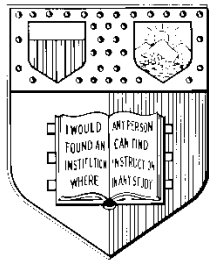


# CORNELL LAW SCHOOL

## LEGAL STUDIES RESEARCH PAPER SERIES



# **DID RUSSIAN CYBER- INTERFERENCE IN THE 2016 ELECTION VIOLATE INTERNATIONAL LAW?**

**Jens David Ohlin**

Cornell Law School  
Myron Taylor Hall  
Ithaca, NY 14853-4901

Cornell Law School research paper No. 17-15

This paper can be downloaded without charge from:  
The Social Science Research Network Electronic Paper Collection:  
<http://ssrn.com/abstract=2934321>

## DID RUSSIAN CYBER-INTERFERENCE IN THE 2016 ELECTION VIOLATE INTERNATIONAL LAW?

*Jens David Ohlin\**

### INTRODUCTION

Sovereignty is a funny thing. It is allegedly the foundation of the Westphalian order, but its exact contours are frustratingly indeterminate. When it was revealed that the Russian government interfered in the 2016 U.S. presidential election by, among other things, hacking into the email system of the Democratic National Committee and releasing its emails, international lawyers were divided over whether the cyber-attack violated international law. President Obama seemingly went out of his way to describe the attack as a mere violation of “established international norms of behavior” and pointedly declined to refer to the cyber-attacks as a violation of international *law*.<sup>1</sup>

Some international lawyers were more willing to describe the cyber-attack as a violation of international law.<sup>2</sup> However, identifying the exact legal norm that was contravened turns out to be harder than it might otherwise appear. To the layperson, the Russian hacking constituted an impermissible (and perhaps) shocking interference in the American political process—an intervention that non-lawyers would not hesitate to label a “violation of sovereignty” as that term is used in political or diplomatic discourse.<sup>3</sup> The problem arises when one attempts to translate that com-

---

\* Associate Dean for Academic Affairs and Professor of Law, Cornell Law School.

<sup>1</sup> Barack Obama, The White House, Office of the Press Secretary, Statement by the President on Actions in Response to Russian Malicious Cyber Activity and Harassment, Dec. 29, 2016. One reason Obama may have been unwilling to describe the attack as illegal was because the U.S. government might want the flexibility to conduct similar operations in the future, without conceding that they are illegal.

<sup>2</sup> See, e.g., Steven J. Barela, *Cross-Border Cyber Ops to Erode Legitimacy: An Act of Coercion*, JUST SECURITY (Jan. 12, 2017). It is also beyond question that the cyber-attack violated various American statutes, including, possibly, 18 U.S.C. § 2701.

<sup>3</sup> For a discussion, see Sean Watts, *International Law and Proposed U.S. Responses to the D.N.C. Hack*, JUST SECURITY (October 14, 2016) (discussing hacking as a violation of U.S. sovereignty).

mon-sense intuition into legal discourse. At that point, the translation effort breaks down for a variety of reasons.

The genesis of the difficulty is that none of the standard rubrics for understanding illegal interventions clearly and unambiguously applies to the facts in question. For example, the Russian interference could simply be viewed as an act of espionage, but it has long been understood (at least until recent controversies in human rights law) that spying violates domestic—but not international—law. An alternative rubric would focus on the intervention aspect of Russia’s behavior. The problem here is that the standard—though by no means universally accepted—definition for what counts as an illegal intervention requires doctrinal elements such as coercion that may not be present in this case. So too with regard to the notion of an illegal “usurpation of an inherently governmental function,” a legal description that is a poor fit for Russia’s hacking during the 2016 election, for reasons that will be more fully articulated below.

That being said, it would be a mistake to hastily reject our common-sense intuitions about the impropriety of Russian hacking during the election. The lack of fit with the doctrinal requirements for an illegal intervention against another state’s sovereignty is simply an indication that the notions of “sovereignty” and “intervention”—though mainstays of contemporary public international law doctrine—are poorly suited to analyzing the legality of the conduct in this case. A far better rubric for analyzing the behavior is the notion of self-determination, a legal concept that captures the right of a people to decide, for themselves, both their political arrangements (at a systematic level) and their future destiny (at a more granular level of policy). It is precisely this more basic right of self-determination that was violated by Russia’s conduct. Unfortunately, the right of self-determination has largely lain fallow since the global process of de-colonization was complete,<sup>4</sup> with the exception of a few cases of controversial secessions.<sup>5</sup> But the Russian hacking campaign is evidence that

---

<sup>4</sup> For a longer discussion of this phenomenon, see Jens David Ohlin, *The Right to Exist and the Right to Resist*, in *THE THEORY OF SELF-DETERMINATION* 70, 72 (Fernando Teson ed., 2016) (describing self-determination as a “right that is universally recognized as central and indisputable in international law, but unfortunately of very little practical significance”).

<sup>5</sup> For an example where self-determination played an important role in the legal analysis, see *Reference re: Secession of Quebec*, 2 S.C.R. 217 (1998).

self-determination's departure from the scene in international law should be mourned and, if possible, reversed, because there are situations and cases where the best legal categories for understanding the situation are not sovereignty and intervention but rather the frustratingly imprecise notion of self-determination.<sup>6</sup>

Accordingly, this Essay proceeds in three parts. Part I will analyze the law of espionage and spying, which are widespread practices in today's world. Though spying was once condemned as illegal under international law, that historical mistake has been rectified and most international lawyers agree that spying violates domestic rather than international law. Part I will then query whether spying violates a human right to privacy, an argument that suggests that the Russian hacking might have violated international human rights law. Part I will conclude by outlining the obstacles to this argument.

