on a case-to-case basis, however, for referring us to electoral processes, most interventions will *prima facie* meddle in internal affairs.

States and diplomats should make more declarations and statements about this point. That interfering in foreign elections is a violation of the non-intervention principle. These declarations would be better if done collectively on the floor of an international organization, such as the General Assembly of the United Nations, or at least in the assemblies of regional organizations such as the Organization of American States or the European Union. These declarations should not be abstract, they must be concrete in which methods of intervention are illegal and under which rule. If not, we will have empty declarations that would not amount to developing clear state practice and *opinion iuris*.

Also, special emphasis should be made regarding the illegality of interventions using cyberspace, not just cyber-attacks but also cyber operations that include disinformation campaigns on social media and the promotion of *fake news*. This could be done by clearly including manipulation as a method of coercion. Also, more statements are needed concerning the illegality of financing foreign political campaigns, because at this point, they are precarious.

Once we have more declarations and statements it could be possible that States would gather to prepare and enter into an international treaty, as they have done in the past with the 1936 Use of Broadcasting Convention, which is outdated. We must be careful that the new treaty would not have the same destiny as this treaty. It would need a great effort from States to reach an agreement around the methods of intervention that will be prohibited, at least the most obvious ones, such as cyber-attacks and foreign financing, and the sanctions to be applicable, in order for these to be feasible, realistic, reasonable and that will, in fact, be relevant for States to no longer take decisions to interfere inadequately in other states. Also, States should refrain from making reservations to avoid the jurisdiction of international tribunals or any method to enforce the compliance of the treaty. The best way to do this is by using the mechanism proposed by the Rome Statute of the International Criminal Court that did not allow reservations.

It is less likely, however, that States will reach an agreement around when information must be considered false. That was one of the problems with the 1936 Use of Broadcasting Convention. Who will be the entity that will decide what piece of information is true and which is not? This is a question with no answer. It is more possible that each State will take the responsibility to create domestic laws to approach this issue and regulate the use of newspapers and social media, rather than a global agreement on what is *fake news*. Also, the task could be entrusted to an international independent organization of journalists. Although this has its own risk, we will be giving a sole entity the power to decide what is true and what is not. Additionally, there is an ongoing debate between false information and the human right of liberty of expression, which is a topic of its own. Of course, this could also be decided by an international tribunal if entrusted with the necessary jurisdiction on the treaty.

Moreover, there are many States which are moving their electoral systems to cyberspace. Every year, it is possible in more countries to vote through the internet, select their representatives or participate in referendums, and more. This is not recommended, at least until the integrity of these systems can be guaranteed.

Elections are a delicate topic to leave at the mercy of computing programs that can be easily hacked, as the case of the 2014 Ukrainian election showed us. Therefore, this thesis recommends staying with the traditional ballot box, at least in the States with young democracies and with a history of fixed elections that are still on their way to building strong democratic institutions. If not, the phantom of electoral fraud will be more present than ever when there are doubts about the integrity of these systems.

The fragility of democracy has been shown even in countries with alleged strong democracies, like the USA that suffered when Joe Biden won the 2020 Presidential election, what appears to be an organized attack to not recognize the results of the election by former President Trump and some of his close advisors.

Furthermore, States should upgrade their cyberinfrastructure to be able to track cyber operations from abroad. It is fundamental for States to be able to identify the source of a cyber intrusion to attribute the conduct to a State that could be in the future used as evidence in a court of law. This upgrade should also work to shield electoral systems and other essential infrastructure of the State.

The speed of communication is wondrous to behold. It is also true that speed can multiply the distribution of information that we know to be untrue.

Edward R. Murrow

CONCLUSIONS

FIRST.- This work has been able to ascertain that interventions in foreign elections are as old as elections themselves. States are always interested in being involved in the decision-making process that other States have that could affect their interests. They will usually use covert or overt methods to this end, including campaign funding, declarations, *dirty tricks*, misinformation campaigns, and cyber-attacks.

SECOND.- Nowadays, most of these interferences have moved to cyberspace. In modern democracies, cyberspace and cyberinfrastructure are used daily to conduct elections, from using them as a forum open to political discussion to the platform to cast and count votes. There is no surprise that foreign States are using these tools to meddle in the elections of other states, and there is a growing tendency to do so.

