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**Foreign Electoral Interference:
Normative Implications in Light of
International Law, Human Rights,
and Democratic Theory**

Nils Reimann

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Human Rights, and Democratic Theory

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International Law, Human Rights,
and Democratic Theory**

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Zurich, December 2022

Nils Reimann

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List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
App	Application
ASEAN	Association of Southeast Asian Nations
BGBI	<i>Bundesgesetzblatt</i> (German Federal Law Gazette)
BGE	Official collection of (selected) decisions of the Swiss Federal Supreme Court
BVerfGE	Official collection of (selected) decisions of the German Federal Constitutional Court
c	Chapter
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CFREU	Charter of Fundamental Rights of the European Union
CIA	Central Intelligence Agency (United States)
CRPD	Convention on the Rights of Persons with Disabilities
dec	Decision
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) / Reports of Judgments and Decisions of the European Court of Human Rights
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EU	European Union
FBI	Federal Bureau of Investigation (United States)
FSB	A Russian intelligence agency
GC	Grand Chamber (of the European Court of Human Rights)
GRECO	Group of States against Corruption (Council of Europe)
GRU	A Russian military intelligence agency
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILC	International Law Commission

ILM	International Legal Materials
JORF	<i>Journal officiel de la République française</i> (Official Gazette of the French Republic)
KGB	An intelligence agency of the Soviet Union
NATO	North Atlantic Treaty Organization
NCP	National Contact Point
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
PCIJ	Permanent Court of International Justice
Rep	Reports
Res	Resolution
RT	(Formerly) Russia Today
S	<i>Seite</i> (page)
SC	Statutes of Canada
SCR	Supreme Court Reports (Canada)
Stat	Statutes at Large (United States)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Doc	UN Document Symbol (Official Document System of the UN)
UNGA	United Nations General Assembly
UNGP	United Nations Guiding Principles on Business and Human Rights
UNTS	United Nations Treaty Series
US	United States of America / United States Reports
VCDR	Vienna Convention on Diplomatic Relations
VCLT	Vienna Convention on the Law of Treaties

Part I

Problématique:
*The Silhouettes of a
Phenomenon*

Introduction

In the early hours of Wednesday, 9 November 2016, it became clear that Donald Trump had been elected the 45th president of the United States.¹ A month later, the then incumbent US president, Barack Obama, ordered intelligence agencies to fully review evidence of alleged Russian interference in said election.² Another month later, the US intelligence community published a report, concluding ‘with high confidence’ that there had indeed been ‘an influence campaign in 2016 aimed at the US presidential election, the consistent goals of which were to undermine public faith in the US democratic process, denigrate Secretary Clinton, and harm her electability and potential presidency.’³ Almost 230 years earlier, in 1787, John Adams had written to Thomas Jefferson that ‘as often as Elections happen, the danger of foreign Influence recurs.’⁴ It seems Adams was right.⁵ But what exactly is the danger Adams referred to? What is actually imperilled by foreign interference in elections? And is there something to be done about it?

This study looks at possible answers to these questions. Its principal focus is the permissibility of foreign electoral interference under international law. Given the nature of the object of enquiry, however, such a legal assessment cannot ignore the political realities accompanying the phenomenon and the democratic theory underpinning elections. While being mindful of the pitfalls

1 Ciara McCarthy & Claire Phipps, US election 2016 results timeline: how the night unfolded (The Guardian, 9 November 2016). See also Gouzoules 2017, esp 215: the president of the United States is not elected by the US electorate directly but by electors, who ‘are obligated by custom and, in some states, by law, to cast their Electoral College votes for the candidate who won their state’s election’. On the Electoral College and obligations on electors see also the recent ruling by the US Supreme Court in the case *Chiafalo v Washington* 591 US ___ (2020).

2 Spencer Ackerman & David Smith, Barack Obama orders ‘full review’ of possible Russian hacking in US election (The Guardian, 9 December 2016).

3 Office of the Director of National Intelligence (US), Intelligence Community Assessment: Assessing Russian Activities and Intentions in Recent US Elections (6 January 2017), 1. This report was later followed up by further investigations. See Special Counsel Robert S. Mueller, III, Report On The Investigation Into Russian Interference In The 2016 Presidential Election, Volumes I-II (Washington DC, March 2019). See also United States Senate Select Committee on Intelligence, Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Volumes 1-5 (2020).

4 ‘To Thomas Jefferson from John Adams, 6 December 1787’ (Founders Online, National Archives). See also footnote 46 below and the accompanying text.

5 For more thoughts by Adams, Hamilton, and Washington on interference in elections see section 1.1.2 below. On the history of foreign electoral interference from then to now see section 1.2 below.

of multi-disciplinary research, the study attempts to offer the most comprehensive normative account of foreign electoral interference yet. It discusses the consequences of foreign electoral interference for the international legal order and for democracy, covering three pivotal concepts of international law – two of which belong to the domain of international human rights law – as well as relevant strands of democratic theory. At the heart of the legal assessment lie the inter-state prohibition of intervention, the right of peoples to self-determination, and the electoral rights of individuals. Meanwhile, the subsequent theoretical evaluation looks through the conceptual lenses of participation, representation, and deliberation. Thereby, the enquiry addresses potential deficits of legality, accountability, and legitimacy ensuing from foreign electoral interference.

The study is structured as follows. The remaining sections of Part I describe the silhouettes of the phenomenon at hand by providing some background information, identifying the object of enquiry in the foreground, and explaining the methodological approach chosen. Parts II through IV offer a legal assessment of foreign electoral interference focused on the international law of non-intervention, the international law of self-determination, and the international law of electoral rights.⁶ Part V provides a summary of the most important lessons from the legal assessment before first taking a step back, to evaluate them in light of democratic theory, and then moving forward, charting an outlook on possible responses to foreign electoral interference. A conclusion reiterates the key insights of the study and weaves together its different threads.

1. Background

Foreign electoral interference is not a novel phenomenon. Others have written and thought about related questions for centuries. It is thus necessary to sketch the background against which this study is undertaken.⁷

6 I am grateful to Professor Evelyne Lagrange for valuable suggestions on the sequence of the legal assessment. While this study puts a lot of emphasis on the importance of individual rights as normative yardsticks, the order of chapters was necessitated by the fact that non-intervention – and to some extent self-determination – has a longer history as a binding norm of international law, is the subject of more voluminous interpretative work, and can thus inform the human rights perspective later in the study by means of cross-references.

7 For a compilation of recent publications on the legal aspects of foreign electoral interference see section 3.5 below, especially footnote 246.

1.1. The history of ideas and the apprehension about foreign electoral interference

The possibility of foreign interference in governmental affairs and, more specifically, in electoral processes has concerned various philosophers since at least the eighteenth century. Their works have subsequently influenced the architecture of the international legal order. The following sections briefly revisit the respective writings.

1.1.1. Interference in government: Wolff, de Vattel, Kant, Mill, and beyond

Valuable efforts have been made in the quest for the origins of the concept of humanitarian intervention.⁸ In the context of the question of whether it is justified to wage war against ‘tyranny’⁹, to use the language of earlier times, references point back as far as to the writings of Aristotle, Cicero, and Seneca, among others.¹⁰ Only later in the history of ideas does the focus seem to shift from the exception – justified intervention – to the rule, a general principle of non-intervention. While others laid important groundwork before,¹¹ Christian Wolff and Emer de Vattel are regarded as the first theorists to describe such a norm of international relations.¹² In 1749,¹³ Wolff completed *Jus gentium methodo scientifica pertractatum* – ‘The Law of Nations Treated According to the Scientific Method’ –, which contains the following excerpt:¹⁴

§ 257. – Of not interfering in the government of another.

Since by nature no nation has a right to any act which pertains to the exercise of the sovereignty of another nation, since, moreover, the ruler of a state exercises the sovereignty of a state, and since government consists in the exercise of sovereignty; no ruler of a state has the right to interfere in the government of

8 For an introduction see Heraclides/Dialla 2015, 11-30.

9 See Heraclides/Dialla 2015, 14, 16.

10 Heraclides/Dialla 2015, 14; Meron 1991, 115; Nussbaum 1943, 453-455; von Elbe 1939, 666-667; Cox 2017.

11 Vincent 1974, 22: ‘Grotius, Hobbes, and Pufendorf can be regarded as precursors of the notion because their writings furnished ideas without which the principle could not have found expression in the form which it took in the works of Wolff and Vattel.’ On Grotius in particular see also Lauterpacht 1946, esp 46.

12 Vincent 1974, 22; Heraclides/Dialla 2015, 11; Beitz 1999, 71. On de Vattel only see also Lowe 1994, 75-77; Athen 2017, 31.

13 While the volume was written in 1749 – in Latin, to facilitate wide circulation –, it was only published in 1764, when Wolff had already died: Wolff 1934, xxiii, xxvi.

14 Wolff 1934, 131.

another, consequently cannot urge that another should establish anything in its state or do anything, or not do anything, and the government of the ruler of one state is not subject to the decision of the ruler of any other state. [...]

Interestingly, Wolff goes on to discuss a potential exception if ‘the ruler of a state should burden his subjects too heavily or treat them too harshly’, yet Wolff denies a right of forcible interference in such cases.¹⁵ De Vattel’s *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* – ‘The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns’ – was first published in 1758 and includes the following paragraph:¹⁶

§ 54. No nation has a right to interfere in the government of another. It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that no one of them has the least right to interfere in the government of another. Of all the rights possessed by a Nation that of sovereignty is doubtless the most important, and the one which others should most carefully respect if they are desirous not to give cause for offense.

De Vattel, too, discusses the question of possible exceptions and answers it in the affirmative.¹⁷ Immanuel Kant subsequently provided another notable

15 Wolff 1934, 132, para 258: ‘[i]f the ruler of a state should burden his subjects too heavily or treat them too harshly, the ruler of another state may not resist that by force, nevertheless he may intercede in their behalf. For no ruler of a state has the right to interfere in the government of another, nor is this a matter subject to his judgement. [...]’.

16 de Vattel 1916, 131. While the English translation facilitates comparison, the text was originally published in French. See de Vattel 1758, 297: ‘§. 54. Aucune Nation n’est en droit de se mêler du Gouvernement d’une autre. C’est une conséquence manifeste de la Liberté & de l’indépendance des Nations, que toutes sont en droit de se gouverner comme elles le jugent à propos, & qu’aucune n’a le moindre droit de se mêler du Gouvernement d’une autre. De tous les Droits qui peuvent appartenir à une Nation, la Souveraineté est sans-doute le plus précieux, & celui que les autres doivent respecter le plus scrupuleusement, si elles ne veulent pas lui faire injure.’

17 de Vattel 1916, 131: ‘§ 56. When it is permitted to interfere in a contest between a sovereign and his people. But if a prince, by violating the fundamental laws, gives his subjects a lawful cause for resisting him; if, by his insupportable tyranny, he brings on a national revolt against him, any foreign power may rightfully give assistance to an oppressed people who ask for its aid. [...] But this principle should not be made use of so as to authorize criminal designs against the peace of Nations. It is in violation of the Law of Nations to call on subjects to revolt when they are actually obeying their sovereign, although complaining of this rule. [...]’ For the French wording see de Vattel 1758, 298-299: ‘§. 56. Comment il est permis d’entrer dans la querelle d’un Souverain avec son peuple. Mais si le Prince, attaquant les Loix fondamentales, donne à son peuple un légitime sujet de lui résister; si la Tyrannie, devenuë insupportable,

formulation, in his 1795 work *Zum ewigen Frieden* – ‘Perpetual Peace’. The essay, a ‘philosophical sketch’¹⁸, contains six ‘Preliminary Articles’ and three ‘Definitive Articles’ intended to secure perpetual peace among states. Kant’s formulation of the fifth ‘Preliminary Article’ and his commentary on it read as follows:¹⁹

5. ‘No state shall forcibly interfere in the constitution and government of another state.’

For what could justify such interference? Surely not any sense of scandal or offence which a state arouses in the subjects of another state. It should rather serve as a warning to others, as an example of the great evils which a people has incurred by its lawlessness. And a bad example which one free person gives to another (as a *scandalum acceptum*) is not the same as an injury to the latter. But it would be a different matter if a state, through internal discord, were to split into two parts, each of which set itself up as a separate state and claimed authority over the whole. For it could not be reckoned as interference in another state’s constitution if an external state were to lend support to one of them, because their condition is one of anarchy. But as long as this internal conflict is not yet decided, the interference of external powers would be a violation of the rights of an independent people which is merely struggling with its internal ills. Such interference would be an active offence and would make the autonomy of all other states insecure.

soulève la Nation ; toute Puissance étrangère est en droit de secourir un peuple opprimé, qui lui demande son assistance. [...] Mais on ne doit point abuser de cette maxime, pour autoriser d’odieuses manœuvres contre la tranquillité des Etats. C’est violer le Droit des Gens que d’inviter à la révolte des sujets, qui obéissent actuellement à leur Souverain, quoiqu’ils se plaignent de son gouvernement.’

18 Kant 1991, 93. Or, in German, *Ein philosophischer Entwurf*: Kant 1912, 314.

19 Kant 1991, 96 (italics in the original). See also the original German wording in Kant 1912, 346 (italics in the original): ‘5. “Kein Staat soll sich in die Verfassung und Regierung eines andern Staats gewaltthätig einmischen.” Denn was kann ihn dazu berechtigen? Etwa das Skandal, was er den Unterthanen eines andern Staats giebt? Es kann dieser vielmehr durch das Beispiel der großen Übel, die sich ein Volk durch seine Gesetzlosigkeit zugezogen hat, zur Warnung dienen; und überhaupt ist das böse Beispiel, was eine freie Person der andern giebt, (als *scandalum acceptum*) keine Läsion derselben. – Dahin würde zwar nicht zu ziehen sein, wenn ein Staat sich durch innere Veruneinigung in zwei Theile spaltete, deren jeder für sich einen besondern Staat vorstellt, der auf das Ganze Anspruch macht; wo einem derselben Beistand zu leisten einem äußern Staat nicht für Einmischung in die Verfassung des andern (denn es ist alsdann Anarchie) angerechnet werden könnte. So lange aber dieser innere Streit noch nicht entschieden ist, würde diese Einmischung äußerer Mächte Verletzung der Rechte eines nur mit seiner innern Krankheit ringenden, von keinem andern abhängigen Volks, selbst also ein gegebenes Skandal sein und die Autonomie aller Staaten unsicher machen.’

By bringing up the concept of autonomy, Kant provides a good illustration of why questions around interference and non-interference are of central importance to the coexistence between states.²⁰ Lastly, a publication by John Stuart Mill is interesting. ‘A Few Words on Non-Intervention’ first appeared in 1859²¹ and summarizes the author’s thoughts on foreign interference. The question to be answered, according to Mill, is the following:²²

The disputed question is that of interfering in the regulation of another country’s internal concerns; the question whether a nation is justified in taking part, on either side, in the civil wars or party contests of another; and chiefly, whether it may justifiably aid the people of another country in struggling for liberty; or may impose on a country any particular government or institutions, either as being best for the country itself, or as necessary for the security of its neighbours.

Mill differentiates between a set of scenarios: ‘[a]ssistance to the government of a country in keeping down the people’²³, ‘a protracted civil war’ with ‘no probability of a speedy issue’²⁴, ‘helping the people of another [country] in a struggle against their government for free institutions’,²⁵ and assistance to ‘a

20 See on this Doyle 1983, 213: ‘[t]he basic postulate of liberal international theory holds that states have the right to be free from foreign intervention. Since morally autonomous citizens hold rights to liberty, the states that democratically represent them have the right to exercise political independence. Mutual respect for these rights then becomes the touchstone of international liberal theory.’ See also the second part of Doyle’s article: Doyle 1983a. On the relationship between autonomy and ‘nonintervention’ see also the work of Beitz (to whom Doyle refers as well): Beitz 1999, esp 67–123. On how the concept of political autonomy is expressed in today’s international legal order, see section 13.1 below.

21 Mill 2006, 252. Note that Mill seems to use ‘non-intervention’ and ‘non-interference’ interchangeably (ibid, 258): ‘[t]here seems to be no little need that the whole doctrine of non-interference with foreign nations should be reconsidered, if it can be said to have as yet been considered as a really moral question at all.’ For terminological notes on ‘intervention’ and ‘interference’ see section 2.1.3 below.

22 Mill 2006, 261.

23 Mill 2006, 261. For Mill’s opinion see ibid: ‘[a] government which needs foreign support to enforce obedience from its own citizens, is one which ought not to exist; and the assistance given to it by foreigners is hardly ever anything but the sympathy of one despotism with another.’

24 Mill 2006, 261. See also ibid: ‘[i]ntervention of this description has been repeatedly practised during the present generation, with such general approval, that its legitimacy may be considered to have passed into a maxim of what is called international law.’

25 Mill 2006, 261. See also ibid, 261–262: ‘[w]hen the contest is only with native rulers, and with such native strength as those rulers can enlist in their defence, the answer I should give to the question of the legitimacy of intervention is, as a general rule, No. [If people] have not sufficient love of liberty to be able to wrest it from merely domestic oppressors, the liberty which is bestowed on them by other hands than their own, will have nothing real, nothing permanent.’

people struggling against a foreign yoke, or against a native tyranny upheld by foreign arms'²⁶. As a general matter, Mill offers the following conclusion:²⁷

It can seldom, therefore – I will not go so far as to say never – be either judicious or right, in a country which has a free government, to assist, otherwise than by the moral support of its opinion, the endeavours of another to extort the same blessing from its native ruler.

Many more authors have contributed to the discussion of whether it is legitimate for states to interfere in the governmental affairs of other states.²⁸ Yet not only do the texts discussed so far offer particularly pointed formulations, their authors are also regarded as highly influential on today's international legal order and its concept of non-intervention.²⁹

It is striking how reminiscent the considerations of Wolff and de Vattel on possible justifications of intervention – in case of violations of 'fundamental laws'³⁰ or '[i]f the ruler of a state should burden his subjects too heavily or treat them too harshly'³¹ – are of today's discussions about humanitarian intervention.³² Furthermore, the language employed by Kant and Mill, as well as the threshold they suggested for undue interventions, is also reflected in contemporary international law. Kant's mention of 'forcibly'³³ represents an important step away from the formulations of Wolff and de Vattel and towards

26 Mill 2006, 263. See also *ibid.*: '[i]ntervention to enforce non-intervention is always right-ful, always moral, if not always prudent. Though it be a mistake to give freedom to a people who do not value the boon, it cannot but be right to insist that if they do value it, they shall not be hindered from the pursuit of it by foreign coercion.'

27 Mill 2006, 262.

28 For a more detailed account of the history (and theory) of non-intervention see Vincent 1974, 20–63. In addition to those treated here, Vincent mentions the following authors: Thomas Hobbes, Samuel von Pufendorf, Hugo Grotius, Georg Friedrich von Martens, James Kent, Henry Wheaton, Sir Robert Phillimore, William Edward Hall, T. J. Lawrence, Mountague Bernard, Richard Cobden, and Joseph Mazzini. Furthermore, Doyle discusses the contribution of Michael Walzer at length: Doyle 2009.

29 On the – undoubtedly important – place of Wolff, de Vattel, and Kant in the history of international law see Haakonssen 2012, Jouannet 2012, and Kleingeld 2012, respectively. Though Mill may have had less influence on general international law, Mill's writings also include what has been described as a 'theory of international relations': Miller 1961. On their influence on the international law of non-intervention see Vincent 1974, 20–63. For summaries of the views held by de Vattel, Kant, and Mill on just and unjust (military) intervention see the contributions in Recchia/Welsh 2013: Pitts 2013; Hurrell 2013; Doyle 2013. On the role of the four authors in the conceptualization of humanitarian intervention in particular see Heraclides/Dialla 2015, 11–97.

30 de Vattel 1916, 131, para 56.