Part II will focus on impermissible interventions against sovereignty and in particular on the requirement of coercion. The concept of coercion can be defined narrowly or broadly, with huge consequences for the outcome of the analysis in this case. Unfortunately, there is little in international law that outlines a complete theory of coercion—for that, one must look to philosophy. Finally, Part III will offer a conceptual argument that seeks to recast the sovereignty argument with a new legal architecture built from the raw materials of self-determination. The result of the argument is that the Russian cyber-intervention in the 2016 election may very well have violated international law, but not for the reason that most lawyers assume. In making these arguments, the essay will make extensive reference to the *Tallinn Manual on Cyber-Operations*, which offers the most up-to-date guidance on the law of cyber-activities under international law.<sup>7</sup> Although some of the manual's statements and conclusions of law are controversial, it is nonetheless undeniable that the document is the most complete rendering of an emerging (but not universal) consensus regarding the law in this area.

---

<sup>6</sup> See Edward A. Laing, *The Norm of Self-Determination, 1941–1991*, 22 CAL. WESTERN INT'L L.J. 209, 221 (1992).

<sup>7</sup> *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Michael N. Schmitt ed., 2017) (hereinafter cited as "Tallinn Manual 2.0").

One final methodological point is in order. This essay assumes that the facts currently in the public domain, and as reported by the U.S. intelligence agencies, are accurate.<sup>8</sup> This essay is not the right place to conduct an independent analysis of the factual underpinning of the intelligence assessment. Moreover, some facts will simply be assumed. This Essay will assume that the hacking involved state action on the part of the Russian government, as opposed to private behavior.<sup>9</sup> Also, this Essay will assume that the attribution requirement is satisfied, and that there is sufficient evidence to link the hacking with the Russian government. Moreover, in conducting the legal analysis, it is important to look at the entire event together, rather than segmenting the Russian cyber-interference into isolated behaviors. It is not just that the Russian government engaged in cyber-intrusions against the DNC; that they disclosed emails to Wikileaks; that they distributed the emails; that they did not engage in the same activity to the GOP; and that they deployed other cyber-resources to spread fake news stories on social media. It is *all of it* taken together that paints an entire picture of cyber-interference in the 2016 election. It is this total picture that will be evaluated in this Essay.

## I. SPYING, SURVEILLANCE & PRIVACY

One obvious way of analyzing the Russian intervention is to focus exclusively on the illicit and unauthorized access to specific computer networks and specific email accounts—access that sounds like spying under a layperson’s definition of spying. However, while spying is clearly a violation of U.S. law, it is a separate question whether it is a violation of international law, whose scope is more limited.

### A. *Spying under International Humanitarian Law*

In 1942, the U.S. Supreme Court upheld the conviction at a military commission of Nazi operatives who landed on the east coast of the United States with orders to proceed covertly across the homeland to

---

<sup>8</sup> Office of the Director of National Intelligence, *Assessing Russian Activities and Intentions in Recent US Elections* (Jan. 6, 2017) [hereinafter cited as *Assessing Russian Activities*].

<sup>9</sup> *Id.* at 1.

sabotage key civilian and military installations.<sup>10</sup> In its decision, the Supreme Court noted that “[t]he spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”<sup>11</sup> With this phrase, the Supreme Court seemed to convey that spies were subject to the jurisdiction of military commissions because spying violates the international law of war.

Over time, most international lawyers have come to view the *Quirin* holding as resting on a mistaken assumption, insofar as it relies on the notion that spying represents a violation of the international law of war. Richard Baxter, in his famous article on spies, saboteurs, and guerillas, spoke for a scholarly consensus when he concluded that the *Quirin* court had suffered from a basic but understandable confusion: the difference between a violation of international law and a violation of domestic law that is unprivileged under international law.<sup>12</sup> Spying falls into the latter category, not the former.<sup>13</sup>

---

<sup>10</sup> *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>11</sup> 317 U.S. at 31.

<sup>12</sup> See RICHARD BAXTER, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, in HUMANIZING THE LAWS OF WAR: SELECTED WRITINGS OF RICHARD BAXTER 37, 44 (Detlev F. Vagts et al. eds., 2013).

<sup>13</sup> This issue is also raised by the appellate litigation in *Bahlul*, which concerns the applicability of the conspiracy charge before military commissions. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1167, 1183 (U.S.C.M.C.R. 2011), *vacated*, No. 11-1324, 2013 WL 297726 (D.C. Cir. Jan. 25, 2013), *reh’g en banc granted*, No. 11-324 (D.C. Cir. Apr. 23, 2013), *aff’d in part, vacated in part*, 767 F.3d 1 (D.C. Cir. 2014), *vacated in part*, 792 F.3d 1 (D.C. Cir. 2015). At issue is how to read the *Quirin* precedent, given the court’s confusion between international offenses and domestic offenses that are unprivileged. One way of reading *Quirin* is that the court upheld jurisdiction of military commissions for domestic offenses (because spying is a domestic offense). Another way of reading the case is that the court upheld jurisdiction of military commissions for international offenses only, because the court was laboring under the mistaken view that spying was a direct violation of international law.

### B. *Privacy Under Human Rights Law*

The established view that spying is not a violation of international law has recently come under attack from human rights lawyers who note that the right to privacy is protected by international and European human rights law. For example, article 17 of the ICCPR states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”<sup>14</sup> According to this provision, it would seem as if Russia’s cyber-intrusion violated the human rights of the owners of the various email accounts, including John Podesta and several DNC officials. Indeed, the reference in article 17 to “correspondence” would seem to be especially relevant to this case.

International lawyers studying intelligence surveillance were late to recognize the significance of article 17 and similar provisions in other human rights instruments protecting the right to privacy. However, with the revelation of global surveillance efforts by the National Security Agency, and similar agencies in other countries, some of which were disclosed by Edward Snowden, human rights activists have harnessed international human rights law as a potential rubric with which to resist mass surveillance efforts.<sup>15</sup> If these provisions apply, they may suggest that the legal status of spying may have changed since the time of *Quirin*. Despite the fact that spying is a widespread or even universal tool of statecraft, the adoption of the ICCPR and ECHR may have outlawed the practice.