THIRD.- The most powerful States in terms of economic and political resources are the main responsible for conducting these activities, from less coercive misinformation campaigns to direct cyber-attacks on the electoral infrastructure of a State. This is a topic in which no side has clean hands. Since the Cold War, both great powers, the Soviet Union and the United States performed multiple interferences, according to the studies reviewed in our research, 1 of every 9 elections in the world were targeted from 1945 to the 2000. Also, other States as China and Iran have joined the practice to intervene in foreign elections. States are every day more concerned about cybersecurity and the integrity of their electoral processes.

FOURTH.- It was seen that elections are an important part of liberal democratic States around the globe and a fundamental core principle to practice a healthy constitutional rule of law. To meddle with a foreign election may put in jeopardy the legitimacy of the authorities ruling those States and the decision reached by the exercise of participative democratic methods. Therefore, this conduct may be understood by many States as a clear example of the violation of their

sovereignties. Nowadays, democracy is considered by many States and international organizations as the OAS and the European Union as an indispensable value in international relations and the pursuit of the common good. To protect elections is to guarantee human rights, government stability, and the protection of minorities.

FIFTH.- The main rules that States may use to protect their elections against foreign interference are the principle of sovereignty, the prohibition on intervention, the prohibition on the use of force, the Budapest Convention, and the Broadcasting Convention. Although there is not a main rule in Public International Law that prohibits election interference, most of the methods employed by States to meddle could be regulated by these rules.

SIXTH.- The prohibition on the use of force can be breached in very limited situations when one State conducts cyber operations intending to destroy or disable cyberinfrastructure necessary for the electoral process, like voting machines, communications devices, voting facilities, etcetera. However, this study considers that this kind of intervention is less likely to occur because it will delegitimize the election in the eyes of the population, and on most occasions, the foreign power aims to influence the results, not to invalidate the election. Moreover, there is not enough state practice or international court resolutions to affirm that a cyber-attack is equivalent to the use of force when the consequences are not of a military nature.

SEVENTH.- Another rule that was examined was the sovereignty principle. This rule can be violated when the conduct of a State does not respect the territorial integrity of another or when it interferes with the inherent functions of another State. In an election, this will mean meddling with the cyberinfrastructure of the election, not just by damaging it, but by altering its optimal functioning. Examples of this could be to turn down or by changing the information on the website and social media of the electoral authorities. Also, it could include cyber operations against non-government entities, like candidates and political parties, misinformation campaigns, and *fake news*.

However, this rule is too broad and difficult to apply because many conducts could be considered as meddling with the inherent functions of a State as declarations by foreign leaders about the election. Also, there is no consensus and enough state practice to consider sovereignty as the most adequate rule to outlaw interferences in foreign elections, especially when it's difficult to know the content and scope of this principle.

EIGHTH.- Other States prefer the non-intervention principle as a better tool to outlaw interferences in electoral processes, and this work shares this view because it requires interventions not just to attempt against an inherent function of a State, but also the use of methods of coercion during its performance. This means that States must employ coercive threats, force, or manipulation when carrying out the interference. The threshold of this rule is the clearest and, in our opinion, makes it a better tool to ban electoral interference. However, more elements of international custom, a clear declaration issued by consensus by the General Assembly, or a specific treaty are required to include manipulation in the list of coercive methods, to effectively outlaw *fake news* and disinformation campaigns.

NINTH.- In our opinion, the right to self-determination is not a good tool to ban electoral interference, although many authors consider it as one. It will not be effective because this right is used in the context mainly of decolonization, not for elections. Moreover, it will arise many more questions about who the people are and the mechanism to enforce this right, which is not a violation of a State but of its citizens directly.

TENTH.- Electoral interference can also breach treaties like the Budapest Convention and the Broadcasting Convention but very narrowly. The former would be when a State fails in its duty of due diligence to stop cybercrime originating from its territory. The latter would be when a State allows the dissemination of *fake news* within its borders. However, as it was explained in detail throughout this investigation, the application of this Convention is very limited due to the low number of States parties to it.

ELEVENTH.- Campaign funding by foreign States is not prohibited in Public International Law. Many States have domestic laws that outlaw it, however other States are not obliged by domestic provisions. Nevertheless, campaign funding could be considered a violation of State sovereignty when the effects are measurable, and the illegal intromission has resulted in a severe alteration of the outcome of the election. More declarations of States are needed to ban campaign funding by foreign interests.