31 Wolff 1934, 132, para 258.

32 For a starting point on humanitarian intervention see Rodley 2015.

33 Kant 1991, 96. Or, 'gewalthätig' in the German original wording: Kant 1912, 346.

today's international legal framework, in which intervention is prohibited if it involves force or is otherwise coercive.³⁴ Mill even used the specific notion of coercion,³⁵ later described as 'the very essence of [...] prohibited intervention' by the International Court of Justice.³⁶

Given these continuities, there is little doubt that foreign electoral interference would have been of concern to the authors discussed here, had they witnessed instances of it.³⁷ At the very least, the fact that interference in government caught the attention of theorists whose ideas are echoed in today's international legal order tells us something about whether it should be of concern to us, too.

Moreover, the writings of Wolff, de Vattel, Kant, and Mill arguably show another point of importance, namely that every theory of international law needs to include an understanding of what is desirable interaction and what is undesirable interference. If there is to be cooperation among states, any ban on certain behaviour at the international level needs to be clearly and convincingly defined. A blanket ban on interference, without criteria of illegality, would preclude relations among states altogether, a consequence both unrealistic and undesirable. In short, if there is supposed to be lawful interaction at the international level, there needs to be a threshold for unlawful interference. It is by no means self-evident what exactly is wrong about 'interference' or 'intervention', and why.³⁸ Instead, these are concepts in need of definition and contextualization. The contributions by Wolff, de Vattel, Kant, and Mill represent important early attempts at identifying the specific wrongs of interference in government.

34 On the prohibition of intervention and the element of coercion see section 4.3.2 below.

35 Mill 2006, 263 (emph add): '[t]hough it be a mistake to give freedom to a people who do not value the boon, it cannot but be right to insist that if they do value it, they shall not be hindered from the pursuit of it by *foreign coercion*.'

36 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205. See also footnote 293 below and the accompanying text.

37 The history of foreign electoral interference appears to have begun in 1796. See section 1.2.1 below.

38 For an interesting analysis of the concept of 'intervention' see Rosenau 1969, esp 151: '[h]owever it may be defined, intervention is not in and of itself either good or bad. A double standard prevails: most interventions may be undesirable for a variety of reasons, but some are eminently desirable for equally compelling reasons. Most interventions probably invade the privacy of people and undermine the stability of the international system, but some interventions uphold human rights and preserve international order. Intervention, in other words, is normally an instrument of action, a means and not an end, and the morality or immorality of interventionary behavior thus depends on the end toward which it is directed.' See also Sellers 2014, esp 6: '[e]verything that anyone ever does is an intervention in the strictest sense of the term, to the extent that it has an effect or an influence on someone else.'

1.1.2. Interference in elections: Adams, Hamilton, and Washington

Perhaps with the exception of Mill, who mentioned ‘taking part, on either side, in [...] party contests’³⁹, the authors discussed above wrote about interference in government, but they did not specifically address interference in elections. Wolff and de Vattel passed away too early to witness the advent of modern electoral democracy, at least if one believes the American and the French Revolution to epitomize the beginning of its spread in the respective continents.⁴⁰ Kant followed the French Revolution from afar,⁴¹ yet *Zum ewigen Frieden* was completed in 1795,⁴² one year before what is usually cited as the first instance of foreign electoral interference.⁴³

By contrast, some of the United States’ ‘founding fathers’⁴⁴ seem to have been well aware of the possibility of foreign electoral interference. To begin with, John Adams wrote a notable letter to Thomas Jefferson in 1787, not long before the first presidential election in the United States would take place.⁴⁵ It contains the following lines:⁴⁶

39 Mill 2006, 261.

40 This is of course a simplification, and there is much more to be said about the genesis of democracy. In particular, the egalitarian promises made in the 1776 Virginia Declaration of Rights and the 1789 *Déclaration des Droits de l’Homme et du Citoyen* were not kept, with slavery, colonialism, and racist and sexist disenfranchisement – to name just a few inegalitarian practices – outliving the respective revolutions. For a detailed account of the significance of the revolutions in France and America – as well as of other political developments between 1760 and 1800 – for democracy, see Palmer 2014. See also Edelstein 2014, esp 333: ‘[t]he French Revolution, together with its American counterpart, originated modern electoral democracy.’ See also Vann R. Newkirk II, *American Democracy Is Only 55 Years Old—And Hanging by a Thread* (The Atlantic, 11 February 2021).

41 In his 1798 work ‘The Contest of Faculties’ (*Der Streit der Fakultäten*), Kant described the French Revolution as ‘an occurrence in our own times which proves this moral tendency of the human race’: Kant 1991a, 182–183. For the German text see Kant 1907, 85–87. See on this also Mahlmann 2021a, 121, paras 3–4.

42 See footnotes 18–19 above and the accompanying text.

43 Baines/Jones 2018, 12; Mohan/Wall 2019, 110; Levin 2020, 3; Levin 2021, 23. See also section 1.2.1 below.

44 While this term is commonly used to refer to Adams, Hamilton, Jefferson, and other framers of the US constitution, it does not paint the full picture. See Nikole Hannah-Jones, *Our democracy’s founding ideals were false when they were written. Black Americans have fought to make them true.* (The New York Times Magazine, 14 August 2019): ‘[m]y father, one of those many black Americans who answered the call, knew what it would take me years to understand: that the year 1619 is as important to the American story as 1776. That black Americans, as much as those men cast in alabaster in the nation’s capital, are this nation’s true “founding fathers.” And that no people has a greater claim to that flag than us.’

45 While the election of George Washington in 1789 was the first presidential election, it was not yet a contested one. See footnote 52 below.

46 ‘To Thomas Jefferson from John Adams, 6 December 1787’ (Founders Online, National Archives).

You are apprehensive the President when once chosen, will be chosen again and again as long as he lives. So much the better as it appears to me.—You are apprehensive of foreign Interference, Intrigue, Influence. So am I.—But, as often as Elections happen, the danger of foreign Influence recurs. The less frequently they happen the less danger.—And if the Same Man may be chosen again, it is probable he will be, and the danger of foreign Influence will be less. Foreigners, seeing little Prospect will have less Courage for Enterprize. Elections, my dear sir, Elections to offices which are great objects of Ambition, I look at with terror. Experiments of this kind have been so often tryed, and so universally found productive of Horrors, that there is great Reason to dread them.

A year later, in 1788, Alexander Hamilton voiced similar concerns in a text which illustrates that one of the reasons⁴⁷ why the United States established a system of indirect presidential elections – the Electoral College – was to prevent foreign interference:⁴⁸

Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union? But the convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.

Lastly, George Washington, in his 1796 ‘Farewell Address to the People of the United States’ after two terms as president, also reminded readers of the possibility of foreign electoral interference:⁴⁹

47 On the Electoral College and the possibility of foreign influence being one reason for its creation, see Feerick 1968, esp 254. This is not the full story, however. See Wilfred Codrington III, *The Electoral College’s Racist Origins* (The Atlantic, 17 November 2019).

48 Hamilton 2009, 345.

49 ‘Washington’s Farewell Address to the People of the United States’ (19 September 1796), 20–21 (italics in the original).

Against the insidious wiles of foreign influence (I conjure you to believe me, fellow citizens) the jealousy of a free people ought to be *constantly* awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government. But that jealousy to be useful must be impartial; else it becomes the instrument of the very influence to be avoided, instead of a defense against it. Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real patriots, who may resist the intrigues of the favorite, are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people to surrender their interests.

As it turned out, the first prominent case of foreign electoral interference would occur only weeks later, when France tried to prevent John Adams from being elected as Washington's successor.⁵⁰ While the French attempt was not successful,⁵¹ it proved that the framers' concerns about foreign interference in elections were justified. In short, the apprehension about foreign electoral interference is as old as US electoral democracy⁵² – not to say as modern electoral democracy itself.⁵³ The historical extent to which this apprehension was proven right will be discussed next.

1.2. History and the recurrence of foreign electoral interference

According to recent scholarship, foreign electoral interference is 'ubiquitous'.⁵⁴ While more detailed historical accounts can be found elsewhere,⁵⁵ the following sections will summarize their most important insights.

50 Baines/Jones 2018, 12; Mohan/Wall 2019, 110; Levin 2020, 3; Levin 2021, 23. See also section 1.2.1 below.

51 For the results of the 1796 election and other US presidential elections see *The American Presidency Project* by the University of California Santa Barbara.

52 The 1796 election was not the first US election, but it was the 'first *contested* presidential election': DeConde 1957, 658 (emph add). For more on the 'first presidential contest' of 1796 see Pasley 2013. See also section 1.2.1 below.

53 See footnote 40 above.

54 Bubeck/Marinov 2019, 148. The authors use the term 'electoral intervention' rather than foreign electoral interference, yet their understanding of it is not far from the subject matter of this study. See *ibid.*, 45: 'we define an electoral intervention as a deliberate attempt by a foreign government to change the electoral rules or the election outcome.' For the definition of foreign electoral interference used here, see section 2.1.4 below. Levin also writes of the 'ubiquity of partisan electoral interventions': Levin 2020, 168.

55 See most notably Shimer 2020. See also – more broadly, on 'the secret history of disinformation and political warfare' – Rid 2020 (capitalization removed).

1.2.1. The 1796 US presidential election: beginnings

The history of foreign electoral interference appears to have begun with the 1796 US presidential election, the country's first actual contest for the presidency.⁵⁶ Before that, George Washington had twice been elected unanimously by the presidential electors,⁵⁷ since 'Washington, everyone agreed, simply had to be the first President.'⁵⁸ The race for Washington's succession was fought between then-vice president⁵⁹ John Adams and Thomas Jefferson.

Believing that a win by Jefferson, formerly a diplomat in Paris,⁶⁰ would benefit French interests and '[l]ooking upon John Adams as an enemy of France and a friend of England'⁶¹, French diplomat Pierre-Auguste Adet engaged in a pattern of conduct later described as 'brazen electioneering maneuvers by a foreign agent'^{62,63} Among other things, Adet wrote a series of official notes to the US Secretary of State between 27 October and 15 November 1796 and, in order to influence public opinion, also had them published in a Philadelphia newspaper.⁶⁴ Voicing French discontent with the recently concluded Jay Treaty – a US-British treaty of amity, commerce, and navigation⁶⁵ –, Adet threatened that if the US pursued its pro-British course by electing John Adams as president,⁶⁶ France's relations with the US would not only be suspended but turn hostile.⁶⁷ In Adet's words, the US 'would become its enemy'⁶⁸. A last effort to influence the outcome of the election ended with the following appeal: '[l]et your Government return to itself, and you will still find in Frenchmen

56 See footnote 52 above.

57 Boller 2004, 3-6.

58 Boller 2004, 3.

59 In contrast to the election of Washington as president, the election of Adams as vice president was far from unanimous: Boller 2004, 4.

60 On 'the Paris years of Thomas Jefferson' see Howard Adams 1997 (capitalization removed).

61 DeConde 1957, 652.

62 DeConde 1957, 654.

63 On Adet's role in the 1796 US presidential election see also DeConde 1958, 456-500.

64 See DeConde 1957, 653-654. See also Conlin 2000, esp 508.

65 For the text of the treaty see *The Avalon Project* by Yale Law School. See also the copy provided by the US Library of Congress. For more on the Jay Treaty see Combs 1970.

66 To quote Levin, the content of the letter was 'a lightly veiled reference to the election of John Adams.' Dov H. Levin, Sure, the U.S. and Russia often meddle in foreign elections. Does it matter? (The Washington Post, 7 September 2016).

67 See also Baines/Jones 2018, 13.

68 See the reproduction of Adet's letters in the American State Papers: Lowrie / St. Clair Clarke 1833, 577.

faithful friends and generous allies.’⁶⁹ However, the French interference proved insufficient, if not counterproductive.⁷⁰ Adams won the presidency by three votes and Jefferson, for now,⁷¹ became vice president.⁷²

While 1796 may have marked the beginning of the history of foreign electoral interference, it would take many more years for it to become a regularly observed phenomenon. Other well-researched early examples include alleged Soviet influence in the 1924 British general election⁷³ as well as reported operations by Nazi Germany and the UK in the context of the 1940 US presidential election⁷⁴. It is the emergence of the East-West divide in the twentieth century, however, that would for the first time generate a large set of pertinent cases.

1.2.2. The Cold War period: intensification

A particularly comprehensive and recent historical account, covering ‘America, Russia, and One Hundred Years of Covert Electoral Interference’, comes from David Shimer.⁷⁵ For much of the twentieth century, elections around the world would become an arena for the struggle for power between the United States and the Soviet Union. Both sides had already started to exert influence in other states’ elections earlier,⁷⁶ yet with the end of World War II and the

69 Lowrie / St. Clair Clarke 1833, 583.

70 Conlin 2000, 509. See also DeConde 1957, 656: ‘[s]uch a charge, whether or not true, gives the opposition the opportunity of patriotically denouncing foreign interference and of posing as the defender of national honor against foreign subversives.’

71 Thomas Jefferson would of course become the third president of the United States. On Jefferson’s election in 1800 see Boller 2004, 10–18.

72 DeConde 1957, 657; Conlin 2000, 509.

73 See Baines/Jones 2018, 13–14: ‘[t]he Zinoviev Letter was a letter purportedly from Grigory Zinoviev, the head of Comintern in Moscow, to the Communist Party of Great Britain to mobilise “sympathetic forces” in the Labour Party to support an Anglo-Soviet treaty and loan to the Bolshevik government, and foment revolt in the British armed forces.’ See also Shimer 2020, 18–19. The letter is considered a forgery today – see Shimer 2020, 19. See also Baines/Jones 2018, 14. For more on the Zinoviev Letter see Bennett 2018.

74 See Levin 2020, 4: ‘one of the main methods used by Nazi Germany in their attempt to prevent Franklin Delano Roosevelt’s election to a third term in the 1940 U.S. elections was the covert leak (via a bribed U.S. newspaper) of a captured Polish government document four days before the election that supposedly showed Roosevelt to be a “hypocrite” and a “warmonger” [...]’ Meanwhile, the UK made efforts in support of Roosevelt: Steve Usdin, *When a Foreign Government Interfered in a U.S. Election – to Reelect FDR* (Politico, 16 January 2017).

75 Shimer 2020.

76 Regarding the USSR see Shimer 2020, 17: ‘[b]eginning in the spring of 1919, the Comintern [Communist International] financed various Communist groups, including in the United States, Hungary, Czechoslovakia, Germany, Italy, Yugoslavia, Austria, Poland, Holland, and Britain.’ Regarding the US, see Mohan/Wall 2019, 110: ‘[t]here is a long

advent of the Cold War began a period of increased efforts by the US and the USSR to promote their respective interests through foreign electoral interference. Elections essentially became a vehicle for the two blocs to advance their vision of where the world should be headed politically.⁷⁷

In contrast to the USSR,⁷⁸ the US did not possess an agency carrying out foreign intelligence activities during peacetime until the CIA was founded in 1947.⁷⁹ Among other things, the CIA was authorized to covertly influence elections abroad, a power it first made use of in Italy's 1948 general election.⁸⁰ This electoral contest, well-researched by now,⁸¹ became a 'cold war propaganda battle'⁸² with foreign interference from both East and West. Together with Greece (1958) and Chile (1964 and 1970), Italy (1948, 1953, 1972, and 1976) would become one of three sites of 'double interventions' by the US and the USSR.⁸³ Techniques in 1948 included covert funding for political parties⁸⁴ as well as 'psychological warfare'⁸⁵. The US ambassador to Rome at the time gave around 40 speeches and is said to have implicitly threatened a halt to US aid to Italy if communists were elected.⁸⁶ In addition, the US government encouraged Americans of Italian descent to send letters and other messages to voters in

history of political and electoral interference by US government and corporate interests in Central America, for example, in Honduras from 1911 and El Salvador in 1944 and 1960.' On the involvement of the US in Central America and Honduras in particular see Wright 1960a.

77 See Shimer 2020, 23.

78 On the Comintern, the Cominform, the KGB, and their role in the USSR's activities around foreign electoral interference see Shimer 2020, 15-22.

79 Shimer 2020, 16. On the history of CIA (and US military) operations since World War II see generally Blum 2003. See also the following report of the 'Church Committee': United States Senate, *Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities* (Washington: US Government Printing Office, 1976), esp 97-125 (on the history of the CIA) and 141-161 (on covert action).

80 Mistry 2006, 312-313; Shimer 2020, 27.

81 For an assessment of previous scholarship on the 1948 Italian election and US influence see Mistry 2011.

82 Ellwood 1993.

83 See Levin 2020, 267-270. On covert action in Chile by the CIA see also the following report by the 'Church Committee': United States Senate, *Staff Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities: Covert Action in Chile 1963-1973* (Washington: US Government Printing Office, 1975). On 'United States intervention in post-war Greek elections' see also Kassimeris 2009 (capitalization removed).

84 On funds provided by the United States see Mistry 2006, 309, 313-315. With respect to the pro-Soviet left-wing campaign, at least CIA officials believed that it was covertly funded by the USSR: Shimer 2020, 25. However, according to Miller, 'American funding was not a critical element in the [Democrazia Cristiana]'s triumph.' – Miller 1983, 53.

85 Del Pero 2001.

86 Mistry 2006, 314.

Italy, asking them to reject communist candidates.⁸⁷ Some of the instructions, publicized with the help of a local New York church, read as follows:⁸⁸

[...] To encourage these people, we urge every American of Italian descent *immediately to write a letter to their relatives and friends in Italy as follows:*

1. Tell them of the blessings of democracy.
2. Tell them the rights and privileges we enjoy under a representative government.
3. Encourage them to vote for a representative form of government.
4. Warn them of the threat and danger of Communism that will deprive them of liberty, religion, and all civil rights.
5. Explain that conditions might be bad there now, but they will be worse if Communism succeeds.

We urge you to *write* today. Send the letters by *Air Mail* so that they will arrive before April 18th.

If you wish, *use the suggested letter printed below*. . . . Write today!! [...] Pray!!! Pray!!! Pray!!!

It is estimated that an impressive ten million messages reached Italy this way.⁸⁹ In the end, US-supported anti-communists triumphed over the USSR-supported left-wing alliance.⁹⁰ Emboldened by this success, the CIA continued to interfere in elections abroad, using the Italian experience as a ‘template’;⁹¹ so did the Soviet Union. After 1948, the stage was set for a decades-long power struggle of remarkable dimensions, which Dov H. Levin has summarized as follows:⁹²

Overall, 117 partisan electoral interventions have been done by the U.S. and the USSR/Russia between January 1, 1946, and December 31, 2000. Eighty-one (or 69%) of these interventions were done by the U.S. while the other thirty-six cases (or 31%) were conducted by the USSR/Russia. To put this number in the proper perspective, during the same period 937 competitive national-level

87 Martinez/Suchman 1950.

88 Martinez/Suchman 1950, 122 (italics in the original).

89 Shimer 2020, 30.

90 Del Pero 2001, 1306. For more details on the election and its outcome see Einaudi 1948.

91 David Robarge, the chief internal historian of the CIA, put it this way in an interview with David Shimer – see Shimer 2020, 44. See also Mistry 2006, 319: ‘[s]uch operations, which had begun during the first post-war Italian election, became a regular feature of US involvement in national elections in the country; a further illustration of the legacy of the 1948 campaign.’ In other words, the US had ‘[taken] off the gloves’: Miller 1983. See also Ishaan Tharoor, *The long history of the U.S. interfering with elections elsewhere* (The Washington Post, 13 October 2016).

92 Levin 2020, 152-153. For the definition underlying the work, see footnote 118 below and the accompanying text. For a study that found foreign electoral interference in general to be even more frequent, see footnote 110 below.

executive elections, or plausible targets for an electoral intervention, were conducted within independent countries. [...] Accordingly, 11.3% of these elections, or about one of every nine competitive elections since the end of WW2, have been the targets of an electoral intervention.

By the end of the twentieth century, the Cold War was officially over. Foreign electoral interference, however, persisted.