However, there are several obstacles to this “spying as a violation of the right to privacy” argument. First, human rights provisions were

---

<sup>14</sup> International Covenant on Civil and Political Rights, art. 17, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>15</sup> The Tallinn Manual recognizes that human rights law may be a constraint on cyber-related activities. However, its statements relate mostly to surveillance *within* the territorial state, rather than extraterritorial surveillance. See Tallinn Manual 2.0, *supra* note 7, at 314 (“Note that the scope of *domaine réservé* may shrink as States commit issues related to cyberspace to international law regulation. Intra-State communications, for example, have traditionally been considered to fall entirely within the *domaine réservé* of the State concerned. However, international human rights law by which a State is bound (Chapter 6) may significantly narrow the premise that how a State controls, or otherwise takes measures that affect, the communications of individuals (for instance, by engaging in domestic electronic surveillance) on its own territory is solely an issue of domestic concern.”).

originally conceptualized as constraints against a government's conduct towards its own citizens. So, for example, article 17 would constrain and prohibit Russian attempts to spy on its own citizens, or U.S. attempts to spy on Americans—at least if they are arbitrary or unlawful. (Lawful or non-arbitrary spying, i.e. authorized by domestic statute, would not necessarily be covered by the provision). In the 2016 election, the spying by Russia targeted American citizens, and it is unclear whether the article 17 right to privacy was meant to cover such transnational conduct.

The second problem is that foreign spying is so widespread that arguably customary international law does not prohibit it. There are two responses to this objection. The first is that a customary international law analysis should not displace a treaty-based analysis. So just because spying does not violate customary international law does not answer the question of whether spying violates a particular treaty provision. This is a common problem with international law discourse—the tendency to evaluate all conduct under the rubric of customary international law, even if a treaty covers the conduct. Often, these invocations of customary international law are purportedly justified by claiming that customary international law runs parallel to the treaty provisions. But even if that were the case, the conduct only needs to be illegal according to one source of international law.

The other response is an appeal to “the subsequent practice of the parties”—a doctrine that encourages reference to the practice of states as a means of treaty interpretation.<sup>16</sup> Under this methodology, the fact that states all engage in spying—and rarely criticize it as illegal—could be relevant for an interpretation of article 17 and other treaty provisions. Unfortunately, this methodology is vastly overused in contemporary legal discourse; it is objectionable because it threatens to transform treaty interpretation into a kind of ersatz customary international law analysis (based on state practice). State practice is important but only when the norm flows from custom; when a norm flows from treaty law, state practice ought to fade in relevance. Indeed, even under the interpretive doctrine of the “subsequent practice of the parties,” the method should only be used when it is clear that the parties are acting pursuant to the treaty—in all other cases the practice of the parties is not a relevant method for analyzing an am-

---

<sup>16</sup> See generally TREATIES AND SUBSEQUENT PRACTICE (Georg Nolte ed., 2013).



biguous treaty provision.<sup>17</sup> This methodology seems especially ill suited to analyzing human rights treaties, which demonstrate a unique structure that is not at all analogous to the typical bilateral arrangement. Human rights treaties are multilateral conventions that have *individuals* as their primary beneficiaries. The fact that most nations ignore their obligations under particular human rights provisions ought not to be an argument that the conduct therefore does not violate a human rights obligation.<sup>18</sup> That conclusion would turn human rights treaties on their head by whitewashing widespread non-compliance and transforming it into compliance by redefining the relevant norm.<sup>19</sup>

At the end of the day, treaty interpretation is different from customary international law, and ought to be. Although state practice can be relevant for treaty interpretation under the rubric of “subsequent practice” of the parties, there are substantial constraints on the application of this methodology.<sup>20</sup> Moreover, it is not at all clear that the subsequent practice of states ought to be relevant in the context of human rights treaties, where the ultimate beneficiary of the relevant provision are individuals per se, whose “subsequent practice” would be largely ignored under a putative rule that allows a subsequent practice of widespread noncompliance to effectively gut the core of important human rights provisions codified in binding human rights instruments.

---

<sup>17</sup> See Georg Nolte, Special Rapporteur, Second report on subsequent agreements and subsequent practice in relation to the interpretation of treaties, International Law Commission Sixty-sixth session Geneva, UN Doc. A/CN.4/671 (March 26 2014) (defining “in the application” and “regarding the interpretation” of the treaty).

<sup>18</sup> For a similar argument, see Sean D. Murphy, *The Relevance of Subsequent Agreement and Subsequent Practice for the Interpretation of Treaties*, in Nolte, *supra* note 16, at 82, 91 (suggesting that human rights tribunals may shy away from the “subsequent practice” methodology because it would diminish rather than enhance human rights norms).

<sup>19</sup> An over-reliance on practice also has the opposite problem as well. If states are engaging in a particular practice, it does not automatically mean that the practice demonstrates that they are required to engage in the activity. See Separate Opinion of Judge Fitzmaurice, *Certain Expenses of the United Nations*, Advisory Opinion, I.C.J. Reports 151, 201-02 (1962), *cited in* Nolte, *supra* note 17, at 5-6.

<sup>20</sup> For example, Nolte argues that “[t]he examples from the case law and State practice substantiate the need to identify and interpret carefully subsequent agreements and subsequent practice, in particular to ask whether the parties, by an agreement or a practice, assume a position regarding the interpretation of a treaty, or whether they are motivated by other considerations.” See Nolte, *supra* note 17, at 11.

*C. Extraterritorial Obligations under Human Rights Law*

The bigger problem with concluding that Russian spying during the 2016 election violated the ICCPR is the question of the treaty's extraterritorial scope. The ICCPR requires that "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>21</sup> The question is the proper scope of the qualification "to all individuals within its territory and subject to its jurisdiction." One interpretation is that this qualification applies to both the obligation to respect and the obligation to ensure. This suggests that the treaty has little or no extraterritorial scope. In other words, Russia has an obligation to respect and ensure the right to privacy to individuals within its territory, which would exclude DNC officials living in the United States.