TWELFTH.- Providing facts about the candidates or the situation of a State by foreign powers is not a breach of international law. Neither is misinformation when there is no knowledge of the falsehood of the information. Disinformation campaigns or fake news, on the other hand, can be considered illegal under the prohibition on intervention or by the sovereignty principle, but only if we accept manipulation as a form of coercion under international law standards and if the practice can be understood as meddling with inherent functions of the State. This is based on the belief that *fake news* may alter the perception of the voters and if done efficiently and systematically it could change the outcome of the election, depriving the voters of their freedom of choice when their decisions are based on false premises that will invariably result in false conclusions.

THIRTEENTH.- Mere criticism of the internal politics of another state is not prohibited intervention. The declarations of foreign States about the electoral process are not considered to be violations of international law. They are on many occasions messing with the internal affairs of the State but there is no coercion nor meddling with the inherent functions of the State. Those declarations are just statements that voters may consider but they are not obliged to them. A different situation would be a declaration that could amount to a coercive threat, in that sense it would be illegal when it forces the electorate to make a choice heavily based on the threat when they are deprived of their freedom to choose.

FOURTEENTH.- Cyber-attacks against electoral authorities are violations of sovereignty and the non-intervention principle. It could even amount to illegal use of force if damages are produced. If the attack is against private entities, not directly

the State, it could be a violation of other rules, such as the Budapest Convention or human rights like privacy.

FIFTEENTH.- Once there is clarity in the fact that a rule of international law has been breached, it becomes necessary to attribute the conduct to a State so it can be made responsible and accountable for it. Attribution can be updated when the act or omission that resulted in the breach was realized by a State organ, government employees in their official capacities, persons exercising government authority, acts *ultra vires*, by a group under the control of the State, or when a State accepts responsibility for another's actions and makes it its own. A State may also be responsible for acts conducted by non-State actors outside its control in light of the due diligence principle when they have operated from the territory of the State and it had the capacity to prevent it.

SIXTEENTH.- However, as a result of the stealth and anonymity that characterizes cyber operations, there are many difficulties to attribute these conducts to state organs. If interference is detected and analyzed, it may lead to a private group with no links to the State. Still, the State will be made responsible by the due diligence principle when it had the obligation and possibility to not allow its cyberinfrastructure to be used to conduct cyber operations against the elections of a foreign State.

SEVENTEENTH.- After wrongful conduct is attributed to a State, it can be made accountable before one of the several defense resources States have in Public International Law. The first and most obvious will be the ICJ, however, there are many difficulties to give jurisdiction to the Court to entertain a case, it will depend heavily on the context and the identity of the States involved in an electoral interference to conclude if the Court has jurisdiction. At a glance, the States that nowadays conduct more cyber operations against elections will not be bound to the jurisdiction of the Court in these situations due to the large number of reservations in international treaties.

The ideal would be for an international treaty to come into force on this subject, to be executed by a large number of countries, including those that in the

past have been involved in this kind of activity and that establish the forceful jurisdiction of the ICJ. However, that is very unlikely to occur.

EIGHTEENTH.- Another resource would be the Security Council. Though, due to the veto power that some States have in this body, it will be very difficult to resolve a dispute when the most active States in cyber operations (or their strategic international allies) belong to this privileged group. The General Assembly would be the best option to publicly condemn electoral interferences in front of the international community and to make more *opinion iuris* to strengthen the legal arguments to outlaw electoral interventions.

NINETEENTH.- Countermeasures could also be performed to protect the elections and as an immediate response to cyber-attacks and interferences, although due to their nature they must be temporal and proportionated, and they will not resolve the problem in the long term, on the contrary, it has the elements to exacerbate it.

TWENTIETH.- There is still a lot of work that must be done by the international community to protect elections from foreign interference around the world. We need studies on the effects of social media and *fake news* on elections. We require more political initiative and commitment by the States to attend to the problems and to make more clear and precise rules on what is permitted and what is not. However, there is not much hope for this when the most powerful States are the ones frequently interfering in other States through digital means. Like many other problems in the international community, political will is needed heavily to achieve advances in these issues.

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