1.2.3. The twenty-first century: no end in sight

For much of the twentieth century, foreign electoral interference had been ‘a story of Washington and Moscow’,⁹³ with the United States being significantly more active than the Soviet Union.⁹⁴ With the end of the Cold War, the roles shifted. While interference in elections lost importance for the CIA, at least according to US officials,⁹⁵ Russian activities appeared to increase.⁹⁶ They would not be coordinated by the KGB anymore, but rather by intelligence agencies such as the FSB, ‘the main successor to the KGB’⁹⁷, or the GRU, ‘Russia’s military intelligence agency’⁹⁸. In addition, other states have appeared to be ‘warming up to’⁹⁹ foreign electoral interference as well.¹⁰⁰

The internet has of course enabled new means of interference and enhanced existing ones. However, the 1948 example discussed above vividly illustrates how some underlying tactics remain the same, even though different channels of communication are used today. While there are important differences, the similarities between the 1948 letter campaign¹⁰¹ and today’s ‘troll factories’¹⁰² – essentially state-sponsored groups of individuals

93 Shimer 2020, 8.

94 See footnote 92 above and the accompanying text.

95 Others disagree – see Shimer 2020, 118-124.

96 Shimer 2020, 124: ‘[a]s Washington moved away from covert electoral interference, Moscow rediscovered and enhanced this weapon.’

97 Shimer 2020, 153.

98 Shimer 2020, 146.

99 Editorial Board, There’s another expert player warming up to online election interference. We should worry. (The Washington Post, 23 September 2019).

100 See David Smith, Russia, China and Iran seeking to influence US ahead of elections, top intelligence official says (The Guardian, 8 August 2020). On ‘the specter of Chinese interference’ see Sukumar/Deo 2021 (capitalization removed).

101 See footnotes 87-89 above and the accompanying text.

102 See Shaun Walker, The Russian troll factory at the heart of the meddling allegations (The Guardian, 2 April 2015). For a more recent report see Alex Hern & Luke Harding, Russian-led troll network based in west Africa uncovered (The Guardian, 13 March 2020). See also Aric Toler, Anatomy of a Russian ‘Troll Factory’ News Site (Bellingcat, 8 June 2018). For a pertinent case study see Marcia/Desouza 2021, 76-77.

systematically spreading biased content on social media to influence discourse abroad – are striking.

Generally, foreign electoral interference in the twenty-first century is in many ways similar to the activities during the Cold War. In addition to the persistence of financial assistance,¹⁰³ Shimer summarizes the parallels between then and now as follows:¹⁰⁴

- Just as the Soviets and their collaborators altered actual votes in postwar Poland and Hungary, Russia uses the internet to target voting systems and voter registration databases.
- Just as the KGB and the CIA spread propaganda through third-party cutouts, such as radio programs and newspapers, Russia uses the internet to work through third parties like Wikileaks, anonymous social media accounts, and unsuspecting foreigners.
- Just as the KGB circulated forged FBI files about politicians, Russia uses the internet to hack and release emails that reveal the personal lives of public figures.
- Just as the CIA waged scare campaigns, Russia uses the internet to spread propaganda meant to provoke fear.
- Just as the KGB sowed discord by staging racist and anti-Semitic hate crimes, Russia uses the internet to disseminate divisive content designed to pit citizens against each other.
- Just as the CIA worked to turn out certain voters in countries like Italy and Chile, Russia uses digital advertisements and propaganda to motivate some citizens to vote and persuade others not to.
- Just as democracies struggled to defend their electoral processes during the Cold War, so, too, are democracies struggling to secure their elections today.

The history of foreign electoral interference reached a new milestone in 2016. Not only did the US presidential election become the most well-reported, well-studied, and well-known example,¹⁰⁵ the ‘Brexit’ referendum in the UK was reportedly targeted too.¹⁰⁶ Yet, while 2016 may have brought about a

103 Shimer 2020, 149: ‘[t]he most basic consistency is cash.’

104 Shimer 2020, 149–150.

105 See footnotes 1–3 above and the accompanying text. For a recent overview see also Shimer 2020, 163–239.

106 On this allegation and the lack of a sufficient assessment see the following (redacted) report: Intelligence and Security Committee of Parliament (United Kingdom), ‘Russia’ (2020), 12–14. It should be noted that referendums are not technically covered by the definition of foreign electoral interference proposed in this study. See section 2.1 below.

culmination, the history of foreign interference in elections did not end there. The 2017 presidential election in France¹⁰⁷ proves this as well as the German general election in the same year¹⁰⁸. In 2020, yet another US presidential election reportedly became the target of foreign interference.¹⁰⁹

In fact, one study found ‘some type of electoral intervention for 65 percent of the elections’¹¹⁰ in a sample of national elections worldwide between 1945 and 2012.¹¹¹ As has happened before, foreign electoral interference may adapt over time and come in different shapes and with different actors and targets. Vasu Mohan and Alan Wall offered the following prediction about future trends:¹¹²

We envisage four distinct trends in future foreign electoral interference: it will shift from local operations to remote-based interference; electoral data will be increasingly vulnerable to cyberattacks; there will be a shift from mass communication-drive interference to using personalized interference tools; and the shrinking reach of legacy media will reduce filters on information accuracy and availability, providing an environment in which electoral interference can thrive.

107 See Alex Hern, *Macron hackers linked to Russian-affiliated group behind US attack* (The Guardian, 8 May 2020). See also Paul Sonne, *A Russian bank gave Marine Le Pen’s party a loan. Then weird things began happening.* (The Washington Post, 27 December 2018). For a discussion of the latter case as an example of economic means of interference see footnote 165 below and the accompanying text.

108 BBC, *Turkey’s Erdogan says German leaders are enemies* (18 August 2017). For a discussion of this as an example of informational means of interference see footnote 175 below and the accompanying text.

109 National Intelligence Council (US), *Intelligence Community Assessment: Foreign Threats to the 2020 US Federal Elections* (10 March 2021); Tim Mak & Dina Temple-Raston, *How The U.S. Fended Off Serious Foreign Election Day Cyberattacks* (NPR, 18 November 2020).

110 See Bubeck/Marinov 2019, 111: ‘[o]ur sample covers a total of 262 elections in 157 countries since the end of the World War II. We track the behavior of 201 interveners, of which 160 meet our sample criteria. Overall we find some type of electoral intervention for 65 percent of the elections in our random sample (170 out of 262 elections in total). We find interventions in the electoral process in 52 percent of elections and interventions that target specific candidates in 33 percent of elections. Both types of interventions are present in 20 percent of the cases.’ For their definition of electoral interventions see *ibid.*, 45. See also footnote 54 above.

111 This includes electoral interference by any foreign state, not just the ‘great powers’ as in the dataset of Levin discussed above (see footnote 92 and the accompanying text). See Bubeck/Marinov 2019, 20: ‘[t]he dataset codes all 1945-2012 national-level direct elections in the world [...]’. For a list of the cases in their sample see *ibid.*, 236-249. The full dataset is available in the [Harvard Dataverse Repository](#).

112 Mohan/Wall 2019, 113.

As the authors note themselves,¹¹³ speculating about the future is difficult. One thing seems clear nonetheless: there is no indication that foreign electoral interference might disappear anytime soon. In other words, it is ‘here to stay’¹¹⁴.

1.3. Political science and the effects of foreign electoral interference

Foreign electoral interference has also caught the attention of some political scientists. The available studies have found effects on both voting behaviour within a particular election and the democratic system surrounding it.¹¹⁵

1.3.1. Effects on voting behaviour: vote share and election outcome

An important contribution in political science comes from Dov H. Levin, who studied ‘partisan electoral interventions’.¹¹⁶ More particularly, Levin looked at those by the ‘great powers’ – the US and the USSR/Russia – and gathered them in the ‘Partisan Electoral Intervention by the Great Powers dataset’.¹¹⁷ The following definition underlies the dataset:¹¹⁸

A partisan electoral intervention is defined [...] as a situation in which one or more sovereign countries intentionally undertakes specific actions to influence an upcoming election in another sovereign country in an overt or covert manner which they believe will favor or hurt one of the sides contesting that election and which incurs, or may incur, significant costs to the intervener(s) or the intervened country.

Analysing cases between 1946 and 2000,¹¹⁹ Levin found significant evidence that partisan electoral interventions are indeed beneficial to the candidate or party they are designed to support.¹²⁰ While overt operations appear to be

113 Mohan/Wall 2019, 113.

114 Bubeck/Jäger/Marinov/Nanni 2022, 102.

115 For a more comprehensive enumeration of possible effects see Levin 2021, 27: ‘[r]esearch on this issue has so far focused on five major possible impacts: (1) their effects on political polarization in the target state; (2) their effects on the election results; (3) their effects on the target state’s democracy; (4) their effects on intrastate violence in the target state; and (5) the policy reactions usually enacted and supported by the target state’s public after the intervention.’

116 Levin 2020. See also Levin’s earlier publications: Levin 2016; Levin 2016a; Levin 2019; Levin 2020a. For a recent summary see Levin 2021.

117 See Levin 2020, 267-270. The dataset is also available on Dov H. Levin’s website. It is introduced by the following publication: Levin 2016.

118 Levin 2020, 50.

119 Levin 2020, 267.

120 Levin 2020, 186.

more effective than covert ones,¹²¹ the average increase in the supported electoral contestant's vote share is as high as three percent.¹²² Foreign electoral interference is thus indeed an 'effective foreign policy tool'¹²³ with the potential to decisively influence election outcomes.¹²⁴

1.3.2. Systemic effects: polarization, system trust, and level of democracy

In his 1971 work 'Polyarchy',¹²⁵ Robert A. Dahl wrote the following: '[...] one must not lose sight of the simple proposition that overt foreign intervention is not necessarily fatal to an already existing polyarchy and may actually strengthen it in some respects.'¹²⁶ Johannes Bubeck and Nikolay Marinov made a similar point in their monograph on 'Foreign Election Interventions'. Some interventions, they write, 'can have a staying power, motivating local actors to "keep at it."¹²⁷ Generally, however, political scientists describe the following – arguably rather negative – systemic effects: increased polarization, decreased trust in democracy, and a decreased 'level of democraticness'¹²⁸.

A 'polarizing effect' was first described by Daniel Corstange and Nikolay Marinov in 2012.¹²⁹ Studying the 2009 parliamentary elections in Lebanon, they found support for their hypothesis¹³⁰ that foreign electoral interference polarizes the electorate towards the interfering state.¹³¹ If a foreign state takes sides in an election, the side of the electorate that is supported consequently tends to prefer closer relations with the interfering state, whereas voters on the disadvantaged side are subsequently inclined to seek more distance.¹³² A partisan bias regarding foreign interference has been confirmed by other studies as well.¹³³

121 Levin 2020, 186.

122 Levin 2020, 186.

123 Levin 2020, 186.

124 See Levin 2020, 187: 'partisan electoral interventions can and do swing elections.'

125 Dahl understood polyarchies as regimes characterized by public contestation and participation, two theoretical dimensions of democratization: Dahl 1971, 6–7. See also *ibid.*, 8: '[p]olyarchies, then, may be thought of as relatively (but incompletely) democratized regimes, or, to put it in another way, polyarchies are regimes that have been substantially popularized and liberalized, that is, highly inclusive and extensively open to public contestation.'

126 Dahl 1971, 197.

127 Bubeck/Marinov 2019, 224.

128 See footnote 138 below.

129 Corstange/Marinov 2012.

130 Corstange/Marinov 2012, 656, 658.

131 Corstange/Marinov 2012, 663.

132 Corstange/Marinov 2012, 658, 663–667. See also Bubeck/Marinov 2019, 225–226.

133 See Bush/Prather 2020, esp 605–606: '[w]e theorized that partisan meddling by outside countries influences how individuals think about foreign economic relations. We

This does not mean, however, that foreign interference is generally desired by voters who benefit from it. While there is a certain double standard, foreign electoral interference is viewed negatively overall, even by those whose side a foreign state takes.¹³⁴ Nevertheless, it seems fair to say that ‘foreign interference sows domestic divisions.’¹³⁵

In addition to confirming the existence of a polarized view on foreign electoral interference, Michael Tomz and Jessica L. P. Weeks also describe a potential to negatively affect trust in democratic institutions. Not only did foreign interference ‘greatly increase [...] distrust in the results of the election’ in question, it also adversely affected faith in the democratic system as such.¹³⁶ Moreover, Tomz and Weeks found a modest but nonetheless significant impact on voters’ intention to abstain in future elections.¹³⁷

Lastly, a third systemic effect of (covert) foreign electoral interference has been suggested, namely on the target state’s ‘level of democraticness’¹³⁸. Levin found support¹³⁹ for the following hypothesis: ‘Successful covert electoral interventions will, over time, be associated with greater harm to the target’s democracy than overt electoral interventions.’¹⁴⁰ While some overt forms of interference ‘even significantly increase the chances of a transition to democracy’, covert operations were associated with negative effects on the target state’s democraticness and, in particular, ‘an increase in the risk of a democratic breakdown’.¹⁴¹ Furthermore, a study from 2013 found that ‘superpower interventions in the domestic politics of other countries during

supported the argument with evidence from Tunisia and the United States, finding patterns consistent with our hypothesis. Across both countries and multiple policies, individuals were more likely to support engagement with a supportive partner than with a partner who opposed their side in domestic politics.’ See also Shulman/Bloom 2012, 460-466; Tomz/Weeks 2020, 864.

134 See Shulman/Bloom 2012, 471: ‘[t]he data in this study show that whatever their ethnicity or region, Ukrainians generally do not wish their elections to be meddled with. Most strikingly, even in Western Ukraine intervention by the West is illegitimate, and even in Eastern Ukraine intervention by Russia is illegitimate.’ See also Tomz/Weeks 2020, 8. While the degree of disapproval depends on the means of interference, all examples except for one are viewed negatively by a majority of respondents. On voter attitudes towards foreign influence on electoral processes see also Marinov 2013.

135 Tomz/Weeks 2020, 864.

136 Tomz/Weeks 2020, 865.

137 See Tomz/Weeks 2020, 866. The results again depend on the specific means of interference employed. Generally, however, ‘foreign intervention modestly depressed future intentions to vote’ (ibid).

138 Levin 2019, 847.

139 Levin 2019, 852-853.

140 Levin 2019, 846.

141 Levin 2019, 853.

the Cold War had substantial adverse consequences for democracy in the intervened countries.’¹⁴²

To conclude, several systemic – and arguably quite negative – effects can ensue from foreign electoral interference. To be sure, this summary has only scratched the surface of what political science has to say about the matter at hand. However, it suffices to see that foreign electoral interference is not merely of theoretical interest. It is a potent tool in states’ foreign policy instrumentarium and it can have significant practical consequences. If it leaves the electorate more polarized, faith in the voting process eroded, and democracy harmed, foreign electoral interference may achieve exactly what it is designed to achieve.¹⁴³ Some of the effects described may perhaps be mitigated to a certain extent.¹⁴⁴ Yet, these findings are certainly not good news, and they underscore that foreign electoral interference is a phenomenon that warrants close attention.

2. Object of enquiry

Before proceeding, the object of enquiry needs to be defined and captured. The following sections offer a combined approach to the identification of foreign electoral interference. Firstly, a definition is proposed. Secondly, a typology outlines different examples or varieties of means of interference. Thereafter, some conceptual subtypes and limitations will be addressed. While the definition is rather broad, the typology gives more concrete shape to the object of enquiry.

2.1. Definition of foreign electoral interference

Taken literally, foreign electoral interference could encompass any trans-boundary activity that somehow affects electoral processes. For the purpose of this study, some qualifications are needed. However, none of them is intended to prejudge the legal assessment or the theoretical evaluation in any way.

142 Berger/Corvalan/Easterly/Satyanath 2013, 33. The events studied include but are not limited to interference in elections – see *ibid.*, 24. See also *ibid.*, 33: ‘[t]he longer the interventions last, the stronger the negative effects of the intervention. However, once the intervention ends, the effects dissipate quite rapidly.’

143 For an example with the goal ‘to undermine public faith in the [...] democratic process’ see footnote 3 above and the accompanying text. On ‘chaos [being] the point’ see Nicole Perlroth & David E. Sanger, ‘Chaos Is the Point’: Russian Hackers and Trolls Grow Stealthier in 2020 (The New York Times, 10 January 2020, updated 10 September 2020).

144 On possible responses to foreign electoral interference see section 15 below.

2.1.1. Understanding of ‘foreign’

As regards foreignness, there need to be links to a state other than the one whose elections are at stake. Notwithstanding the fact that non-state actors alone may be capable of influencing elections in significant ways, too, the focus of this study lies on situations in which a foreign state is somehow involved, at least indirectly by cooperating with non-state entities. ‘Foreign’ thus refers to the involvement of a foreign state.

2.1.2. Understanding of ‘electoral’

As the target of the interference, elections¹⁴⁵ are the primary concern of this study. Referendums are of course a conceivable object of interference as well, and much of what can be said about interference in elections will also be true for interference in referendums.¹⁴⁶ Still, elections are the principal instrument to guarantee democratic legitimacy,¹⁴⁷ and referendums are certainly less common, even though direct forms of democracy¹⁴⁸ have been spreading throughout the world.¹⁴⁹ The notion of ‘election’ as understood here encompasses all stages of the electoral process.¹⁵⁰ When it comes to electoral integrity and its potential corruption by foreign interference, the process of will formation is as relevant as the process of voting itself. Lastly, while subnational and supranational elections can be the target of interference as well, the considerations that follow generally refer to state-wide executive or legislative elections.

2.1.3. Understanding of ‘interference’

In order to constitute interference, the activity in question needs to be that of a person. A natural disaster may also have an impact on the opinion-forming

145 On the concept of elections in general see Pildes 2012. See also section 3.3 below.

146 For a study of external influences on the outcome of (constitutional) referendums, exerted by ‘institutions of the EU and pro-integrationist national governments’, see Tierney 2012, 153-184 and 298-299.

147 See Pildes 2012, 529: ‘[I]legitimate elections are not sufficient to ensure democracy, but they are its most necessary condition. Regular and genuine elections remain the primary institutional mechanism through which rulers are made accountable to those in whose name they exercise political power.’

148 On the idea of democracy see Frankenberg 2012. See also Waldron 2012.

149 On referendums as such see Morel 2012. On the steady increase of referendums around the world since 1793 see Qvortrup 2018, 263.

150 The following stages have been identified in the ‘electoral integrity circle’: ‘Election laws; Electoral procedures; Boundaries; Voter registration; Party and candidate registration; Campaign media; Campaign finance; Voting process; Vote count; Results; [Electoral-management bodies]’: Norris 2018, 225.

process preceding an election, or even prevent members of the electorate from voting altogether, yet this is not a case of interference as it is understood here. Only the conduct of a natural or legal person is.

Furthermore, the behaviour in question should have at least a theoretical potential to influence the outcome of an election in a way that is not completely insignificant.¹⁵¹ It is often – albeit not always¹⁵² – unhelpful to focus on intentions when it comes to the conduct of states, given their fictitious personality.¹⁵³ Relying on effects to define interference is fraught with problems, too, as it would entail the troublesome task of proving that foreign influence was a decisive factor for one side’s win or loss of an election. Therefore, this study relies on the conduct’s purpose and potential rather than its effects or its author’s intentions. If the partial or sole apparent purpose of the conduct in question is to influence the outcome of an election and if it possesses a significant potential to achieve that aim, this is sufficient for it to qualify as ‘interference’ as understood here.

On a terminological note, the term electoral ‘intervention’ – sometimes used in non-legal academic literature to describe the phenomenon at hand¹⁵⁴ – is avoided throughout this study in order not to prejudge the legal assessment within the framework of the prohibition of intervention.¹⁵⁵

151 If not indicated otherwise, the outcome of an election is understood here as its specific results – that is, the distribution of votes between candidates, campaigns, or parties that determines who won and who lost. This is not to say, however, that there cannot be reasons for manipulating an election that are about ‘more than winning today’, taking into account future elections as well: Simpser 2013, 239 (italics removed).