Some human rights scholars have recently suggested that this narrow reading of article 2 is far too restrictive. They suggest that the phrase "to all individuals within its territory and subject to its jurisdiction" applies only to the obligation to ensure, and that by contrast the obligation "to respect" is territorially unbounded and applies across the globe.<sup>22</sup> If this view is correct, then Russia has an obligation to respect the privacy of all individuals around the world (and then has the further obligation to "ensure" this right to those living in Russia). But the more basic obligation applies universally. If this is true, the hacking violated the ICCPR.

The problem with the U.S. asserting this reading of the ICCPR is that the U.S. insists that the ICCPR does not have this broad extraterritorial scope. This legal question was the subject of intense interdepartmental dispute toward the end of the Obama administration. The longstanding view of the U.S. government has been that most provisions of the ICCPR do not apply extraterritorially. In 2010, State Department Legal Advisor Harold Koh authored a memorandum that argued that this

---

<sup>21</sup> ICCPR, *supra* note 14, art. 2.

<sup>22</sup> See MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW, PRINCIPLES, AND POLICY 18 (2011).

established view was wrong and that the legal argument in favor of extra-territoriality ought to be given greater credence.<sup>23</sup> Ultimately, though, after pushback from other executive agencies, the Administration did not adopt the Koh memorandum as official U.S. legal policy. If Koh is right, though, this would provide one avenue through which to view the Russian interference as unlawful, i.e. a violation of international human rights law. However, it is not an argument that the U.S. will adopt anytime soon—at least not until it changes its position on the extraterritorial scope of human rights obligations.

## II. VIOLATIONS OF DOMAINE RÉSERVÉ

The more likely and potentially fruitful rubric for analyzing the Russian cyber-interference with the 2016 election is the concept of sovereignty. Under bread-and-butter principles of public international law, states are prohibited from interfering with another state's sovereignty. These actions can be understood as either an "intervention" against another state's sovereignty or as an illegal "usurpation" of a state's inherently governmental power.<sup>24</sup> Either way, both avenues flow from the basic building blocks of sovereignty. As this Part demonstrates, however, the technical requirements for an illegal intervention might not to apply to the Russian intervention, depending on how one understands the concept of coercion.

---

<sup>23</sup> United States Department of State, Office of the Legal Adviser, October 19, 2010, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights, at 4 ("the Covenant *does* impose certain obligations on a State Party's extraterritorial conduct under certain circumstances").

<sup>24</sup> See, e.g., Tallinn Manual 2.0, *supra* note 7, at 21 ("The second basis upon which the Experts determined a violation of sovereignty occurs is when one State's cyber operation interferes with or usurps the inherently governmental functions of another State. This is because the target State enjoys the exclusive right to perform them, or to decide upon their performance. It matters not whether physical damage, injury, or loss of functionality has resulted or whether the operation qualifies in accordance with the various differing positions outlined above for operations that do not result in a loss of functionality.").

A. *The Concept of Domaine Réservé*

When speaking about the general prohibition against interfering with another state's sovereignty, public international lawyers often refer to a state's *domaine réservé*, its exclusive power to regulate its internal affairs without outside interference. Indeed, the notion of *domaine réservé* would seem to be constitutive of the descriptive and normative uses of the phrase "sovereignty," in the sense that being a sovereign state naturally entails the power to act as the sovereign. This is the enduring notion of sovereign prerogative.

Unfortunately, despite the patina of precision in its French rendering, the concept has little internally generated content. It has to be spelled out with reference to theories and concepts that are external to the notion of sovereignty. The notion of sovereign prerogative has limits and almost every international lawyer would agree with this. The question is where to locate the limit—which domains or activities should be off limits because it falls within a state's *domaine réservé*, and which domains are subject to foreign action.

The Tallinn Manual argues that interventions against a state's choice of political structure would count as an infringement against its *domaine réservé*, but only in the case where the intervention is accompanied by some degree of coercion. So, for example, the drafters of the Tallinn Manual do not view the spreading of propaganda as, by itself, indicative of an illegal intervention against another state's *domaine réservé*.<sup>25</sup> In prior international conflicts, the United States and other countries have dropped leaflets on the territory of another state in order to convince a foreign population to pressure its leaders into a course of action. The Voice of America broadcasts across the globe in order to provide information to foreign audiences. The government of South Korea places loudspeakers near the border with North Korea in order to disseminate news and information

---

<sup>25</sup> *Id.* at 26 ("With regard to propaganda, the International Group of Experts agreed that its transmission into other States is generally not a violation of sovereignty. However, the transmission of propaganda, depending on its nature, might violate other rules of international law. For instance, propaganda designed to incite civil unrest in another State would likely violate the prohibition of intervention (Rule 66). Similarly, propaganda by a vessel in transit through the territorial sea renders the passage noninnocent (Rule 48).")

that might not otherwise reach its epistemically isolated population.<sup>26</sup> No one denies that Putin would have been permitted to speak publicly on RT, the decidedly pro-Putin state television network, and declare his support for Trump and urge all Americans to vote for him. This right to engage in the political process is hardly a violation of America's *domaine réservé*.

### B. *The Requirement of Coercion*

In order to find that there was an impermissible intervention, the Tallinn Manual points to the requirement of coercion, a doctrinal element that flows from the *Nicaragua* judgment.<sup>27</sup> In order to count as illegal intervention, the structure of the interaction must have the following form: engage in this action otherwise you will suffer a particular consequence. Then, the state complies with the coercive demand because it finds the promised consequence to be intolerable to live with.

A key element here is the assumption that the threatened consequence constitutes an *illegal* or *wrongful* action. Although never stated explicitly, this assumption is arguably implicit in the *Nicaragua* judgment, in part because the court concluded that actions of the US constituted an illegal use of force under international law. In contrast, if the threatened consequence is an action that the threatening state clearly has the authority under international law to engage in, then the action is merely an example of bald strategic behavior, not coercion per se. So, for example, in the *Nicaragua* case, the ICJ concluded that the mining of the harbor waters (and support for the Contras) constituted illegal intervention because the U.S. did not have the right to mine the harbor and the action constituted a use of force in violation of the U.N. Charter and customary law. If, on the other hand, a state mounts a naval blockade in a situation when the blockade is permissible under international law, it cannot count as an example of coercion just because the target of the blockade views the situation as intolerable and therefore capitulates. The same thing might be said of a

---

<sup>26</sup> Julian Ryall & Colin Freeman, *South Korea uses loudspeakers to blast North Korea with 'propaganda'*, THE TELEGRAPH (Jan. 8, 2016).

<sup>27</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27), para. 205 ("Intervention is wrongful when it uses methods of coercion... The element of coercion... defines, and indeed forms the very essence of prohibited intervention..."), cited in Tallinn Manual 2.0, *supra* note 7, at 316.

sanctions regime where the underlying sanctions are consistent with international law. So the key to an impermissible act of coercion is that it forces the target state to act by virtue of its desire to avoid the consequences that flow from a third state's illegal or impermissible action.<sup>28</sup>

However, it is not obviously the case that the *Nicaragua* paradigm for coercion is the correct interpretation. Although there is not much law on this question in the burgeoning field of the international law of cyber operations, the issue has been raised and analyzed in numerous other fields, including domestic law and philosophy. For example, in the philosophical literature on coercion, most scholars writing in this area have assumed that what makes coercion wrongful is that the coercer threatens an outcome that makes the target worse off. Some scholars argue that even conditional offers—which might make the target better off—can be coercive because they may constitute an offer so good that it cannot be refused. The difference between a conditional threat and a conditional offer is a non-arbitrary baseline against which we can label something as a benefit or a burden. Some scholars believe that the baseline is the “normal or natural or expected course of events,”<sup>29</sup> while others insist that establishing a coherent baseline will inevitably be arbitrary, and therefore that offers can be coercive.<sup>30</sup> Under either understanding, there is no requirement that the conditional threat or offer involve an otherwise illegal action. One prominent exception is Mitchell Berman, who concludes that wrongful coercion involves threats to engage in otherwise impermissible actions.<sup>31</sup>

---

<sup>28</sup> It is unclear whether a causal requirement must be satisfied. *See* Tallinn Manual 2.0, *supra* note 7, at 319 (“The Experts were divided, however, over the requisite causality of the coercive effect. The majority took the position that an act is coercive so long as there is a causal nexus to an infringement on the internal or external affairs of the target State (the effect); such causation of the requisite effect may be direct or indirect in nature. The minority would impose a requirement that the target State’s action directly cause the effect.”).

<sup>29</sup> *See* Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440, 447 (Sidney Morgenbesser et al eds., 1969); *Coercion*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (2011), available at <https://plato.stanford.edu/entries/coercion/>.

<sup>30</sup> *See, e.g.*, David Zimmerman, *Coercive Wage Offers*, 10 *PHIL. & PUB. AFF.* 121 (1981); Virginia Held, *Coercion and Coercive Offers*, in *NOMOS XIV: COERCION* (J. Roland Pennock & John W. Chapman eds., 1972).

<sup>31</sup> *See* Mitchell Berman, *The Normative Functions of Coercion Claims*, 8 *LEGAL THEORY* 45 (2002); Mitchell Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *GEORGETOWN L.J.* 1 (2001).

Berman's argument is that coercion is wrongful because it involves threatening to do an action which itself is impermissible; the impermissibility of the threat flows from the impermissibility of the completed action, even if it is never required (because the threat is successful).

In domestic law, coercion does not always require the threatening of a consequence that constitutes an illegal or impermissible act, i.e. something that the threatening agent is not permitted to do. Consider the U.S. Supreme Court's review of Medicaid expansion in *NFIB v. Sebelius*.<sup>32</sup> In *Sebelius*, the question facing the Court was whether Congress had engaged in impermissible coercion by attaching a condition to the funds that the federal government provides to states for their Medicaid programs. The condition required the states to expand their Medicaid programs or risk losing federal funding for Medicaid entirely (not just for the expansion). The Supreme Court had already determined, back in *South Dakota v. Dole*, that Congress could use its spending power to induce compliance by sovereign states. In that case, Congress had tied federal funding for highways to the drinking age, so that states were required to raise their drinking age to 21 or risk losing 5 percent of the funding that they received from the federal government for highway projects. The court ruled that these funding conditions were not unconstitutionally coercive, but did concede that prior "decisions have recognized that, in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"<sup>33</sup> So although the funding scheme in *Dole* was constitutional, the court reiterated its holding that the withdrawal of financial *benefits* could rise to the level of coercion.

In *Sebelius*, the court declared that it had finally found a case where pressure had turned into compulsion, even though Congress was simply threatening to take away a benefit that it was under no obligation to provide in the first instance. Writing for the majority, Chief Justice Roberts declared that "[i]n this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head."<sup>34</sup> But what was the gun to the head? It was simply a threat to re-

---

<sup>32</sup> *National Federation of Independent Businesses v. Sebelius*, 567 U.S. 519 (2012).

<sup>33</sup> *South Dakota v. Dole*, 483 U.S. 203, 211 (1987), quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

<sup>34</sup> *Sebelius*, 567 U.S. 519.

move all Medicaid funding to a state—something that the Constitution does not require the federal government to do in the first place. So how can it be coercive to remove something that you are not required to do in the first place?