152 While it would not be sound to rely on intentions for the purpose of identifying the object of enquiry and defining foreign electoral interference, intentions are not considered completely irrelevant in this study. Intentions may often not be readily apparent in the conduct of states. However, when they are identifiable, they may very well be taken into account, be it within a legal assessment, within a theoretical evaluation, or when it comes to drafting new legal rules. For some such examples see footnote 381 below and the accompanying text, footnote 399 below, and section 15.1 below, esp footnote 1143 and the accompanying text. I am grateful to Professor Matthias Mahlmann for valuable contributions to this argument.

153 For this reason, the International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts rely on the ‘principle of “objective responsibility”’ as well: Crawford 2013, 60–62. For the text of the Articles see UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex.

154 See for example Shulman/Bloom 2012; Corstange/Marinov 2012; Levin 2016; Levin 2016a; Levin 2019; Levin 2020; Levin 2020a; Levin 2021; Bubeck/Marinov 2019; Tomz/Weeks 2020.

155 See section 5 below. The notion of ‘interference’ is regarded by some as having legal implications, too. That is not the case here. See on this section 4.1 below, especially footnotes 257 and 258 as well as the accompanying text.

2.1.4. Proposed definition

In accordance with the explanations above, the definition of foreign electoral interference proposed here is as follows:¹⁵⁶

Any conduct with 1) the – partial or sole – purpose of influencing the outcome of an election, 2) a significant potential for doing so – alone or in combination with other conduct –, and 3) the involvement of a state – or several states – other than the one whose election is at stake.

This definition encompasses a wide range of situations. Not all cases it covers are necessarily problematic, or at least not to the same degree. However, all relevant state conduct that is problematic from a normative standpoint – and thus of concern for this study – is supposed to be covered by this definition.

Despite its comprehensiveness, the formulation suggested nonetheless represents a delimitation. Conduct not covered by this definition includes foreign interference in *referendums*, purely *domestic* electoral interference between organizational units of the same state, and electoral interference conducted by *non-state actors* only. Yet, the elaborations of this study might still be useful for the assessment of such variants, given their proximity to the object of enquiry addressed here. As for the conduct that is covered by the definition, the following typology illustrates what specific cases can look like.

2.2. Typology: means of interference and corresponding examples

This study suggests that there are three main categories into which examples of foreign electoral interference can be grouped: economic means, informational means, and technical means.¹⁵⁷ This categorization is supposed to be broad enough to include more than just the pattern of one past series of events

¹⁵⁶ I am grateful to Professor Alex Mills and to Roman Zinigrad for their valuable comments on an earlier version of the definition. For two definitions by political scientists cited in this study see footnotes 54 and 118 above and the accompanying text. For a collection of some previous suggestions see Kristine Berzina & Etienne Soula, *Conceptualizing Foreign Interference in Europe* (Alliance for Securing Democracy, 18 March 2020).

¹⁵⁷ There are now numerous publications on foreign electoral interference, and many authors have put forward their own typology. These attempts at classification are too extensive to be covered in detail here. For an overview of previous scholarship in general see section 3.5 below, especially footnote 246. One previous typology should be singled out, however, because it was one of the first and informed this study in its early stages. The article in question also suggests a tripartite categorization and includes a technical example ('hacking'), an economic one ('boosting opposition parties'), and an informational one ('fake news and disinformation'): Becky Branford, *Information warfare: Is Russia really interfering in European states?* (BBC, 30 March 2017). For a caveat on this typology see section 2.3.1 below.

such as the 2016 US presidential election. At the same time, the categorization is supposed to be narrow enough to include only those scenarios that pose open normative questions.¹⁵⁸

A study like this cannot assess every single case of foreign electoral interference. Instead, the idea is to cover the most relevant scenarios that may conceivably occur in today's – or tomorrow's – geopolitical environment. In order to further clarify the silhouettes of the phenomenon at hand, a non-exhaustive list of examples or varieties follows for each of the aforementioned categories. Importantly, the fact that a certain scenario is included in this typology should by no means prejudice its legality or desirability. Similarly, when a series of events appears more than once, this should not be read as having any meaning other than that it is particularly illustrative or well-documented.

While the examples discussed draw on real cases, they are not supposed to fully represent any specific instances. They constitute model scenarios that are reduced in complexity, and their subsequent legal assessment thus cannot be taken as a final determination on the permissibility of actual events. Instead, the examples are merely supposed to illustrate the diversity of possibilities and provide prototypes of interference that can later be taken as the basis for legal considerations and theoretical reflections.

2.2.1. Economic means of interference

Money and politics have an intricate relationship.¹⁵⁹ The question of how much political campaign spending by whom should be allowed has been a matter of long-standing controversy, culminating perhaps most famously in the case *Citizens United v Federal Election Commission* before the US Supreme Court.¹⁶⁰ The legal implications of political campaign spending are manifold, and states have chosen different regulatory approaches to address this issue.¹⁶¹ Just as the impact of economic factors on electoral processes is relevant within the domestic sphere, it also provides an avenue for interfering with elections from abroad. The assumption here is that an increase in financial resources tends to result in increased chances of winning an election, whereas a lack of resources may adversely affect a campaign's chances of success.¹⁶² Consequently, as has

158 On forcible means of interference being deliberately excluded from the typology, see section 2.3.3 below.

159 For a starting point, see Christiano 2012. See also Magleby 2020. See also Caroni 2009.

160 US Supreme Court *Citizens United v Federal Election Commission* 558 US 310 (2010).

161 For a comparison of different campaign finance laws see Caroni 2009, 55-151. See also the typology by Wiltse/La Raja/Apollonio 2019. See also footnote 1165 below.

162 For the finding that partisan 'electoral interventions' by great powers significantly influence election outcomes, see footnotes 119-124 above and the accompanying text.

been the case historically,¹⁶³ foreign states may be interested in working towards an unequal allocation of resources that suits their political preferences. Some conceivable ways of doing so are the following.

2.2.1.1. Helping friends: financial support

A first example of economic means of interference is the provision of financial support to a candidate, campaign, or party by means of a donation, a loan, or another financially beneficial transaction. The decisive point is that the financial situation of the recipient is thereby improved, at least temporarily, during a crucial phase of the electoral process. The scale of the impact might depend on the presence or absence of domestic campaign finance laws that regulate and potentially limit the types and amount of financial support candidates may receive. For example, a system of public financing may be in place, whereby funding is distributed through the government. Alternatively, there may be a maximum amount of financial support contestants are allowed to receive with respect to an election.¹⁶⁴ In both cases, financial support from foreign states has a potential to jeopardize the equilibrium that such domestic laws aim to establish. Even if no such domestic laws have been enacted, financial support from abroad may still provide significant financial advantages to the recipients over other political actors. A pertinent example that illustrates the conceivability of this scenario occurred in the context of the 2017 presidential election in France, when the party of presidential candidate Marine Le Pen received a loan from a Russian bank.¹⁶⁵

2.2.1.2. Hindering foes: targeted adverse economic measures

A second variant of economic means of interference encompasses targeted adverse economic measures, such as asset freezes, restrictions on certain transactions, or other financial sanctions that economically disadvantage a

One of the main categories of ‘electoral intervention’, according to that study, is ‘campaign funding’ (Levin 2020, 159). In fact, it seems to be the method employed most frequently – see *ibid.*, 160: ‘the most commonly known method of electoral intervention by far, used in nearly two-thirds of all electoral interventions, is the provision of campaign funding in some manner.’

163 On money being the ‘most basic consistency’ in the history of foreign electoral interference see footnote 103 above. On historical aspects in general see section 1.2 above.

164 For different models of public funding of political activities – partial public funding of campaigns, full public funding of campaigns, indirect public funding of campaigns, no public funding, and public funding of political parties –, see Caroni 2009, 149–151.

165 Paul Sonne, A Russian bank gave Marine Le Pen’s party a loan. Then weird things began happening. (The Washington Post, 27 December 2018). See also the loan contract mentioned in the article.

candidate, campaign, or party. This includes but is not limited to instances of ‘sanctions’ in the sense of international law.¹⁶⁶ Furthermore, the target does not necessarily have to be a candidate, campaign, or party itself but may also be an enterprise a candidate, campaign, or party is involved with, financially profiting from, or economically dependent on. What matters is that the measures employed affect a political actor in a way that might decrease their chances of success in an electoral campaign. A nonideal but nonetheless illustrative example that shows the conceivability of this scenario comes from Hong Kong, where chief executive Carrie Lam was denied a bank account due to sanctions imposed in 2020 by the United States.¹⁶⁷

2.2.1.3. Holistic measures: biased economic policies

A third version of economic means of interference is the employment of biased economic policies that help the cause of favoured political actors or hinder the cause of unfavoured political actors. Such policies may concern trade relations or development cooperation, they may entail the severance of existing ties or the establishment of closer ones, and they may also be merely promised or threatened without being implemented. The decisive aspect is that the current or expected future level of welfare is influenced in a way that affects the chances of electoral success of certain political actors, be it the incumbent government or (parts of) the opposition. While the first two varieties of economic means of interference directly target specific actors and their electoral campaigns, this variety concerns general welfare and its influence on public opinion. As is encapsulated by a famous catchphrase – ‘It’s the economy, stupid’ –, economic welfare, changes therein, and perceptions thereof are crucial factors in elections.¹⁶⁸ An economy that fares well can be wind in the sails of incumbent office-holders. Conversely, widespread economic hardship may boost the election chances of the opposition. Accordingly, foreign states may also choose this

166 See Pellet/Miron 2013, esp paras 34-35.

167 Agence France-Presse, ‘Piles of cash at home’: Hong Kong leader says US sanctions mean she has no bank account (The Guardian, 28 November 2020). It should be noted that the chief executive of the Hong Kong Special Administrative Region is not elected by the people but by a committee. On the region’s government structure, see its official website. It should also be noted that the sanctions were not imposed in temporal proximity to an election. Consequently, the sanctions were hardly intended to influence the outcome of an election, which means the example is not perfectly in line with the definition proposed in section 2.1.4 above. The story nonetheless illustrates how effective targeted adverse economic measures can be, including against high-ranking officials. For a further example and remarks on the legality and desirability of such measures, see footnote 381 below and the accompanying text.

168 See Soroka/Stecula/Wlezien 2015. The catchphrase is attributed to James Carville, a strategist for Bill Clinton during the 1992 US presidential election – see *ibid*, 459.

avenue for attempting to influence public opinion and, consequently, the outcome of an election. A pertinent example illustrating the conceivability of this scenario was reported in the context of the 2018 US midterm elections, when tariffs imposed by China were expected to have a disproportionate adverse effect on Republican-leaning areas.¹⁶⁹

2.2.2. Informational means of interference

Elections are in many ways about information. Voters being the recipients, political actors convey different messages, leaving the electorate with a choice between competing political visions. This gives the media a crucial role. The media landscape has of course changed significantly over the last decades.¹⁷⁰ New channels have opened up and the traditional media have lost their gate-keeping function to a certain extent, with social media enabling constant direct communication between campaigns and voters without the need for an intermediary.¹⁷¹ This has created challenges and raised questions, including such that relate to the opinion-forming process in democratic societies.¹⁷² The informational avenues for impacting electoral processes are of course manifold, for both domestic and foreign actors. Yet, while the means of communication may have changed, some underlying patterns have remained the same. After all, coordinated attempts by foreign state-linked actors to influence voters via (dis-)information campaigns on social media may not be that different from government-encouraged initiatives to influence public opinion by sending millions of letters to relatives and friends abroad – as was the case in 1948, when the US targeted an election in Italy.¹⁷³ Contemporary examples of foreign electoral interference that concern the informational surroundings of elections include the following.

2.2.2.1. Non-neutral: criticism or endorsement

A first variety of informational means of interference consists of public statements of opinion such as criticism of an unfavoured campaign, candidate, or

169 Edward Helmore, China threatens ‘Trump country’ with retaliatory tariffs ahead of midterms (*The Guardian*, 6 April 2018). See also Joseph Parilla & Max Bouchet, Which US communities are most affected by Chinese, EU, and NAFTA retaliatory tariffs? (*The Brookings Institution*, October 2018).

170 On ‘campaigns and elections in a changing media landscape’ see Delli Carpini/Williams 2020 (capitalization removed). See also Council of Europe, ‘Study on the use of internet in electoral campaigns’ (Prepared by the committee of experts on media pluralism and transparency of media ownership (MSI-MED) Rapporteur: Damian Tambini) DGI(2017)11.

171 On social media as a source of political information see Allcott/Gentzkow 2017, 221-223.

172 For a collection of contributions on this matter see Uhle 2018.

173 See on this section 1.2.2 above.

party and their cause or the endorsement of a favoured one. While this is quite a simple way of trying to exert influence, one can nonetheless imagine it being effective, should an influential figure make a compelling statement of opinion at a critical point in time.¹⁷⁴ An example of this occurred in the context of the 2017 general election in Germany, when Turkish president Recep Tayyip Erdoğan called politicians of the incumbent German government ‘enemies of Turkey’ and encouraged German-Turkish voters to reject them at the polls.¹⁷⁵

2.2.2.2. Non-true: dissemination of false or misleading information

A second example of informational means of interference is the dissemination of verifiably false or misleading information. It is perhaps thanks to the 2016 US presidential election that terms such as ‘fake news’, ‘trolls’, and ‘disinformation’ have become part of daily discourse.¹⁷⁶ While it is beyond the scope of this study to cover all the specifics of these phenomena, the dissemination of verifiably false or misleading information generally represents an important avenue for influencing elections.¹⁷⁷ It is also at the heart of the concept of disinformation, as defined by the institutions of the European Union: ‘[d]isinformation is understood as verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm.’¹⁷⁸ Examples of such public harm include ‘threats to democratic political and policy-making processes’.¹⁷⁹ While disinformation can come from within the domestic sphere as well,¹⁸⁰ it represents

174 On the ‘persuasion effects of political endorsements’ see Boudreau 2020 (capitalization removed).

175 BBC, Turkey’s Erdogan says German leaders are enemies (18 August 2017). As for endorsements, the 2008 US presidential election can serve as an example: Mark Tran, Hugo Chávez does Barack Obama a favour (The Guardian, 17 July 2008).

176 On the function of trolls see for example Jensen 2018. On the role of fake news see for example Allcott/Gentzkow 2017. For a conceptual analysis of disinformation see for example Fallis 2015.

177 On ‘misinformation, fake news, and dueling fact perceptions in public opinion and elections’ see Barker/Marietta 2020 (capitalization removed).

178 European Commission, ‘Tackling online disinformation: a European Approach’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2018) 236 final, para 2.1. See also European Union, Code of Practice on Disinformation (2018); European Commission, A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation (2018).

179 European Commission, ‘Tackling online disinformation: a European Approach’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2018) 236 final, para 2.1.

180 Julia Carrie Wong, ‘Putin could only dream of it’: how Trump became the biggest source of disinformation in 2020 (The Guardian, 2 November 2020); Matthew Rosenberg, Jim

an important vector of influence from abroad. A pertinent example was reported in the context of the 2016 US presidential election, when false news stories – including such that originated in Russia – might have had a decisive impact on the election outcome according to a group of researchers.¹⁸¹

2.2.2.3. Non-public: disclosure of private information

A third variant of informational means of interference is the unauthorized publication of private information incriminating a candidate, campaign, or party. This essentially equals what some call ‘leaking’ – or one of the components of ‘doxing’. The former refers to the release of non-public information while the latter denotes a combined method of first gaining unauthorized access to information and then releasing it.¹⁸² While others treat doxing as a single operation,¹⁸³ this typology treats informational and technical aspects separately. After all, the extraction and the publication of private information do not necessarily go hand in hand, they can be employed by different actors, and they may entail different legal consequences. In some cases, no technical measures whatsoever will be necessary to gain access to incriminating information. For those cases that do require some form of intrusion, the extraction of private information will be discussed as a separate – technical – means of interference below.¹⁸⁴ Here, only the actual disclosure of the information in question is regarded as an informational means of interference. A pertinent example of this scenario was reported in the context of the 2016 US presidential election, when tens of thousands of emails surfaced that had been extracted from the account of John Podesta, chair of the campaign of presidential candidate Hillary Clinton.¹⁸⁵

Rutenberg & Nick Corasaniti, *The Disinformation Is Coming From Inside the White House* (The New York Times, 5 November 2020, updated 8 January 2021).

181 Aaron Blake, *A new study suggests fake news might have won Donald Trump the 2016 election* (The Washington Post, 3 April 2018). For the research cited in the article see Gunther/Beck/Nisbet 2018; Gunther/Beck/Nisbet 2018a. See also Olivia Solon & Sabrina Siddiqui, *Russia-backed Facebook posts ‘reached 126m Americans’ during US election* (The Guardian, 31 October 2017).

182 Sander 2019, 8-10.

183 See Sander 2019, 8-10. Other terms used to describe doxing as a composite act include ‘doxfare’ (Kilovaty 2018), ‘hack and leak’ (Fidler 2017, 337), or ‘hack and info dump’ (Hamilton 2017, 181).

184 See section 2.2.3.1.

185 David Smith, *WikiLeaks emails: what they revealed about the Clinton campaign’s mechanics* (The Guardian, 6 November 2016). See also BBC, *18 revelations from Wikileaks’ hacked Clinton emails* (27 October 2016).

2.2.3. Technical means of interference

Activities related to information technology have become an important aspect of states' security and foreign policy considerations. Questions relating to international law have also been raised in this respect. The Tallinn Manual (2.0), the result of NATO-coordinated efforts to portray the applicability of international law to cyber¹⁸⁶ operations, addresses some of them.¹⁸⁷ In addition, the events surrounding the 2016 US presidential election have drawn a fair amount of scholarly attention to foreign electoral interference by means of cyber operations. Yet, while there seems to be a general inclination to focus on and emphasize cyber aspects,¹⁸⁸ the relevant studies include discussions of purely informational means, purely technical means, as well as combinations of the two.¹⁸⁹ This study suggests separating the message from the medium. While informational means of interference have already been discussed above, the following examples illustrate what foreign electoral interference by technical means can look like.

2.2.3.1. Targeting campaigns: extraction of private information

A first example of technical means of interference is the extraction of private information with the potential to incriminate a candidate, campaign, or party or to otherwise be of political value. A specific way to do so is 'spear-phishing'¹⁹⁰.

186 The glossary of the Tallinn Manual 2.0 defines 'cyber' as follows: '[c]onnotes a relationship with information technology.' – Schmitt/Vihul 2017, 564.

187 Schmitt/Vihul 2017.

188 See for example the works on 'cyber influence operations on elections' (Sander 2019), 'cyber election meddling' (Schmitt 2018), 'electoral cyber interference' (Tsaourias 2020), 'cyber interference in [an] election' (Ohlin 2017), 'foreign cyber interference in elections' (Schmitt 2021), 'foreign cyber intervention in electoral processes' (Boulos 2021), 'cyber operations to manipulate voting behaviour' (Moynihan 2019, 41), 'election hacks' (Fidler 2017), or 'hacking the domaine réservé' (Ossoff 2021) (all capitalization removed).

189 A particularly helpful typology is the one by Sander 2019, 5-14. Sander divides 'cyber election meddling' (ibid, 5) into 'cyber tampering operations' (ibid, 5) and – building on Hollis 2018 – 'cyber influence operations' (Sander 2019, 7). 'Cyber influence operations', in turn, are divided into 'doxing operations' (ibid, 8) and 'information operations' (ibid, 10). As Sander also acknowledges, 'information operations [...] do not entail any form of cyber attack' and 'do not require any form of cyber exploitation' (Sander 2019, 14). Therefore, this study regards only 'cyber tampering operations' as genuinely technical, whereas 'information operations' are considered as informational and 'doxing operations' as a combination of the two categories.