Justice Roberts answered that in contrast to the modest amount of highway funds that were at issue in *Dole*, the *Sebelius* funding scheme made up as much as 10 percent of the state's entire budget, a consequence that constituted an "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."<sup>35</sup> The states, having grown accustomed (addicted?) to the higher amount of federal aid, would not be able to survive once it was withdrawn—at least not without substantial bureaucratic and financial chaos. So the majority apparently viewed the total amount as the crucial factor, not the question of whether the threatened consequence was illegal or not. At least in this limited circumstance, a court viewed "coercion" as applying to a case where the negative consequence is not otherwise illegal or impermissible. In essence, an offer that is too good to refuse may constitute coercion because it seems impossible for the recipient to forego the benefits in question.<sup>36</sup>

Applying this insight to the case of Russian cyber-interference, one might argue that coercion does not necessarily require a threat to commit an unlawful act, in the sense in which *Nicaragua* implies or Berman argues. The *sine qua non* of coercion is that the threat compelled the state to act in a way that it otherwise would not act,<sup>37</sup> not that the threatened consequence was illegal.<sup>38</sup> If the Russian hacking constituted "threatening conduct," the

---

<sup>35</sup> *Sebelius*, 567 U.S. 519.

<sup>36</sup> The philosopher Robert Nozick argues that coercion involves the substitution of the agent's motives and intentions for the motives and intentions of the coercer. *See* ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 48 (1981). This insight provides an opening for explaining how the withholding of a benefit could rise to the level of coercion. In that situation, the action produced by the withholding of the benefit might stand in a closer relationship to the coercer's motives and intentions than to the target's motives and intentions. This is certainly the case with regard to the coercive Medicaid expansion, which stood in a closer relationship to Congress' intention than it did to the states' intention.

<sup>37</sup> *See* Tallinn Manual 2.0, *supra* note 7, at 318 ("The key is that the coercive act must have the potential for compelling the target State to engage in an action that it would otherwise not take (or refrain from taking an action it would otherwise take).").

<sup>38</sup> This would imply that a retorsion is inherently coercive; it is not clear whether international lawyers would be comfortable with that conclusion.



lack of a threatened consequence that is independently illegal should not be taken as a fatal defect to the argument.

Even so, there are substantial impediments to concluding that the Russian hacking in the 2016 election constituted illegal coercion—impediments that raise a series of broader questions about the entire episode. A legal finding of coercion would depend on identifying some individual or group as the target of the coercion. Was it the American voters? Were they coerced into voting for Trump and not for Clinton? If so, what were the threatened consequences? One might argue that the Russian intervention came with an implied threat to withhold benefits if Hillary Clinton were elected, and that Russia would act in a more cooperative manner towards the United States if Trump were elected, perhaps in exchange for reciprocal considerations from a new Trump Administration. Or perhaps one might argue that the hacking came with the threat of future illegal behavior on the part of the Russian government, either more instances of hacking, or more daringly, increase military aggression in places like Crimea or Eastern Ukraine. Or, one might assume that the object of the coercion was actually Hilary Clinton. In that regard, perhaps the point was that Clinton was implicitly informed that she should adopt a more conciliatory attitude toward Russia (and drop any attempts to pursue regime change in Russia or oust Putin), and that if she did not comply, the hacking of DNC emails would be the threatened consequence.<sup>39</sup> However, it is unclear if this threat/offer was made, either explicitly or implicitly. Furthermore, it is also unclear whether one should equate the American electorate with the “state” itself.

Certainly, the question of whether there was coercion in this case should be determined holistically based on the entire facts surrounding the intervention, rather than hewing formalistically to abstract requirements.<sup>40</sup>

---

<sup>39</sup> It is certainly the case that coercion need not be direct, and may come in an indirect form. *See* Tallinn Manual 2.0, *supra* note 7, at 318 (“Coercion sufficient to support a finding of unlawful intervention may take either a direct or indirect form. In its findings of fact, the International Court of Justice in the *Nicaragua* judgment determined that the United States had supplied assistance to rebels, including ‘training, arming, equipping . . . [rebel] military and paramilitary actions in and against Nicaragua’. The Court held that the principle of non-intervention ‘forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States’.”).

<sup>40</sup> *See* Tallinn Manual 2.0, *supra* note 7, at 318 (“A few Experts, however, argued that it is impossible to prejudge whether an act constitutes intervention without knowing its specif-

Other scholars have concluded that the Russian hacking included some coercive element, implicitly rejecting the requirement of an impermissible consequence.<sup>41</sup> One possibility for defining coercion is simply the scale and effect of the overall intervention,<sup>42</sup> which in this case was quite substantial. This is perhaps the most important lesson of the *Sebelius* reasoning, where the court looked to the totality of the circumstances before deciding whether the actions in the case were fundamentally coercive. However, there must be a line between being coercive and being corrosive to the proper functioning of a democracy. While the Russian hacking was certainly corrosive, it is genuinely unclear whether it should count as coercive.<sup>43</sup>

---

ic context and consequences. For them, the context and consequences of a particular act that would not normally qualify as coercive could raise it to that level.”).

<sup>41</sup> For example, Steven Barela has concluded that “coercion can be understood as more than simply forcing an electoral outcome. The significance and expanse, both in scale and reach, of the interests targeted are relevant. Whether the Russian meddling was meant to achieve a particular result in the election (wishing to aid one candidate over another), there were also more important—even if less tangible—matters at stake.” See Steven J. Barela, *Cross-Border Cyber Ops to Erode Legitimacy: An Act of Coercion*, JUST SECURITY (Jan. 12, 2017).

<sup>42</sup> See Myres S. McDougal and Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 YALE L.J. 771, 782 (1958) (suggesting that coercion is defined by three dimensions of consequentiality, including “the importance and number of values affected, the extent to which such values are affected and the number of participants whose values are so affected”); Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, in CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICT 257 (Jens David Ohlin et. al. 2015) (“Applied to cyber means and acts, McDougal and Feliciano’s dimensions of coercion might consider the nature of state interests affected by a cyber operation, the scale of effects the operation produces in the target state, and the reach in terms of number of actors involuntarily affected by the cyber operation in question”); Barela, *supra* note 41 (concluding that the McDougal and Feliciano formulation lends support to the conclusion that the Russian hacking violated international law).