190 The glossary of the Tallinn Manual 2.0 defines spear-phishing as follows: '[a] "phishing" [...] operation that targets particular individuals and involves a higher level of sophistication and tailored content. Many malicious cyber operations begin with a spear-phishing campaign.' See Schmitt/Vihul 2017, 567. 'Phishing', in turn, is defined as follows: '[a] type of social engineering attack most commonly executed by the use of email, social networks, or instant messaging. The perpetrator attempts to lure

If this is followed by the publication of private information, the combined conduct will amount to doxing.¹⁹¹ Yet, as mentioned before,¹⁹² the two measures do not necessarily have to be employed together, shortly after each other, or by the same actor. While private information, once obtained, can also be used to subject someone to blackmail or for other purposes, its publication with a view to influence public opinion may often be the most attractive use. One such case was reported in the context of the 2016 US presidential election, as discussed before,¹⁹³ when Russian actors gained access to John Podesta's email account by means of spear-phishing, obtaining information that was later published.¹⁹⁴

2.2.3.2. Targeting voters: computational amplification of communication

A second example of technical means of interference is the computational amplification¹⁹⁵ of political communication. This comprises both microtargeting¹⁹⁶ and social bots¹⁹⁷ as well as potential further algorithm- and data-driven techniques that enable the (partial) automation or other enhancement of political messaging.¹⁹⁸ The field of what is sometimes called 'computational propaganda' has become increasingly complex, and its different manifestations certainly deserve attention on their own.¹⁹⁹ What is decisive for the matter at

unsuspecting victims into visiting a malicious website, opening an infected document, or executing actions on behalf of the attacker. The purpose of a phishing operation is generally to acquire sensitive information, such as user credentials, personal data, or credit card details.' See Schmitt/Vihul 2017, 566.

191 See footnote 182 above.

192 See section 2.2.2.3 above.

193 See footnote 185 above and the accompanying text.

194 Luke Harding, *Top Democrat's emails hacked by Russia after aide made typo, investigation finds* (The Guardian, 14 December 2016).

195 This term is also used in the following report: European Parliament, 'Automated tackling of disinformation: Major challenges ahead' (2019) PE 624.278, 33-35. On 'computational politics' see Barela/Duberry 2021, 53-58 (capitalization removed).

196 On (digital) microtargeting in the political context see International Institute for Democracy and Electoral Assistance (IDEA), *Digital Microtargeting: Political Party Innovation Primer 1* (2018), esp 10: '[t]argeting voters is about (a) collecting data and dividing voters into segments based on characteristics such as personality traits, interests, background or previous voting behaviour; (b) designing personalized political content for each segment; and (c) using communication channels to reach the targeted voter segment with these tailor-made messages.'

197 On the social bot – a concept covering 'various forms of automation operating on social media platforms' – within a typology of bots see Gorwa/Guilbeault 2020, esp 231-232.

198 For a publication that covers 'social bots' and 'psychographic micro-targeting', *inter alia*, through the lens of artificial intelligence, see Brkan 2019.

199 For a use of this term see for example Keitner 2021, 189. For a helpful collection of pertinent research see the Programme on Democracy & Technology at the University of Oxford.

hand is, however, that the measures in question have the potential to help disseminate political communication more effectively – faster, to more recipients, or in more targeted ways. While the creation and publication of informational content falls within informational means of interference in the typology advanced here,²⁰⁰ the computational amplification of its spread is regarded as a technical means. Hence, as is also true for the extraction of private information,²⁰¹ the computational amplification of communication is auxiliary in nature. Both the availability of large sets of personal data and the manifold technological means to utilize them for political purposes are part of the new normal. This has consequences for elections as well.²⁰² Needless to say, these circumstances also provide wide avenues for cross-border political influence. A pertinent example that illustrates this new reality was reported in the context of the 2016 US presidential election, when over 50,000 Twitter accounts turned out to be Russia-linked bots spreading automated political communication.²⁰³ In addition, the story around Cambridge Analytica, in which personal data was famously harvested from Facebook and later used to micro-target voters, appears to have links to Russia, too.²⁰⁴

2.2.3.3. Targeting voting: compromising election infrastructure

A third example of technical means of interference concerns different forms of compromising election infrastructure²⁰⁵. In contrast to all other varieties

200 For example, the dissemination of ‘deep fakes’ is regarded as informational at heart here, even though the process of creating them requires technical assistance. On deep fakes see William A. Galston, *Is seeing still believing? The deepfake challenge to truth in politics* (The Brookings Institution, 8 January 2020). See also European Parliament, ‘Polarisation and the use of technology in political campaigns and communication’ (2019) PE 634.414, 39–40. See also Brkan 2019, 68–69.

201 See section 2.2.3.1 above.

202 On political campaigns driven by big data see Rubinstein 2014.

203 Jon Swaine, *Twitter admits far more Russian bots posted on election than it had disclosed* (The Guardian, 20 January 2018). On automated political communication in the 2016 US election see also Howard/Woolley/Calo 2018.

204 On the Cambridge Analytica story in general see Carole Cadwalladr & Emma Graham-Harrison, *Revealed: 50 million Facebook profiles harvested for Cambridge Analytica in major data breach* (The Guardian, 17 March 2018). On Russian involvement see Carole Cadwalladr & Emma Graham-Harrison, *Cambridge Analytica: links to Moscow oil firm and St Petersburg university* (The Guardian, 17 March 2018). On access of the dataset from Russia see Press Association, *Facebook data gathered by Cambridge Analytica accessed from Russia, says MP* (The Guardian, 18 July 2018). See also Euractiv, *Whistleblower: Cambridge Analytica shared data with Russia* (17 May 2018).

205 For a definition of election infrastructure see US Department of Homeland Security, *Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure* (6 January 2017): ‘storage facilities, polling places, and centralized vote tabulations locations used to support the election process, and information

of foreign electoral interference discussed so far, this conduct does not target the opinion-forming process but the process of voting itself, or the opinion-*collecting* process. States rely on digital infrastructure during various stages of the electoral process these days. This reliance also leads to vulnerabilities. Experts have identified five aspects of the electoral process, at the very least, that are potentially vulnerable to hacking: '(1) the information received by voters in the lead-up to the election; (2) the rolls used to check voters in on Election Day; (3) the machines on which voters cast their ballots; (4) the tabulation mechanisms for determining the winners; and (5) the dissemination systems used to spread news of the results.'²⁰⁶ It is thus conceivable that foreign states might intrude into the digital systems used to administer elections and manipulate the voting process.

If communication discouraging voters from participating in elections or containing false instructions about voting is disseminated via open channels such as social media, it is considered an informational means of interference in this study. If, however, official channels of communication between voters and the election administration authorities are manipulated by hacking into the computer systems of the latter, this counts as a technical means of interference – and perhaps quite a potent one, especially if false instructions are not subsequently rectified. Furthermore, by hacking into databases such as poll books, electoral registers, and voter rolls, foreign states could prevent members of the electorate from voting by deleting names, modifying information, or marking entries such that it falsely appears that certain voters are not entitled to cast a ballot or have already done so. Such scenarios are sometimes called 'digital disenfranchisement'.²⁰⁷ As regards the process of capturing or recording votes, there are various options, not all of which involve electronic tools.²⁰⁸

and communications technology to include voter registration databases, voting machines, and other systems to manage the election process and report and display results on behalf of state and local governments'.

206 Shackelford/Schneier/Sulmeyer/Boustead et al 2017, 636.

207 See for example Matthew Rosenberg, Nicole Perlroth & David E. Sanger, 'Chaos Is the Point': Russian Hackers and Trolls Grow Stealthier in 2020 (The New York Times, 10 January 2020, updated 10 September 2020). The term is ambiguous, however, and can also refer to factual disenfranchisement due to a lack of internet access. For an example of this understanding see Goodman/McGregor/Couture/Breux 2018. For a publication on foreign electoral interference that speaks of 'virtual disenfranchisement' see Schmitt 2018 (capitalization removed).

208 See Center for Internet Security (CIS), *A Handbook for Elections Infrastructure Security* (Version 1.0, 2018), 22: 'Types of vote capture processes: '1) Voter marked and hand counted paper balloting', '2) Voter marked paper balloting with scanning', '3) Electronic marking with paper ballot output', '4) Electronic voting with paper record', '5) Electronic voting with no paper record', '6) Electronic receipt and delivery of ballots conducted remotely'.

If voting machines are in use, however, it is conceivable for them to be manipulated so that the vote captured differs from what the voter intended to express.²⁰⁹ Finally, it is not unthinkable either that votes already cast might be altered or deleted, either during the process of aggregation – counting, tallying, or tabulating – or when the results are communicated, be it to election authorities, to the media, or to the public^{210, 211}

In short, foreign states might conceivably prevent members of the electorate from casting their vote or from having their vote accurately captured, counted, and communicated. That said, there are of course voting procedures that rely on digital infrastructure to a lesser extent and are thus less vulnerable to hacking. It should also be noted that no successful attempts by foreign states to effectively exploit one of the vulnerabilities mentioned have been documented so far.²¹² However, there is ample indication that some have come close to doing so and that these are realistic possibilities. An example that illustrates this was reported, again, in the context of the 2016 US presidential election, when Russian actors targeted election infrastructure in all 50 states of the US, putting them ‘in a position to delete or change voter data’ in at least one.²¹³

2.3. Possible manifestations and limitations

It should have become clear by this point that a singular focus on cyber means of interference would be too narrow to adequately capture the phenomenon

209 For example, it is possible that the vote recorded does not correspond to the voter’s true and final intention because the option displayed on the screen of a voting machine does not match the option recorded by the system. On risks and threats in the vote capture process see Center for Internet Security (CIS), *A Handbook for Elections Infrastructure Security* (Version 1.0, 2018), 23. See also *ibid*, 21: ‘[v]ote capture devices are often top of mind when thinking of election security—and for good reason. Vote capture devices are where democracy happens: the voices of the people are heard via the ballots they cast.’

210 For an illustrative example see BBC, *Ghana election commission website hit by cyber attack* (8 December 2016).

211 For more details on all these vulnerabilities see Shackelford/Schneier/Sulmeyer/Boustead et al 2017, 636–638.

212 This was still true in 2018, at least, when the following report was produced: NATO Parliamentary Assembly, ‘Russian Meddling in Elections and Referenda in the Alliance’ (Science and Technology Committee (STC), General Report by Susan Davis (United States) General Rapporteur) 181 STC 18 E fin, para 51.

213 For the quote and further – albeit partially redacted – information see United States Senate Select Committee on Intelligence, *Report on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election, Volume 1: Russian Efforts Against Election Infrastructure With Additional Views*, esp 22. See also David E. Sanger & Katie Edmondson, *Russia Targeted Election Systems in All 50 States, Report Finds* (The New York Times, 25 July 2019). See also Nicole Perlroth, Michael Wines & Matthew Rosenberg, *Russian Election Hacking Efforts, Wider Than Previously Known, Draw Little Scrutiny* (The New York Times, 1 September 2017).

of foreign electoral interference. Although recent events such as the 2016 US presidential election have emphasized the potency of such novel means of interference, the circumstances of a single election certainly do not represent the full picture. As becomes evident from the examples discussed above, foreign electoral interference comes in many forms, some old, some new. While certain examples may intuitively feel wrong, others illustrate that things might be more complicated than they appear at first sight. Conduct that is perfectly common in international relations – and usually regarded as unproblematic in terms of its legality and legitimacy – may still qualify as foreign electoral interference as defined here and prompt a different evaluation in the context of an election. It is the aim of this study to provide an assessment of the normative implications of foreign electoral interference that is as comprehensive as possible. Accordingly, the definition of the object of enquiry and the typology of examples are deliberately broad. However, this approach also comes with limitations. The following sections add some final clarifications on what conduct falls within the scope of this study, and what does not.

2.3.1. Direct and indirect, overt and covert, successful and unsuccessful interference

Foreign electoral interference as understood here can come in the form of different subtypes. It can be direct or indirect, overt or covert, and successful or unsuccessful. These dichotomies regularly appear in scholarship,²¹⁴ and rightly so, given that they are illustrative and may also have consequences for the normative assessment. However, for the purpose of defining the object of enquiry, this study does not distinguish between these conceptual subtypes. Rather, such distinctions are referred to in the context of specific questions they are relevant to.²¹⁵ The same is true for another distinction on which this study places a lot of emphasis: interference in the opinion-*forming* process (or, the will formation process) versus interference in the opinion-*collecting* process (or, the voting process). This is, in fact, the most important distinction between conceptual subtypes of foreign electoral interference. Economic, informational, and

214 On overt and covert interference see for example Levin 2020, 172–173. On direct and indirect interference see for example Schmitt 2018, 51–52. On successful and unsuccessful interference see for example Sander 2019, 45.

215 On the success or impact of foreign electoral interference, for example, see footnote 151 above and the accompanying text. The distinction between overtness and covertness has consequences from the perspective of political science and with regard to the standards of good deliberation, *inter alia* – see sections 1.3.1 and 14.1.3.2, respectively. By contrast, it is questionable whether the distinction between direct and indirect interference has any real value other than emphasizing the severity of a given case. See already Kunig 1981, 48.

technical means of interference sometimes overlap. The separation between interference in the opinion-*forming* process and in the opinion-*collecting* process, however, is sharper and much easier to maintain, as becomes apparent in this study. For now, suffice to say that all these different manifestations can, in principle, qualify as foreign electoral interference as defined here.

2.3.2. Conduct including several of the means of interference identified

In practice, attempts at foreign electoral interference will come with fuzzier outlines than they appear here. The categories identified cannot always be neatly separated from each other, and some conduct may well involve several of the varieties discussed. Doxing has already been mentioned as a combination of first extracting private information and then publishing it.²¹⁶ Similarly, computational amplification of communication will always go hand in hand with some form of informational activity it is supposed to make more effective. A further, particularly illustrative example is referred to as ‘tainted leaks’ – ‘the deliberate seeding of false information within a larger set of authentically stolen data’.²¹⁷ The distinction between economic, informational, and technical components as suggested here may not perfectly reflect reality, but it is meant to facilitate a more nuanced assessment of the implications of foreign electoral interference and its different manifestations against the background of international law and democratic theory.

2.3.3. Conduct not covered by the means of interference identified

While the typology advanced here is limited to the extent that it does not capture any single real case in all its details, it is also limited to the extent that it is not a comprehensive list of all conceivable scenarios. For example, there is a fourth category that might be discussed: interference that involves the threat or use of force. If a candidate is threatened, detained, or even killed by a foreign state, if a foreign state intimidates voters by military presence during the voting process, if it threatens to halt defence and security cooperation, or if it uses force to destroy election infrastructure, the outcome of elections can certainly be influenced as well. However, such cases neither seem to be widespread in recent times,²¹⁸ nor would the ensuing legal questions be particularly intricate,

216 See section 2.2.2.3 above.

217 Adam Hulcoop, John Scott-Railton, Peter Tanchak, Matt Brooks & Ron Deibert, *Tainted Leaks: Disinformation and Phishing With a Russian Nexus* (The Citizen Lab, University of Toronto, May 2017), esp 9. For an example see Kim Willsher, *French media warned not to publish Emmanuel Macron leaks* (6 May 2017, *The Observer*).

218 For an exception (concerning a referendum) see Aleksandar Vasovic & Mike Collett-White, *Crimea prepares for referendum under heavy military presence* (Reuters, 15 March 2014).

given the comprehensive nature of the prohibition of the threat or use of force in international law.²¹⁹ Therefore, this study focuses on examples that are of contemporary interest due to their practical relevance and the open normative questions they pose.

3. Methodological remarks

While the limitations of the typology presented have already been addressed, some further methodological remarks are in order. The previous sections have outlined *what* is addressed in this study. The following sections explain *how* the object of enquiry is approached.

3.1. International law, democratic theory, and the role of other disciplines

The aim of this study is to portray the normative implications of foreign electoral interference in a way that goes beyond a single legal norm, a single election, and a single form of influence. It does not aspire to make definitive determinations on the legal merits of a specific case study but rather to address some fundamental questions arising from foreign electoral interference. The reflections may thus retain their relevance even as some pertinent past events move further into the background. While the main focus lies on the permissibility of foreign interference under international law, a study of elections can hardly ignore the democratic theory underpinning them. The results of the legal assessment will thus be evaluated against the background of relevant strands of theory.

When it comes to technology-related aspects, the study avoids technological terminology as much as possible in order to focus not on the constantly evolving forms of technical operations but on their essence and their significance for the normative questions at hand.²²⁰ Furthermore, due to the topicality of the subject matter, the study relies on a number of journalistic reports, the ‘first rough draft of history’²²¹; the choice of publications is made

More such examples occurred in 2022, again in Ukraine. See Daniel Moeckli & Nils Reimann, *Are sovereignty referendums but a tool to legitimize territorial claims of the powerful?* (EJIL: Talk!, 1 December 2022).

219 For the textual basis see Article 2(4) of the UN Charter. For commentary see Weller 2015.

220 This concerns previous sections, especially section 2.2.3 above, more than the ones to follow.

221 Philip L. Graham (Forbes Quotes).

in accordance with what the study itself suggests concerning the consultation of reliable sources of information.²²²

Foreign electoral interference is a cross-cutting, long-standing²²³ pattern in international relations. Hoping to do justice to the multi-faceted nature of its object of enquiry, this study attempts to paint a picture that is as comprehensive as the format allows.

3.2. Scope and limitations of the legal assessment in particular

The scope of the legal assessment essentially encompasses three legal concepts: non-intervention, self-determination, and electoral rights. The idea is that these three concepts provide not a complete picture of what international law has to say about foreign electoral interference, but a more comprehensive one than has been offered previously.²²⁴ In addition, the pivotal nature of these three concepts might render the assessment more representative of the international legal order than an examination of very specific norms or treaties that are limited in their material or geographic scope. The choice of these concepts is further grounded in the understanding that there are three normative legal starting points for a systematic assessment of international law's potential and its limits for the evaluation of the matter at hand: states, peoples, and individuals. For each of these subjects – or rights-holders –, there is a corresponding international legal concept that is relevant in the context of foreign electoral interference. The prohibition of intervention puts the idea of sovereign equality of states into practice,²²⁵ the right to self-determination protects a collective entitlement of peoples, and electoral rights constitute political rights of individuals. Accordingly, this study offers three different – yet connected²²⁶ – legal avenues to approach the phenomenon of foreign electoral interference, two of which fall within the domain of international human rights law.

Despite this relative comprehensiveness, there is certainly more to be said. While some legal sources may be important with respect to specific examples of foreign electoral interference, they fail to cover many other instances due to their limited geographic or material scope. Such sources include the International Convention concerning the Use of Broadcasting in the Cause of

222 See section 15.3 below.

223 See section 1.2 above.

224 On previous research see section 3.5 below, especially footnote 246.

225 See section 4.2.1 below.

226 For an important commonality of the three concepts see section 13.1 below. See also section 8.1.3 below.

Peace, international legal rules on diplomacy, privacy, and espionage, or the electoral rights provisions of regional human rights systems. Soft law and norms of customary international law seen by some as being in the process of crystallization will not be the focus of this study either, in contrast to more robust and well-established norms of international law. Where they are illustrative or otherwise relevant, some references are nonetheless included.

A special role is played by domestic law. In principle, domestic legal rules pertaining to foreign electoral interference are not at the heart of this study. The perspective offered here is not one of comparative constitutional law. Yet, as will become apparent in the legal assessment, certain legislative choices of states in the field of electoral law are protected by international law.²²⁷ Thereby, domestic law becomes indirectly relevant to the international law approach employed here. Furthermore, domestic and international legal systems are linked in many ways, which makes occasional references and comparisons to the domestic state of affairs useful. In addition, legislation by states represents one of the avenues to respond to foreign electoral interference as discussed at the end of this study.²²⁸ That said, the focus of the legal assessment is on foreign electoral interference as a matter of international relations and thus, first and foremost, of international law. Beyond their indirect relevance to an international perspective, domestic legal rules lie beyond the scope of the legal assessment presented here.

3.3. A primer on democratic theory and elections

Considerations in democratic theory will generally follow the legal assessment,²²⁹ in the hope that they provide answers to the questions left open by the legal assessment. However, it is nonetheless necessary to briefly address the theoretical context of the main concept this study revolves around: elections.

There are many different theories of what democracy should look like.²³⁰ Not all of them involve elections, either because they confer decision-making power upon certain bodies of delegates but propose different procedures to appoint members – such as selection by lot²³¹ – or because the theories in question do not rely on bodies of delegates for decision-making in the first

227 See on this section 13.2.1 below.

228 See on this section 15.2.1 below.

229 See section 14.1 below.

230 For an introduction to different models of democracy see Held 2006. On different strands of democratic theory see also Gutmann 2007. See also Schmidt 2019.

231 For a recent account of democracy and lottery see Buchstein 2019.

place but opt for direct democratic mechanisms instead – such as referendums²³². Given that this study is about interference in elections, said models of democracy are of no concern here. Yet even those normative models of democracy that involve elections vary considerably. More particularly, they assign different functions and varying importance to elections.²³³ Richard S. Katz summarizes the expectations different democratic theories imply for elections as follows:²³⁴

Elections are to prevent tyranny (ancient Athens and modern liberal democracy), confirm authority (the Roman Republic but reflected in several modern views, especially Tory popular sovereignty democracy), articulate externally determined truth (the medieval church as well as modern emotive communitarianism), select and empower representatives (pre-reform Britain, popular sovereignty democracy, liberal democracy), allow the will of the people to be articulated and carried into effect (popular sovereignty), prevent selfish interests from using control of the government to exploit others (liberalism), promote the flowering of human potential (personal development), and foster the development and maintenance of viable communities (communitarianism).

Albeit very condensed, this summary illustrates the variety of functions elections are expected to perform.²³⁵ Moreover, holding elections may not be enough to meet the standards of a specific democratic system. While some theories deem elections to be a necessary and sufficient condition to realize the values of democracy, others view them as a necessary but not sufficient condition.²³⁶ Depending on the theory and function in question, elections may also have to be designed differently in order to effectively confer legitimacy.²³⁷

As will be discussed later, international law provides some guidance for the appropriate conduct of elections²³⁸ but does not prescribe a specific model of democracy.²³⁹ This also means that international law does not express support for one single strand of democratic theory but rather reflects a minimum consensus that is compatible with different visions of electoral democracy. The

232 For an introduction to referendums and direct democracy see Morel/Qvortrup 2018.

233 This is the focus of Katz 1997, see esp 100–106. See also Pomper 1967.

234 Katz 1997, 100.

235 For a functional analysis of voting and elections see also Rose/Mossawir 1967.

236 Schmitt 2014a, 15–23. As mentioned before, there are also democratic theories according to which elections are not a necessary condition for democracy. See on this Schmitt 2014a, 24–29.

237 Katz 1997, 102.

238 See section 10.3.2 below.

239 See footnote 739 below and the accompanying text.

legal assessment will therefore follow the requirements explicitly mentioned in international legal rules. More far-reaching and comprehensive conceptions of what electoral democracy ought to look like will receive attention later. This will also allow for the consideration of normative requirements and ideals that may be convincing but are as yet not incorporated into international law.

3.4. Underlying intentions and presumptions

A working hypothesis of this study is that foreign electoral interference constitutes a potential challenge to electoral integrity as protected by international law.²⁴⁰ At the same time, it needs to be stressed that the presence or absence of foreign electoral interference is only one of many factors determining electoral integrity. Elections, as well as democracy in general, can be flawed in manifold ways.²⁴¹ If not otherwise indicated, it is assumed here that the interference in question affects an election that fulfils at least the most basic other requirements of electoral integrity and is part of a more or less well-functioning democratic system.

If it is concluded in this study that certain conduct is permissible under international law and unproblematic in light of democratic theory, a specific election involving said conduct might still have to be deemed to lack integrity. Firstly, this study cannot do justice to any real case and all its facets. Secondly, there might be further legal issues at stake that this study does not cover. Thirdly, there are various other factors that determine whether electoral integrity is maintained or not. It is not the aim of this study to establish the responsibility of states and other actors or the legitimacy of specific elections. Instead, it is meant to map the general normative implications of foreign electoral interference, reflect on them, and establish criteria for the assessment of specific cases in practice.

Two key premises of this study are both anchored in Article 1 of the Universal Declaration of Human Rights. Firstly, the study strongly relies on the fundamental value of human rights. It is characterized by the view that ‘[a]ll human beings are born free and equal in dignity and rights’²⁴² and that the protection

240 On electoral integrity in general and foreign interference being a challenge, see van Ham 2020, esp 123.

241 For one of many attempts to systematically measure the state of democracy around the world, see The Economist Intelligence Unit, *Democracy Index 2021: the China challenge* (2022). It is worth noting that two of the four countries at the bottom of the list (see *ibid*, 16) still call themselves democratic – the Democratic Republic of the Congo and the Democratic People’s Republic of Korea –, at least according to the list of UN member states.

242 UDHR, UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/217(III), Article 1.

of human rights is of prime importance. Secondly, the study also assumes that democracy is built on the premise that human beings are ‘endowed with reason and conscience’²⁴³, that they are capable of making informed decisions, and that, when given a choice in an election, they can be expected to make use of this capability.²⁴⁴ Assuming voters to be politically competent has been called an ‘optimistic view’²⁴⁵. Many are markedly less optimistic about political competence, and history provides abundant reasons to question such optimism. Yet, neither is there a lack of evidence that reinforces trust in voters and in their capability to tell right from wrong. After all, without that trust, democracy is a hollow concept.

3.5. Contributions of the study to research

While writing about foreign electoral interference may have been innovative when this research project began, this is certainly no longer the case. The events surrounding the 2016 US presidential election have brought about a wave of attention by researchers.²⁴⁶ With their efforts also came insights into foreign electoral interference and its implications under international law and in other disciplines. Nevertheless, I believe this study provides added value, most notably due to the breadth of its focus. Firstly, the definition of foreign electoral interference employed here includes economic, informational, and technical means instead of focusing only on recent examples from the cyber realm or other similarly limited fields. Secondly, the study covers not just the merits of one or two legal concepts but three – non-intervention, self-determination, and electoral rights – while also addressing certain additional legal

243 *ibid.*

244 On the presumption of voters’ capability to participate politically, see Mahlmann 2021, 114, para 203.

245 McAllister 2018, 13. See also footnotes 932–933 below and the accompanying text.

246 The literature published since 2016 has become too voluminous to do justice to all the works. Furthermore, at the time of writing, discussions are very much ongoing. It would thus be futile to aim for a complete review of all relevant publications. However, it is appropriate to provide at least an overview of the most important scholarly contributions to date. While some works have significantly influenced this study, as is indicated where appropriate, others were added shortly before its publication. The most pertinent recent works on questions of foreign electoral interference and international law include the following (blog posts excluded): Baade 2018; Boulos 2021; Broeders / de Busser / Cristiano / Tropina 2022; Fidler 2017; Hamilton 2017; Helal 2019; Hollis 2018; Hollis/Ohlin 2021 (and the contributions therein); Jones 2019; Kilovaty 2018; Kilovaty 2021a; Lahmann 2020; Moynihan 2019; Ohlin 2017; Ohlin 2018; Ohlin 2020; Ohlin 2021; Ossoff 2021; Pijpers 2022; Sander 2019; Schmitt 2018; Schmitt 2021; Tay 2022; Terry 2022; Tsagourias 2020; Wheatley 2020; Xiao 2020. See also the Oxford Statement on International Law Protections Against Foreign Electoral Interference Through Digital Means (October 2020).

aspects related to accountability and enforcement. Electoral rights, in particular, have not been at the centre of attention so far. Thirdly, the study does not stop at the legal assessment but evaluates the results from the perspective of democratic theory. In short, the scope of the study at hand is relatively comprehensive in terms of its object of enquiry, its legal assessment, and its consideration of non-legal aspects. Furthermore, perhaps as a consequence of this broader focus, the conclusions drawn here differ from earlier studies. To the extent that these conclusions are correct, they might thus represent valuable new insights.

Part II

**Foreign Electoral
Interference and the
International Law
of Non-Intervention:
*A States' Perspective***

4. The international law of non-intervention

The principle of non-intervention was articulated in some of the earliest works that paved the way for today's international legal order.²⁴⁷ The International Court of Justice, in a judgment of 27 June 1986, summarized the substance of the norm as follows:²⁴⁸

[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. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.

Three years later, the UN General Assembly passed a resolution on the 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes' that contains the following paragraph:²⁴⁹

[The General Assembly] 3. *Also affirms* that any extraneous activities that attempt, directly or indirectly, to interfere in the free development of national electoral processes, in particular in the developing countries, or that intend to sway the results of such processes, violate the spirit and letter of the principles established in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Given both its name and its substance, the principle of non-intervention is the most obvious choice when it comes to selecting international legal concepts for an assessment of the permissibility of foreign electoral interference.²⁵⁰ Is an

247 On the works of eighteenth-century theorists such as Christian Wolff, Emer de Vattel, and Immanuel Kant see section 1.1.1 above.

248 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

249 UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147 (italics in the original).

250 For some earlier texts that – in varying depth – cover the relationship between non-intervention and foreign electoral interference, see the following works: Hamilton 2017; Ohlin 2017; Hollis 2018; Schmitt 2018; Moynihan 2019; Sander 2019; Lahmann 2020; Ohlin 2020; Tsagourias 2020; Boulos 2021; Keitner 2021; Ohlin 2021a; Ossoff 2021; Schmitt 2021; Van De Velde 2021. In addition, see already Damrosch 1989.

election not the archetype of an internal affair? Which choices are supposed to remain free ones, if not an electorate's choice of its government? And what constitutes a free choice? The following pages offer a states' perspective on foreign electoral interference by looking through the lens of the international law of non-intervention.

4.1. Scope

First of all, a terminological note is in order. The legal concept at the heart of this chapter is sometimes referred to as 'non-*intervention*'²⁵¹ and at other times as 'non-*interference*'²⁵². Meanwhile, as mentioned above, what is referred to as 'foreign electoral *interference*' here has also been called 'electoral *intervention*' by others.²⁵³ In order to avoid confusion and not to prejudge the conduct in question, this study refers to 'foreign electoral *interference*' to describe the object of enquiry but to 'non-*intervention*' or the 'prohibition of *intervention*' to describe the legal concept at the heart of this chapter. This is not to say, of course, that a certain example of interference cannot constitute an intervention at the same time. The question of whether and when that is the case is precisely what this chapter is about. In any case, throughout the subsequent considerations, 'interference' should not be equated with 'intervention'.

This terminological choice is in conformity with some but not all of the pertinent writings. For the sake of comprehensiveness and without anticipating too much of the legal substance, a brief overview of the terminological and conceptual background shall first be provided. Broadly, three different models are employed in the literature.²⁵⁴ The first model regards 'intervention' as a qualified form of 'interference'. While the latter is not necessarily impermissible, the former is.²⁵⁵ A second – less common – model uses the terms 'intervention' and 'interference' synonymously, with both denoting

251 See for example Gaeta/Viñuales/Zappalà 2020, 52–57; Damrosch 1989; Jamnejad/Wood 2009; Jennings/Watts 1992, 427–455; Kohen 2012; Shaw 2021, 1008; Vincent 1974; Higgins 2009, 272–283; Crawford 2019, 431.

252 See for example Naigen 2016; Conforti/Focarelli 2016, 169; Aloupi 2015 (using both terms simultaneously).

253 See footnote 154 above.

254 For a different – older but more detailed – overview of the terminological landscape, see Kunig 1981, 45–54.

255 See, most illustratively, Jennings/Watts 1992, 432 (emph add): '[i]t must be emphasised that to constitute intervention the interference must be forcible or dictatorial, or otherwise coercive, in effect depriving the state intervened against of control over the matter in question. *Interference pure and simple is not intervention.*'

impermissible conduct.²⁵⁶ A rare third model suggests that two related but distinct legal concepts exist, a ‘prohibition of intervention’ as well as a ‘prohibition of interference’. Similarly to the first model, ‘intervention’ is regarded as a qualified form of ‘interference’, yet both are deemed impermissible.²⁵⁷ However, the claim that there is an additional, stand-alone ‘prohibition of interference’ is not supported by the synonymous use of the two terms in the jurisprudence of the ICJ, the main point of reference for the concept of non-intervention in international law.²⁵⁸ This study follows the first model described, insofar as it treats the term ‘intervention’ as indicating illegality and ‘interference’ as legally neutral.

Furthermore, the international law of non-intervention as understood here essentially corresponds to the general inter-state prohibition of intervention in international law as expressed in the ICJ’s formulation cited above and outlined in more detail below. Several specific rules of international law reflect this general prohibition but are limited to particular fields of application

256 See most illustratively Aloupi 2015, 566 (emph add): ‘[t]he so-called right to non-intervention and non-interference – *notions being here used interchangeably* – is often considered to constitute a classic manifestation of the doctrine of the fundamental rights of states.’ Others do not make their non-distinction explicit but simply use both terms synonymously. See most notably footnote 258 below on the ICJ’s non-distinction.

257 This is the thesis of Trautner 1999. While ‘Intervention’ is also used in German, the term corresponding to ‘interference’ is ‘Einmischung’. Trautner’s thesis of two prohibitions existing in parallel has been referred to in a footnote by von Arnould 2019, para 361, fn 88. It is also briefly touched upon by Athen 2017, 92–94, esp 93, fn 387. Furthermore, the following footnote points to a similar direction, to the extent that it at least does not exclude the possibility of a ‘wider prohibition’ of ‘interference’ existing ‘alongside’ the prohibition of ‘intervention’: Jamnejad/Wood 2009, 347, fn 7. Generally, however, writers concerned with the matter seem to assume that there is only one single prohibition, a conclusion that is also shared by Athen 2017, 93.

258 For the most authoritative formulation of non-intervention as a norm of international law see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14. In it, the court seems to make no distinction between ‘interference’ and ‘intervention’. See para 202 (emph add): ‘[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside *interference*’. In addition, in a later judgment – issued after the publication of Trautner’s suggestion claiming the existence of two separate legal norms – the court reiterates its 1986 judgment and continues to use the two terms synonymously. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 165 (emph add): ‘Uganda’s actions equally constituted an *interference* in the internal affairs of the DRC and in the civil war there raging. The unlawful military *intervention* by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter.’ This terminological choice is hardly accidental, given that it is also found in the French version of the judgments, the corresponding pair of terms being ‘intervention’ and ‘ingérence’.

or addressees.²⁵⁹ Most notably, the prohibition of force is a subtype of the prohibition of intervention, given that military interventions are a subset of interventions in general,²⁶⁰ albeit a very important one.²⁶¹ However, the use of force is not an issue this study is concerned with;²⁶² accordingly, neither is the prohibition thereof. In addition, there is a ‘duty of non-interference’²⁶³ for diplomatic agents, stipulated in Article 41(1) of the Vienna Convention on Diplomatic Relations (VCDR).²⁶⁴ This specific norm, while certainly reflecting the general prohibition of intervention to a certain extent, lies outside the scope of this study, too, given that it only applies to a very limited set of actors. Finally, there is Article 2(7) of the UN Charter²⁶⁵, a provision that is sometimes mistaken for the textual basis of the general principle of non-intervention. Whereas, again, it mirrors the latter, it is specifically addressed to the United Nations and functions as a limitation on the organization’s powers.²⁶⁶ Such *lex specialis*

259 For an overview of treaty-based rules reflecting the general principle of non-intervention, see Jamnejad/Wood 2009, 362-367.

260 This understanding is mirrored in the relevant judgments of the ICJ: ‘[t]he element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State.’ (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205); ‘[t]he Court concludes that acts constituting a breach of the customary principle of non-intervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.’ (ibid, para 209; also cited in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 164). On military aspects representing one end of the spectrum of interventions see Higgins 2009, 278. See also Jamnejad/Wood 2009, 359-360. See also Helal 2019, 91.

261 See also Jamnejad/Wood 2009, 359-360: ‘nowadays the international law on the use of force is not generally thought of in terms of non-intervention but as a self-standing chapter of international law’.

262 On the exclusion of forcible means of interference from this study see section 2.3.3 above. For a discussion of foreign electoral interference in the context of the international law on the use of force see Ohlin 2020, 40-66; Van de Velde 2021a.

263 Behrens 2017. See also Behrens 2016.

264 The full text of the respective paragraph goes as follows: ‘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.’

265 The paragraph reads as follows: ‘[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.’

266 See Jamnejad/Wood 2009, 351, 362-363.

norms are not included in the legal assessment in this chapter, only the general prohibition of intervention applicable between states is.²⁶⁷

4.2. Sources

In contrast to the other concepts treated in this study, there is no single article in an international convention that fully expresses the norm in question. Nevertheless, the prohibition of intervention is a central and integral part of contemporary international law. The following sections outline the sources underpinning the international law of non-intervention.

4.2.1. The Charter of the United Nations

While no inter-state prohibition of intervention is explicitly mentioned in the UN Charter, non-intervention is seen as a ‘corollary of the principle of the sovereign equality of States’.²⁶⁸ The principle of sovereign equality, in turn, is prominently enshrined in Article 2(1) of the UN Charter.²⁶⁹ The prohibition of intervention is therefore indirectly anchored in the founding document of the United Nations and expresses one of the organization’s guiding principles.

4.2.2. Customary international law

The fundamental importance of the principle of non-intervention has been reemphasized in a number of resolutions of the UN General Assembly. Some of them are exclusively dedicated to non-intervention and elaborate on the principle, such as the 1965 ‘Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty’²⁷⁰, the 1976 resolution on ‘Non-interference in the internal affairs of States’,²⁷¹ or the 1981 ‘Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States’²⁷². Yet, not all UN General Assembly resolutions, even if adopted by consensus, reflect customary

267 On the scope of this study and its legal assessment in general see section 3.2 above.

268 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 202. See also Kunig 2008, para 9: ‘the raison d’être of the non-intervention rule is the protection of the sovereignty of the State.’ Thus, this study does not treat sovereignty as a separate norm, as some do.

269 The provision reads as follows: ‘[t]he Organization is based on the principle of the sovereign equality of all its Members.’

270 UNGA Res 2131 (XX) (21 December 1965) UN Doc A/RES/2131/XX).

271 UNGA Res 31/91 (14 December 1976) UN Doc A/RES/31/91.

272 UNGA Res 36/103 (9 December 1981) UN Doc A/RES/36/103.

international law.²⁷³ An important resolution that itself claims to embody ‘basic principles of international law’ is the so-called Friendly Relations Declaration from 1970.²⁷⁴ It contains, inter alia, ‘[t]he principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter’.²⁷⁵ This buttressed the ICJ’s determination that the principle of non-intervention is ‘part and parcel of customary international law’²⁷⁶ in 1986.²⁷⁷ Alongside the Friendly Relations Declaration, the court also cited its own earlier judgment in the Corfu Channel case, in which it had already indicated that a ‘right of intervention [...] cannot [...] find a place in international law’²⁷⁸. The court later confirmed its jurisprudence in 2005.²⁷⁹ Consequently, the following words of Judge Sir Robert Jennings still

273 See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para 70 (italics in the original): ‘[t]he Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.’ See also Jamnejad/Wood 2009, 352.

274 UNGA Res 2625 (XXV) Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (24 October 1970) UN Doc A/RES/2625(XXV), para 3.

275 *ibid*, para 1. The accompanying text reads as follows: ‘[n]o State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law. No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention. Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State. Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.’

276 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 202.

277 *ibid*, paras 202-205.

278 *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 35.