<sup>43</sup> See also William Banks, *State Responsibility and Attribution of Cyber Intrusions after Tallinn 2.0*, TEXAS L. REV. (in this volume) (concluding that according “to the traditional measures, there was no coercion and no unlawful intervention” but also conceding that “because state practice and resulting customary international law is based on examples from kinetic conflicts... [w]e should temper our confidence in this coercion analysis”).

### C. *Illegal Usurpation of a Government Function*

The other possibility is that the Russian cyber-hacking was illegal, not because it constituted a coercive intervention but rather as an illegal “usurpation of an inherently governmental function,”<sup>44</sup> which does not require the element of coercion. The question is what was the inherently governmental function in this case.

Undeniably, the holding of a federal election is an inherently governmental function in a liberal democracy. So, in theory, the *disruption* of an election should count as the usurpation of an inherently governmental function. Indeed, the drafters of the Tallinn Manual listed a number of governmental functions, including “changing or deleting data such that it interferes with the delivery of social services, the conduct of elections, the collection of taxes, the effective conduct of diplomacy, and the performance of key national defence activities.”<sup>45</sup> In the 2016 election, however, the Russian government allegedly *released* private information to the public, rather than “changing or deleting” it.<sup>46</sup> Moreover, the Tallinn Manual does not further define what constitutes the “conduct of elections.”

Everyone agrees that had the Russian government tampered with the ballot boxes, or with electronic voting, this would count as a violation of international law, because the *counting of votes* during an election is a paradigmatically “governmental function,” which in that case would be “usurped” by Russia.<sup>47</sup> Votes should be tabulated, counted, and reported by the government officials administering the election, and any interference with *that* process sounds like a usurpation of an inherently govern-

---

<sup>44</sup> See Tallinn Manual 2.0, *supra* note 7, at 22.

<sup>45</sup> See Tallinn Manual 2.0, *supra* note 7, at 22.

<sup>46</sup> Assessing Russian Activities, *supra* note 8, at 2-3.

<sup>47</sup> See Tallinn Manual 2.0, *supra* note 7, at 312. (“This Rule addresses situations in which a State intervenes by cyber means in the ‘internal or external affairs’ (as discussed below) of another State, for example, by using cyber operations to remotely alter electronic ballots and thereby manipulate an election. It also encompasses situations in which a State intervenes by non-cyber means in cyber activities related to the internal or external affairs of another State. For instance, this Rule would prohibit the use by one State of non-cyber coercive means to compel another State to adopt particular domestic legislation related to Internet service provider liability or to refrain from becoming Party to a multilateral treaty dealing with cyber disarmament or human rights online (on human rights, see also Chapter 6).”

mental function. At this moment in time, however, there is no publicly available evidence that the Russian cyber-interference included tampering with the vote tabulation process.<sup>48</sup> The interference included disclosure of private information and possibly distribution of fake news stories, falling under the umbrella of propaganda and violations of the right to privacy, but no actual interference in the vote tabulation process.<sup>49</sup> We are left then with an overall imprecision of illegal conduct, but without a clear and unambiguous doctrinal route towards that conclusion.

### III. A VIOLATION OF SELF-DETERMINATION

Having failed to identify an unambiguous argument that the Russian cyber-interference satisfied the doctrinal requirements for an illegal intervention under international law, this section will look at the situation with reference to political terminology, in order to identify a better legal framework for analysis.<sup>50</sup> In political terms, the Russian hacking interfered with a key element of “sovereignty,” insofar as sovereignty is understood as a relational concept that connects the government with the will of the people.<sup>51</sup> The whole point of democratic governance is that the government should represent the will of the people, and this relationship might be called the “sovereign will.” If this is what is meant by sovereignty, then clearly the Russian hacking constituted an interference and *distortion* of the sovereign will, because the goal of the hacking was to help elect a candidate who was sympathetic to the interests of the Russian government, rather than elect a candidate who represented the hopes and desires of the American people.

This generates a translation problem. The notion of sovereign will described above does not accord with the concept of sovereignty as public international lawyers usually use the term. Of course, the word “sovereign-

---

<sup>48</sup> Assessing Russian Activities, *supra* note 8, at 3 (concluding that although Russian hackers accessed computer systems of state and local electoral boards, these systems were “not involved in vote tallying”).

<sup>49</sup> Assessing Russian Activities, *supra* note 8, at 4 (describing trolls).

<sup>50</sup> I am indebted to Philip Bobbitt for discussing this point with me.

<sup>51</sup> For example, Rousseau would have referred to this as the “general will.” See JEAN-JACQUES ROUSSEAU, ON SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT (Alan Ritter et al. eds. & Julia Conaway Bondanella trans., 1992) (1762).

ty” is notoriously slippery and vague, and often generates more heat than light.<sup>52</sup> But generally speaking, when a public international lawyer speaks of sovereignty, they mean the right of a state to control its territory, regulate its subjects, and be free from external military aggression, as well as lesser forms of impermissible interventions and interference.<sup>53</sup> Indeed, this is the notion of sovereignty that guided our legal analysis in Parts I and II of this Essay. However, we were proceeding under the assumption that the legal notion of sovereignty—and its companion notion of unlawful interventions against sovereignty—was the proper legal framework for understanding an event that politicians and even political theorists would have analyzed with the language (their language) of “sovereignty.” But this assumption may be false. The best legal analog for the political concept of sovereignty may not be the legal concept of sovereignty after all.