279 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 168, para 164.

ring true today:²⁸⁰ '[t]here can be no doubt that the principle of non-intervention is an autonomous principle of customary law [...]'.²⁸¹

4.3. Substance

The prohibition of intervention is generally seen as consisting of two elements: (intervention in what is called) the *domaine réservé* and (intervention by means of) *coercion*. The following sections outline the substance of the norm at hand by describing its two components.

4.3.1. *Domaine réservé*

The domain protected from intervention is sometimes referred to as 'domestic affairs'²⁸² or 'internal affairs'²⁸³. However, according to the ICJ, the area in question encompasses both internal and external affairs. It covers not only the 'choice of a political, economic, social and cultural system' but extends to 'the formulation of foreign policy' as well.²⁸⁴ The terms 'domestic affairs' and 'internal affairs' can therefore appear misleading to the extent that they may not seem to include issues such as foreign policy. In contrast, the term '*domaine réservé*'²⁸⁵ – reserved domain – seems better suited to capture the 'matters in which each State is permitted, by the principle of State sovereignty, to decide freely'²⁸⁶.

The extent of this area is neither static nor absolute but rather relative in many ways.²⁸⁷ This was already expressed in a 1923 advisory opinion of the Permanent Court of International Justice: '[t]he question whether a certain

280 In theory, customary international law could of course have changed and reversed previous developments. This does not seem to be the case, however, at least according to Kohen 2012, 164: '[w]hat has happened over the course of the last 25 years has not altered the conclusions reached by the Court with regard to the principle of non-intervention.'

281 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, Dissenting opinion of Judge Sir Robert Jennings, 534. The rest of the sentence reads as follows: 'indeed it is very much older than any of the multilateral treaty régimes in question.'

282 See for example Damrosch 1989; Kilovaty 2018, 161.

283 See for example Jones 1977; Wheatley 2020, 162.

284 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

285 For a particularly detailed treatment of this notion see Kolb 2006.

286 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

287 On temporal, substantial, and personal relativity see Athen 2017, 167-215. See also Kolb 2006, 601.

matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.²⁸⁸ The denser the web of international relations and the further it reaches, the fewer matters can be claimed to lie within the *domaine réservé* of a state.

Whereas, for example, states' violations of their citizens' rights once used to be shielded from international accountability by the concept of sovereignty, the protection of human rights is now commonly seen as a concern of international law and the international community.²⁸⁹ Nevertheless, some core areas have prevailed in which states are 'permitted, by the principle of State sovereignty, to decide freely'²⁹⁰. As mentioned before, these include 'the choice of a political, economic, social and cultural system, and the formulation of foreign policy'²⁹¹. Whether foreign electoral interference reaches into the *domaine réservé* will be discussed below, but it is this formulation by the ICJ that continues to provide the most reliable guidance for such an assessment.

4.3.2. Coercion

With respect to the choices that lie within the *domaine réservé*, '[i]ntervention is wrongful when it uses methods of coercion'.²⁹² This requirement 'defines, and indeed forms the very essence of, prohibited intervention'.²⁹³ In short, intervention is 'coercive interference'.²⁹⁴ The criterion of coercion is also of immense practical importance. Without this threshold, any conduct on the part of a state that somehow affects another state's decision-making within the latter's *domaine réservé* would be impermissible²⁹⁵ – a consequence the

288 *Nationality Decrees Issued in Tunis and Morocco* (Advisory Opinion) PCIJ Rep Series B No 4, 24.

289 See on this issue Peters 2009. See also Jamnejad/Wood 2009, 349: '[t]here is now greater emphasis, on the part of many, on democracy, the rule of law, human rights, and sound economic governance, and less on Westphalian concepts of "sovereignty".' See also – in the context of the prohibition of intervention addressed specifically to the United Nations in Article 2(7) of the UN Charter – Conforti/Focarelli 2016, 181: '[w]ith the end of the Cold War and the fall of the Socialist regimes of Eastern Europe, the situation has changed profoundly. The domestic jurisdiction clause has finally vanished as far as human rights are concerned.'

290 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

291 *ibid.*

292 *ibid.*

293 *ibid.*

294 UNGA, Report of the International Law Commission, Fifty-third session (23 April–1 June and 2 July–10 August 2001) (2001) UN Doc A/56/10(SUPP), IV. State Responsibility, E. Text of the draft articles on Responsibility of States for internationally wrongful acts, 2. Text of the draft articles with commentaries thereto, Commentary on Article 18, para 3.

295 Jamnejad/Wood 2009, 381. See also footnote 38 above and the accompanying text.

international legal order is hardly designed to produce. The meaning of coercion, however, is not self-evident. Broadly, coercive (but non-forcible) behaviour is located between the threat or use of force ‘above’ and permissible political influence ‘below’.²⁹⁶ While the upper delineation is relatively well-studied²⁹⁷ and of no relevance to the questions at hand, it is the lower boundary, between coercion and what has been called ‘pressure and persuasion’,²⁹⁸ that needs to be drawn here.

Some scholarly attempts at defining the concept of coercion deserve mention, if only to show their proximity to each other. To begin with, R. J. Vincent, in an extensive study of non-intervention, simply referred to the Oxford English Dictionary to state that ‘to coerce is to “constrain or restrain by application of superior force or by authority resting on force; to constrain to compliance or obedience by forcible means.”’²⁹⁹ A more recent work in political science exclusively dedicated to the concept of coercion in international politics defines the term as follows: ‘[c]oercion is the ability to get an actor – a state, the leader of a state, [...] a private actor – to do something it does not want to do.’³⁰⁰ The Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations refers to coercion as ‘an affirmative act designed to deprive another State of its freedom of choice, that is, to force that State to act in an involuntary manner or involuntarily refrain from acting in a particular way’.³⁰¹ And to quote a last formulation: ‘the meaning of the word depends upon context, but it is often used in situations in which one or more States seek to compel – rather than persuade – another to act in a certain way by applying various kinds of pressure’.³⁰²

Other studies of non-intervention rely primarily on case studies to illustrate the nature of coercion, which is understandable, considering the elusive nature of the concept.³⁰³ However, coercion does have an identifiable content:

296 Gerlach 1967, 107 and 126, respectively.

297 On the use of force in international law see generally Weller 2015.

298 Helal 2019, 4.

299 Vincent 1974, 7-8.

300 Art/Greenhill 2018, 4. The authors then go on to distinguish between ‘deterrence’ and ‘compellence’ as the two subtypes or ‘the two faces of coercion’ (ibid, 5, capitalization removed): ‘deterrence is a coercive strategy designed to prevent a target from changing its behaviour. [...] Compellence [...] is a coercive strategy designed to get the target to change its behaviour.’

301 Schmitt/Vihul 2017, 317.

302 Sender 2021, para 2.

303 For an example of a pertinent typology see Jamnejad/Wood 2009, 367-377. See also Kunig 2008, paras 22-27. For a general overview of different (mostly German) conceptual approaches to coercion see Berstermann 1991, 149-154; Athen 2017, 234-244.

at its core is the restriction of a state's autonomy.³⁰⁴ Given that the prohibition of intervention reflects the sovereign equality of states,³⁰⁵ its function is to balance conflicting spheres of sovereignty, as convincingly explained by Marco Athen.³⁰⁶ Simply put, a state's freedom³⁰⁷ ends where the freedom of another state – or that of other subjects – begins. One state's interest to act freely must be balanced with another state's interest not to be unduly restricted in its own decision-making.³⁰⁸ Whether certain conduct amounts to intervention thus depends, on the one hand, on whether the interfering state acts with good reasons³⁰⁹ and, on the other hand, on the intensity with which it constrains the target state's autonomy.³¹⁰ Coercion is therefore a matter of scale, and its presence or absence may also depend on the ability of the target state to resist.³¹¹ As regards the rationale of the conduct, it can be indicative of permissibility or impermissibility – albeit not fully determinative – that the behaviour in question is protected by or in violation of other rules of international law.³¹²

304 Athen writes of 'Beeinträchtigung staatlicher Handlungsfreiheit': Athen 2017, 245. This does not require proof of success nor of the actor's intentions; the conduct simply needs to be designed to constrain: Athen 2017, 245-249.

305 See footnote 268 above and the accompanying text. See also Athen 2017, 106-111.

306 Athen 2017, 244. While I agree with the main pillars of Athen's argument, there is an exception that deserves mention. I would argue that coercion can also come in the form of *vis absoluta*, not just in the form of *vis compulsiva* (on this pair of terms see footnote 446 below). Accordingly, I also – contrary to Athen's view – regard the use of force as a subtype of coercion and the prohibition of force as a subtype of the prohibition of intervention. See Athen 2017, 138 and 246, respectively, as well as footnote 260 above and the accompanying text. If it is coercive to overly constrain a state's choices, why would it not be coercive to leave a state no choice at all, especially given that a state's 'will' is a somewhat fictitious concept in the first place? For an example of coercion in the form of *vis absoluta* see section 5.4.2 below. For a concurring view see von Arnould 2019, para 361.

307 It is worth recalling that the notion of 'coercion' is used to describe the opposite of choices remaining 'free' – see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

308 This is essentially a proportionality test: Athen 2017, 275.

309 Athen writes of 'Handlungsinteresse', roughly the 'interest to act'. See Athen 2017, 275.

310 Athen 2017, 275-285.

311 The ability to resist is not at the heart of Athen's argument, but its potential relevance is nonetheless acknowledged: Athen 2017, 247. For an understanding of a 'coercion continuum' see Helal 2019, 89 (emph add).

312 Athen 2017, 275-279. Some studies focus on this and suggest that one rely exclusively on this aspect, that is, regard the requirement of coercion as fulfilled whenever the means employed violate other rules of international law. See for example Helal 2019, 8 (italics removed): '[i]n short, this article defines unlawful intervention as the exercise of coercion (i.e. the use of unlawful instruments of statecraft or a combination of lawful and unlawful instruments) to intervene in matters within the domaine réservé of a state.' However, there is nothing to indicate why the violation of other rules of international law alone would suffice to constitute coercion. For the same comment in relation to

Yet, even otherwise lawful conduct can amount to coercion if it is disproportionately intense and thus overly constraining on the autonomy of another state in regard to matters within its *domaine réservé*. Herein lies the added value, the *raison d'être* of the prohibition of intervention.

It is worth noting that the notion of coercion plays a role in a further area of international law.³¹³ Article 18 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts concerns the 'Coercion of another State' to commit an internationally wrongful act.³¹⁴ The ILC's commentary on the Article reads as follows:³¹⁵

Coercion for the purpose of article 18 has the same essential character as *force majeure* under article 23. Nothing less than conduct which forces the will of the coerced State will suffice, giving it no effective choice but to comply with the wishes of the coercing State. It is not sufficient that compliance with the obligation is made more difficult or onerous, or that the acting State is assisted or directed in its conduct: such questions are covered by the preceding articles.

Force majeure, in turn, is defined in Article 23(1) as 'the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation'.³¹⁶ The ILC's work is, of course, not a commentary on the prohibition of intervention, and such statements should thus be borrowed with caution. Nevertheless, it is interesting that the ILC chose the familiar notion of coercion to describe a behaviour that is characterized by such a high degree of irresistibility. This may lend some support to a similarly restrictive interpretation of coercion in the context of non-intervention.³¹⁷

What comes closest to a tangible threshold, encapsulating several of these considerations, is the following formulation: '[i]f [...] the pressure is such that

the thesis of Gerlach 1967, see Athen 2017, 246, 278. The non-intervention norm would arguably become void of meaning if it simply restated other rules of conduct in international law and possessed no substance beyond this function.

313 For yet another example, see Articles 51 ('Coercion of a representative of a State') and 52 ('Coercion of a State by the threat or use of force') of the Vienna Convention on the Law of Treaties (VCLT).

314 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 18.

315 UNGA, Report of the International Law Commission, Fifty-third session (23 April-1 June and 2 July-10 August 2001) (2001) UN Doc A/56/10(SUPP), IV. State Responsibility, E. Text of the draft articles on Responsibility of States for internationally wrongful acts, 2. Text of the draft articles with commentaries thereto, Commentary to Article 18, para 2 (italics in the original).

316 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 23(1).

317 For similarly cautious statements about the scope of the prohibition of intervention, see footnote 370 below.

it could reasonably be resisted, the sovereign will of the target state has not been subordinated.’³¹⁸ The most authoritative text and the ultimate touchstone, however, remains the ICJ’s formula that choices within the *domaine réservé* ‘must remain free ones’³¹⁹. The following assessment will therefore be guided by the question – simply formulated but by no means easy to answer – of whether, in light of foreign interference, the choices offered within an election do remain free ones or whether the respective means of interference constrain these choices with disproportionate intensity, if not virtual irresistibility.

5. Foreign electoral interference and the international law of non-intervention

Given its importance and its substantive demands, there is no way around the prohibition of intervention when assessing the permissibility of foreign electoral interference under international law. The following sections therefore apply the international law of non-intervention to the examples of foreign electoral interference identified at the outset.³²⁰ While the focus will first be on the core legal aspects of non-intervention, selected additional ramifications will receive attention later.³²¹

5.1. Common aspect: elections and the *domaine réservé*

Regardless of the specific means of interference employed, one basic question needs to be answered first: do elections fall within the scope of the *domaine réservé*?

In 1986, the ICJ mentioned the ‘choice of a political [...] system’ as an example of choices that ‘must remain free ones’.³²² If the choice of a political system is covered by the *domaine réservé*, choices *within* a political system are likely

318 Jamnejad/Wood 2009, 348. The notion of ‘subordination’ also appears in the Friendly Relations Declaration: ‘[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the *subordination* of the exercise of its sovereign rights and to secure from it advantages of any kind.’ UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV), para 1 (emph add).

319 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

320 See section 2.2 above.

321 See section 6 below.

322 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

to be covered as well. However, as mentioned before, the scope of the *domaine réservé* can change over time.³²³ Governmental structures are one of the examples said to have become a concern of international law. With the Cold War ending, democracy seemed poised to triumph over other models of governance to many, a sentiment characterizing Francis Fukuyama's proclamation of the 'end of history' or Samuel P. Huntington's discussion of 'democracy's third wave'.³²⁴ Whereas the international legal order had once been seen as indifferent towards domestic political structures,³²⁵ the claim of an 'emerging right to democratic governance' – a term coined by Thomas M. Franck – started to gain traction in the early 1990s.³²⁶ Franck based said claim on three chief building blocks: 'self-determination, freedom of expression and electoral rights',³²⁷ all of which are to some extent anchored in the International Covenant on Civil and Political Rights.³²⁸ The thesis of a democratic entitlement in international law has attracted enormous scholarly attention,³²⁹ yet the norm seems to have never quite left the state of emergence behind.³³⁰ An obligation for states to be democratic, to hold free and fair elections at the very least, may be firmly established in Europe.³³¹ Generally, however, it does not seem safe to assume the existence of a norm that is more than the sum of its parts, that is, more than the components explicitly stipulated in the ICCPR or other international legal documents.

Yet, even the fact that some states are required by international law to have democratic structures and to conduct elections does not mean that the choices *within* these elections are not protected by the *domaine réservé*. To the contrary, the regulation of democratic governance through international law

323 See section 4.3.1 above.

324 Fukuyama 1992; Huntington 1991.

325 d'Aspremont 2011, 549-550.

326 See Franck 1992. For an earlier work pointing in a similar direction – more limited in scope but nonetheless relevant –, see Steiner 1988.

327 Franck 1992, 57.

328 See Article 1(1), Article 19, and Article 25 of the ICCPR.

329 A particularly important contribution to this debate is the volume edited by Fox/Roth 2000. d'Aspremont 2011 and Marks 2011 offered two helpful recapitulations. In addition, symposia were dedicated to the 25th anniversary of Franck's article and to three decades of scholarship on international law and democracy. See for the respective introductions Ginsburg 2018 and Klabbers/Lustig/Nollkaemper/Nouwen et al 2021.

330 See illustratively Pippan 2012, who asks the question of whether democracy as a global norm has 'finally emerged' and answers it – at least partially – in the negative. For two more recent accounts see Besson 2020a and Boysen 2020.

331 The view that an obligation for states to be democratic exists in Europe but not worldwide is held by Wheatley 2002. See generally d'Aspremont 2008, 263-293.

aims precisely at guaranteeing a free choice for voters. Provisions in international human rights law concerning political participation³³² regularly echo the text of Article 21(3) of the Universal Declaration of Human Rights: '[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'³³³ While the respective provisions therefore extend to the domain of elections, their purpose is to protect free choices rather than to remove elections from the area in which choices must remain free ones. International law may require states to respect the voting principles embodied in the UDHR: genuine and periodic elections, universal and equal suffrage, free and secret voting.³³⁴ Beyond these aspects, however, international law stops short of prescribing a specific model of democracy,³³⁵ and it is certainly not its aim to predetermine an electorate's political choices.

The thesis that elections are to be seen as protected by the prohibition of intervention is also supported by a series of resolutions adopted by the UN General Assembly. Between 1989 and 2001, it issued ten resolutions about 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes'.³³⁶ Although the wording has changed

332 See most notably Article 25 of the ICCPR: '[e]very citizen shall have the right and the opportunity, [...]: [...] (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; [...]'. For a portrayal of global and regional human rights instruments and their electoral rights provisions – including Article 25 of the ICCPR, Article 3 of the Protocol to the ECHR, Article 23 of the ACHR, and Article 13 of the ACHPR –, see section 10.2 below.

333 UDHR, UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/217(III), Article 21(3).

334 See *ibid.* On the binding requirements that flow from Article 25(b) of the ICCPR see section 10.3.2.

335 See illustratively UNGA Res 58/189 (22 December 2003) UN Doc A/RES/58/189, para 3 (italics in the original): '*3. Reaffirms the right of peoples to determine methods and to establish institutions regarding electoral processes and, consequently, that there is no single model of democracy or of democratic institutions and that States should ensure all the necessary mechanisms and means to facilitate full and effective popular participation in those processes; [...].*' On the variety of political systems that are compatible with Article 25 of the ICCPR see footnote 739 below and the accompanying text.

336 The following resolutions carry almost the same name, with either 'processes' or 'process' at the end: UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147; UNGA Res 45/151 (18 December 1990) UN Doc A/RES/45/151; UNGA Res 46/130 (17 December 1991) UN Doc A/RES/46/130; UNGA Res 47/130 (18 December 1992) UN Doc A/RES/47/130; UNGA Res 48/124 (20 December 1993) UN Doc A/RES/48/124; UNGA Res 49/180 (23 December 1994) UN Doc A/RES/49/180; UNGA Res 50/172 (22 December 1995) UN Doc A/RES/50/172; UNGA Res 52/119 (12 December 1997) UN Doc A/RES/52/119; UNGA Res 54/168 (17 December 1999) UN Doc A/RES/54/168. The title of a further resolution contains the

over time, all of these resolutions identify electoral processes as a possible target of undue foreign interference, and they specifically mention financial support to political parties as a potential problem. To give an example, Resolution 56/154 of 19 December 2001 contains the following text:³³⁷

1. *Reaffirms* that all peoples have the right to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, and that every State has the duty to respect that right, in accordance with the provisions of the Charter of the United Nations;
2. *Reiterates* that periodic, fair and free elections are important elements for the promotion and protection of human rights;
3. *Reaffirms* the right of peoples to determine methods and to establish institutions regarding electoral processes and that, consequently, States should ensure the necessary mechanisms and means to facilitate full and effective popular participation in those processes;
4. *Also reaffirms* that free development of the national electoral process in each State should be fully honoured in a manner that fully respects the principles established in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; [...]
5. *Further reaffirms* that United Nations electoral assistance is provided at the specific request of the Member State concerned;
6. *Calls upon* all States to refrain from financing political parties or other organizations in any other State in a way that is contrary to the principles of the Charter and that undermines the legitimacy of its electoral processes;
7. *Condemns* any act of armed aggression or threat or use of force against peoples, their elected Governments or their legitimate leaders;
8. *Reaffirms* that the will of the people shall be the basis of the authority of government and that this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

same clause but with an addition: '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*' (UNGA Res 56/154 (19 December 2001) UN Doc A/RES/56/154, *emph add*). Finally, the title of a last resolution does not explicitly refer to 'non-interference' anymore, yet its content is still comparable: 'Respect for the principles of national sovereignty and diversity of democratic systems in electoral processes as an important element for the promotion and protection of human rights' (UNGA Res 58/189 (22 December 2003) UN Doc A/RES/58/189).