The reason for the translation problem is that the legal notion of sovereignty is centered around the state, while the political notion of sovereignty is not so carefully circumscribed, and often relates to the *people* whose sovereign will is represented by the government and even perhaps protected by the constitutional order.<sup>54</sup> To the extent that something untoward happened during the 2016 election, the relevant victim here was not the American state but rather the American *people*, whose expression of political will was interfered with. But once one shifts from discussing the state to the people, the legal language of sovereignty becomes singularly unhelpful for describing the situation. The closest analogue in international law to this political notion of “sovereign will” is the principle of self-determination, the right of all peoples to determine for themselves their political destiny.<sup>55</sup> *That* is the norm that was violated during the election.

The election process is the ultimate expression of a people’s sovereign will. By illicit interference, the Russians influenced the election to

---

<sup>52</sup> See Louis Henkin, *That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999).

<sup>53</sup> See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 105-7 (7<sup>th</sup> ed. 2008).

<sup>54</sup> For example, the Tenth Amendment reserves all powers (not otherwise delegated in the U.S. Constitution) to the “States respectively, or to the people.”

<sup>55</sup> See ICCPR, *supra* note 14, art. 1 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”).

produce the sovereign will of the Russian people (or its government), rather than the sovereign will of the American people. Arguably Russia was concerned that Clinton would pursue regime change as official U.S. policy, and viewed this possibility as an existential threat.<sup>56</sup> The interference substituted one sovereign will for the other as an outcome of the election. Doing so violated the right of the American people to self-determination.

There are several reasons why international lawyers have been unwilling to discuss this incident with the language of self-determination, which is part of a more general hesitation surrounding the legalization of the right of self-determination. First, self-determination is usually invoked as an argument for *constructing* a state (perhaps through secession),<sup>57</sup> but once a state has been created, the legal discourse usually shifts to state “sovereignty” and the principle of self-determination fades into the background. But that fading away is not legally required; indeed, a people’s right to self-determination does not disappear once it succeeds in creating a state to fulfill its self-determination. The concept of state sovereignty does not entirely exhaust the principle of self-determination, which remains an important guiding principle and runs parallel to the legal concept of state sovereignty.

The second problem with invoking self-determination in this context is that the argument presupposes that we can identify, *ex ante*, the sovereign will of the American people, before viewing the results of the election—the process which defines the sovereign will as its ultimate expression. So, for example, a critic might look at the election results and say that the resulting election of Trump was the expression of the American people’s self-determination, and there is little empirical evidence to the contrary. That being said, perhaps it is possible to identify the true expression of a people’s self-determination by invoking counterfactual thinking, which is commonplace in legal discourse. In the absence of the Russian interference, the election would have proceeded quite differently, suggest-

---

<sup>56</sup> Assessing Russian Activities, *supra* note 8, at 1 (“Putin most likely wanted to discredit Secretary Clinton because he has publicly blamed her since 2011 for inciting mass protests against his regime in late 2011 and early 2012, and because he holds a grudge for comments he almost certainly saw as disparaging him.”).

<sup>57</sup> *Reference re: Secession of Quebec*, 2 S.C.R. 217 (1998). For a discussion, see generally MILENA STERIO, *THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: “SELFISTANS,” SECESSION, AND THE RULE OF THE GREAT POWERS* (2012).

ing that the actions of Russia distorted and interfered with the American people's right of self-determination.<sup>58</sup>

The third problem is that concluding that Russia violated the American people's right to self-determination might entail that in previous elections it was the United States that violated the right to self-determination when it meddled in the political and electoral process of a foreign nation.<sup>59</sup> But the mere fact that the U.S. itself may have violated the norm in prior occasions does not necessarily entail that the U.S. cannot be victimized by similarly illegal conduct, nor that the activity is not illegal. Widespread non-compliance does not automatically transform the behavior into compliance, the rules of customary international law (via state practice) notwithstanding. More importantly, even if the U.S. has engaged in such meddling before, it is important to distinguish between political interference in dictatorships and other illiberal systems versus interference in genuinely democratic elections.<sup>60</sup> The former violates the principle of self-determination while the latter does not.<sup>61</sup> Indeed, it should count as a virtue of the self-determination rubric that it helpfully distinguishes between interventions that frustrate democratic self-government and interventions that support it. Furthermore, it is a vice of the blunt-tool of state sovereignty that as a legal concept it is incapable of making such crucial distinctions.

## CONCLUSION

We should be clear on specifically how the self-determination legal analysis differs from the sovereignty analysis. Both analyses agree that in-

---

<sup>58</sup> *But see* Assessing Russian Activities, *supra* note 8, at i (“We did not make an assessment of the impact that Russian activities had on the outcome of the 2016 election.”).

<sup>59</sup> *See generally* Ishaan Tharoor, *The long history of the U.S. interfering with elections elsewhere*, WASHINGTON POST (Oct. 13, 2016).

<sup>60</sup> Some historical examples of U.S. meddling in foreign political processes arguably involved the frustration of democratic processes in favor of non-democratic regimes that were viewed as more friendly to U.S. interests.

<sup>61</sup> In fact, this is a core difference between the sovereignty and self-determination frameworks; the concept of sovereignty leaves little room for discriminating between political arrangements.

terference with a foreign political process might be illegal.<sup>62</sup> Indeed, as long ago as the *Nicaragua* case the ICJ concluded that sovereignty entails the “choice of a political, economic, social, and cultural system, and the formulation of foreign policy.”<sup>63</sup> What is different is that proceeding under the doctrine of self-determination escapes the formalistic and doctrinal requirements for illegal interventions, including the requirement of coercion.

---

<sup>62</sup> For example, the Tallinn Manual concludes that “the matter most clearly within a State’s *domaine réservé* appears to be the choice of both the political system and its organisation, as these issues lie at the heart of sovereignty. Thus, cyber means that are coercive in nature may not be used to alter or suborn modification of another State’s governmental or social structure.” See Tallinn Manual 2.0, *supra* note 7, at 314.

<sup>63</sup> See *Nicaragua*, *supra* note 27, para. 205.