337 UNGA Res 56/154 (19 December 2001) UN Doc A/RES/56/154 (*italics in the original*).

This is considerably broader than the earlier Resolution 44/147 of 15 December 1989, which contained the following paragraph:³³⁸

3. *Also affirms* that any extraneous activities that attempt, directly or indirectly, to interfere in the free development of national electoral processes, in particular in the developing countries, or that intend to sway the results of such processes, violate the spirit and letter of the principles established in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

It should be noted that these resolutions were adopted with varying amounts of abstentions and dissent. In its broadest version, in Resolution 56/154 of 19 December 2001, the text was passed with 10 votes against, 99 in favour, and 59 abstentions.³³⁹ While the reasons for not voting in favour of the resolution may be manifold, this result indicates that a majority of states regard electoral processes as a potential target of intervention. Even electoral assistance by the United Nations is supposed to be provided only at the request of the state concerned.³⁴⁰ If support by the UN – an organization that states join freely and whose purpose is ‘[t]o be a centre for harmonizing the actions of nations in the attainment of [...] common ends’³⁴¹ – is a potential concern of non-intervention, this must be all the more true for the conduct of foreign states, which may very well just pursue their own self-interest rather than the attainment of common ends.

To conclude, it is true that international law is not indifferent towards domestic governmental structures. Yet, the international legal instruments concerned with democratic governance aim at protecting political autonomy rather than limiting the freedom of choice within states’ elections. International law may, depending on the exact rules applicable, impose on states to conduct elections that fulfil certain basic requirements. Political choices *within* such elections and the specific modalities thereof, however, continue to be protected by the *domaine réservé*.³⁴² In fact, one may legitimately ask which

338 UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147 (italics in the original).

339 Votes against: Argentina, Australia, Canada, Chile, Israel, New Zealand, Norway, Samoa, Tuvalu, United States of America. See UNGA, Official Records, Fifty-sixth session, 88th plenary meeting (19 December 2001) UN Doc A/56/PV.88, 14.

340 See on the ‘sensitivity of the issue of elections’ and on governmental systems and elections in the context of Article 2(7) of the UN Charter: Nolte 2012, 306, paras 62–63.

341 Article 1(4) of the UN Charter.

342 This conclusion is in line with previous scholarly assessments. For studies that explicitly – yet not in much detail – declare elections to be protected by the *domaine réservé*, see for example Schmitt 2018, 49; Hollis 2018, 40; Sander 2019, 21; Tsagourias 2020, 49; Xiao 2020, 373; Boulos 2021, 147; Keitner 2021, 227; Ossoff 2021, 307; Schmitt 2021,

choices are supposed to remain free from intervention if not the choices within a democratic election.³⁴³

5.2. Application of the law to economic means of interference

With the first requirement satisfied, a violation of the prohibition of intervention could be established if an example of economic means of interference – financial support, targeted adverse economic measures, or biased economic policies – reached the threshold of coercion. Before the assessment of specific examples is conducted, this section provides a contextualization of the requirement of coercion.

In a far-sighted 1989 article, Lori Fisler Damrosch considered the permissibility of two phenomena against the background of non-intervention: ‘transnational campaign funding’ – that is, states sending ‘money to influence a political contest in another state’ – and ‘economic leverage applied for political purpose’ – that is, states ‘implementing policies affecting trade, aid or other economic relations, where their objective is to affect the outcome of another state’s internal political process’.³⁴⁴ The former covers acts similar to those referred to as financial support in this study, whereas the latter roughly corresponds to what this study calls biased economic policies. Damrosch advanced an understanding under which ‘states would be allowed to encourage political trends in target states through nonforcible techniques not prohibited by the target’s domestic laws, [...] unless the nature or scope of the technique

745-746. On elections and opinion-forming processes being covered, see Athen 2017, 220-224. Furthermore, before the consolidation of a prohibition of intervention based on the two components of *domaine réservé* and *coercion* (see section 4.3 above), there seemed to be agreement in the literature that the ‘appointment of public offices’ – or, in the German original wording, ‘[die] Besetzung von Staatsämtern’ – is protected by non-intervention: Kunig 1981, 305. See also Athen 2017, 130-131. While the appointment of public offices does not necessarily always entail a public vote, elections are a standard way of doing so. The conclusion drawn here is perhaps best expressed in the following formulation by Fassbender 2003, 132: ‘[i]f a state has a democratic constitution, its sovereignty protects a space of democratic self-determination.’

343 See also the strong formulation in the Tallinn Manual 2.0 – Schmitt/Vihul 2017, 315 (italics in the original): ‘[t]he International Group of Experts agreed 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.’

344 Damrosch 1989, 1-2. For more details on ‘financial assistance to electoral campaigns’ see *ibid.*, 13-28. For more details on ‘economic leverage’ see *ibid.*, 28-34. In addition, note the helpful distinction of subcategories Damrosch offers for economic leverage (*ibid.*, 28): ‘(1) affirmative tools of leverage, which include the award of economic and financial benefits such as government-to-government aid, trade preferences and loan facilities; [...] and (2) negative techniques, often called economic sanctions, which involve suspending or terminating such benefits (or threatening to do so). [...]’

in question were such as to infringe upon the ability of the target's people to exercise free political choice.³⁴⁵ In Damrosch's view, the threshold of coercion is thus reached when an interference either contravenes domestic laws or is overwhelming in scope.

While Damrosch called this a 'reformulation'³⁴⁶, it is perfectly within the range of possible interpretations of the standard formulation of non-intervention as outlined above.³⁴⁷ After all, the protection offered by the *domaine réservé* extends to 'the choice of a political [...] system'³⁴⁸, to which domestic laws certainly belong if they concern political matters. In the specific context of elections, this means that foreign interference must respect domestic electoral laws, too³⁴⁹ – unless these are in violation of 'internationally protected political rights'³⁵⁰, to quote Damrosch. To the extent that domestic laws are incompatible with applicable international human rights law standards, the *domaine réservé* – given its relative nature³⁵¹ – indeed no longer protects them. Moreover, as will be discussed in further detail later, the free choice of specific rules for electoral contests is also protected by the right of peoples to self-determination, yet only as long as the rules in question are compatible with other norms of international human rights law.³⁵² It would arguably be inconsistent if the prohibition of intervention protected domestic electoral laws that are in violation of human rights while the closely linked³⁵³ right of peoples to self-determination does not.³⁵⁴ As long as electoral rules are compatible with international human rights law standards, foreign states must play by these same rules. If foreign state-linked actors violate or circumvent³⁵⁵

345 Damrosch 1989, 49.

346 Damrosch 1989, 6, 48, 49.

347 See section 4.3. To argue for this understanding, Damrosch considered 'state system values' such as sovereign equality and political independence on the one hand as well as 'human rights values' such as individuals' political rights on the other hand. See Damrosch 1989, 34-49.

348 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

349 I am grateful to Professor Alex Mills for valuable contributions to this argument.

350 Damrosch 1989, 21, 34-49.

351 See section 4.3.1 above.

352 See section 8.2 below, especially footnotes 640-643 and the accompanying text.

353 On the link between non-intervention and self-determination see section 8.1.3 below, especially footnote 618.

354 For a concise discussion of the commonalities of the three concepts discussed in this study – non-intervention, self-determination, and electoral rights – and their interplay, see section 13 below.

355 By 'circumvent' I mean factual contraventions that lack the possibility of judicial confirmation. Foreign states and their conduct will usually be beyond the reach of the

such electoral laws a state has set for itself, the autonomy of that state is constrained, not to say undermined. Consequently, there is a case for coercion.

Furthermore, it has been previously shown that coercion is a matter of scale,³⁵⁶ a second element included in Damrosch's formula.³⁵⁷ Exactly when foreign electoral interference becomes disproportionately intense – and thus coercive – arguably depends on several factors touched upon earlier. An obvious first factor is the 'nature or scope'³⁵⁸ of the conduct in question, its 'magnitude'³⁵⁹, or its 'intensity'³⁶⁰.³⁶¹ A second factor is the 'vulnerability'³⁶² of the target state, its 'robustness'³⁶³, or, say, its 'susceptibility'.³⁶⁴ Why else would the UN General Assembly stress that interference 'in the free development of national electoral processes, *in particular in the developing countries*',³⁶⁵ is impermissible? A potential third factor is whether there are particularly bad or particularly good reasons for the behaviour that constitutes the interference, which includes but is not limited to rules of international law prohibiting the means in question or explicitly protecting it.³⁶⁶ While this third factor may not always be at play, any available indication of an action's specific rationale can be taken into account as well. This threefold test – scope, susceptibility, and rationale – may lead to the determination that even conduct which does not violate domestic laws must be deemed coercive because of its disproportionate intensity.

This may be an expansion of Damrosch's suggestion, both in terms of substance and its scope of application.³⁶⁷ Still, Damrosch's proposal provides the basis for this contextualization of coercion, it is well in line with more

judicial system of the target state, which means that they may be able to act in contravention of domestic laws without facing consequences. This is itself a problem that could be remedied, to some extent, by the reading of non-intervention advanced here.

356 See section 4.3.2 above, especially footnotes 308-312 and the accompanying text.

357 See footnote 345 above and the accompanying text.

358 Damrosch 1989, 49.

359 See Jamnejad/Wood 2009, 348, 368.

360 Or 'Intensität' in German: Athen 2017, 279.

361 See already footnotes 310-311 above and the accompanying text.

362 Jamnejad/Wood 2009, 371 (emph add): '[t]he reliance of many *vulnerable* states on aid makes its withdrawal in practice one of the most effective methods of pressure.'

363 Or 'Widerstandskraft' in German: Athen 2017, 247.

364 See already footnotes 310-311 above and the accompanying text. I am grateful to Professor Matthias Mahlmann for valuable contributions to this argument.

365 UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147, para 3 (emph add).

366 See already footnotes 309 and 312 above as well as the accompanying text.

367 While Damrosch wrote about two specific examples of economic interference and about political affairs in general, this study discusses additional means of interference and focuses on the particular context of elections.

recent literature,³⁶⁸ and it appears convincing in the specific context of foreign electoral interference.³⁶⁹ The following sections will therefore discuss examples of economic means of interference against the background of the two-pronged understanding described: the threshold of coercion being reached either by a *contravention of domestic electoral laws* – provided that these are not themselves in violation of international human rights law – or due to *disproportionate intensity* – considering the scope of the conduct, the susceptibility of the target state, and, where relevant, the specific rationale of the behaviour that constitutes the interference.

It is worth stressing again, however, that coercion is not a low threshold.³⁷⁰ In the context of economic forms of foreign electoral interference, coercion implies that the economic influences on the opinion-forming process preceding an election render free political choices impossible. What this means for specific examples of economic interference will be discussed next.

5.2.1. The element of coercion and financial support

In accordance with the criteria outlined, a first set of circumstances under which financial support has the potential to impede free choices in the context of a state's elections is when it runs counter to campaign finance laws enacted by the target state. Electoral laws that regulate who may contribute in what ways to electoral campaigns are certainly part of the 'political system', in which choices 'must remain free ones'³⁷¹. If, for example, a state decides to set limits on the amount of money candidates may receive, to require candidates to make their sources of funding transparent, or to prohibit financial help from foreign donors altogether, support from abroad that does not adhere to such rules – by virtue of its amount, its covertness, or its sheer existence – would

368 The understanding Damrosch suggested has been shared in more recent scholarly opinion – see for example Jamnejad/Wood 2009, 352, 368.

369 This is also true beyond economic means of interference. For an application of the same understanding of coercion to informational means of interference, see section 5.3 below.

370 See also Damrosch 1989, 5: '[t]his article contends that there is a legally binding norm of nonintervention that reaches certain kinds of nonforcible political influence, but that the conduct it regulates is not as broad as is often assumed.' See also Jamnejad/Wood 2009, 349: '[c]are is needed not to overstate the scope of the non-intervention principle.' See also O'Malley 2003, 331: '[i]n short, it is impossible to articulate a clear legal prohibition against seeking to influence political developments in another State, especially when that State has even marginally opened itself to international intercourse, and when the aim is to encourage political pluralism rather than the toppling of the incumbent government.'

371 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

undermine the respective legislative choices. The Council of Europe recommends to its member states that they ‘should specifically limit, prohibit or otherwise regulate donations from foreign donors.’³⁷² Unless it is in violation of international human rights law,³⁷³ a state’s framework on campaign funding must be respected by foreign state-linked actors as well. To quote an earlier formulation sharing this position: ‘[f]unding a political party where the domestic law of the recipient party prohibits it will usually contravene the principle of non-intervention’.³⁷⁴

A second set of circumstances under which financial support is incompatible with the demand of non-intervention that choices in an election remain free is when the influence becomes disproportionately intense. This might be the case due to particularly dire economic conditions in the target state or particularly high sums flowing in from abroad – or both. Generally, financial resources alone do not predetermine voters’ choices. However, it is conceivable that certain states and their electoral processes might be especially vulnerable to the impact of foreign financial support, due to a pre-existing scarcity of campaign funding, for example. Damrosch also acknowledged this when writing that transnational campaign funding (as well as economic leverage) should in principle be regarded as compatible with the prohibition of intervention, ‘unless the *nature or scope* of the technique in question were such as to infringe upon the ability of the target’s people to exercise free political choice’.³⁷⁵ Jamnejad and Wood, too, note that even when no pertinent domestic campaign laws exist, ‘the level of support might be *of such a magnitude* as to be

372 Council of Europe, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers’ Deputies), Article 7. For more on this see section 15.2.1.1 below.

373 The European Court of Human Rights has regarded a French prohibition for political parties to receive funding from foreign states as justified. See footnotes 1167–1168 below and the accompanying text.

374 Jamnejad/Wood 2009, 368. In addition, Jamnejad and Wood also mention that funding a party with coercive goals would be incompatible with non-intervention, without going into detail on what would constitute a coercive goal (*ibid*). Another option would be to address such constellations in the framework of attribution. If it is not the funding itself that amounts to coercion, but financial support rather enables domestic actors to take election-related actions that are otherwise coercive, the focus should perhaps be on the nature of the specific means employed by the domestic actors, whereas the financial support from abroad could be regarded as an argument for attribution. On attribution more generally, see section 6.2 below. On funding being relevant but ‘insufficient in itself’ for attribution, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 115.

375 Damrosch 1989, 49 (emph add).

coercive.³⁷⁶ As long as candidates possess more or less comparable financial means to fund their electoral campaigns, be broadly visible, and effectively convey their message, financial support from abroad will usually not reach the threshold of coercion. In purely domestic settings, financial inequalities may – depending on the applicable campaign finance laws – exist, too, and not every minor advantage in resources will automatically lead a candidate to receive more votes. Even in light of more pronounced financial inequalities, a free choice by voters for or against certain candidates remains possible in principle. However, at a certain point, the information costs for voters will become too high to bear.³⁷⁷ While voters can legitimately be expected to be attentive and think critically in a democracy, they cannot be expected to search for a needle in a haystack. If inequalities generated by foreign financial support become so significant that voters need to actively look for low-resource candidates³⁷⁸ in a flood of political communication by well-funded campaigns, for example, the interference arguably amounts to coercion.

Beyond these two sets of circumstances, financial support by foreign states may not be a laudable thing,³⁷⁹ but it will hardly violate the prohibition of intervention.³⁸⁰ After all, voters can still choose freely which names to write on their ballot papers or which boxes to tick, no matter how well-funded an electoral campaign may be. Voters' capability to critically reflect on information they receive, including from high-resource campaigns, should not be underestimated. Viewing the threshold of coercion as one reached easily might imply such an underestimation.

5.2.2. The element of coercion and targeted adverse economic measures

Given that there are hardly any domestic electoral laws that targeted adverse economic measures could run counter to, the question of the permissibility of such examples comes down to whether the interference is disproportionately

376 Jamnejad/Wood 2009, 368 (emph add).

377 Information costs refers to the investment voters need to make to acquire information – see Peters 2018, 46.

378 On 'low-resource candidates and fundraising appeals' see Johnson 2020 (capitalization removed).

379 For a discussion of the appropriateness of international structures of political funding in light of international political structures – the European Parliament being the prime example –, see section 15.2.1.1 below.

380 See also Damrosch 1989, 49: '[t]hus, in the absence of a valid domestic law to the contrary, influencing states could sponsor programs aimed at strengthening political institutions, assist candidates in obtaining media access, aid political parties through financial contributions or other forms of support, and otherwise exercise political influence not inconsistent with the internationally protected political rights of the target's citizens.'

intense or not. In comparison with the example of financial support, an additional element is of increased relevance within this assessment: the reasons for employing the measures.

First and foremost, however, the scope – including the timing – of the measures is relevant. A candidate's ability to conduct an electoral campaign could be severely hampered by an asset freeze that blocks access to vital financial resources at a critical point in time during the electoral process, or by other sanctions and measures that affect the campaign economically – at least if there are no alternative means of generating, storing, and using the resources needed by the candidate, campaign, or party in question.

Furthermore, the susceptibility of the political conditions to such conduct is relevant as well. Systems of public funding or limits on electoral spending might help maintain a balance of access to resources for all campaigns and lower the effectiveness of sanctions that concern only the private wealth of candidates. Similarly, if the media landscape surrounding the election in question provides basic opportunities for candidates to present their programmes, if public broadcasters provide a minimum amount of coverage to each candidate, or if electoral authorities distribute information including the candidates' programmes to all voters, adverse economic measures targeting a certain candidate might be less impactful. In short, the smaller the role that money plays in the electoral process, the less likely it is that targeted adverse economic measures against a contestant will amount to coercion. Conversely, if the use of financial resources is unrestricted and a candidate depends heavily on international business activities or assets stored in foreign banks, for example, becoming the target of adverse economic measures might lead to a decisive disadvantage for an electoral campaign. If a campaign is thereby prevented from effectively reaching voters, the free choice of the electorate is limited by external factors, and one may in principle speak of coercion.

Yet, another aspect needs to be taken into consideration for determining the permissibility of the conduct: whether the interfering state acts with good reasons. For example, human rights abuses are certainly a much better reason to sanction an individual who is also a candidate in an election than pure political self-interest.³⁸¹ In order to be proportionate, even sanctions for crimes

381 For example, such considerations are relevant in the case mentioned at the outset – see footnote 167 above. Even more illustratively, one of the candidates in the 2018 presidential election in the Democratic Republic of the Congo was the target of sanctions by the European Union and Switzerland due to previous human rights abuses. That is of course a comparatively good reason to justify sanctions, even against political actors, provided that the measures comply with the rule of law and do not violate (other) human rights, the principle of proportionality, or other pertinent international legal guardrails. On sanctions in the name of collective security and their legal requirements, see

might have to be designed in a manner that affects the political processes in another country as little as possible. Nevertheless, having reasons of this sort to target someone with punitive measures may have some justificatory force when it comes to making final determinations on the permissibility of targeted adverse economic measures in the context of an election.

It is vital to reemphasize that financial advantages or disadvantages in electoral contests never fully predetermine voters' choices at the ballot box. Hence, not every case of financial sanctions by foreign states against someone with electoral ambitions in the near or distant future constitutes a prohibited intervention. However, if an otherwise viable electoral campaign is sunk by a foreign state's far-reaching and prolonged targeted adverse economic measures that are employed without good reasons, this does unjustifiably remove one option from the free choice the electorate is supposed to have and, as a consequence, fulfil the criterion of coercion.

5.2.3. The element of coercion and biased economic policies

Whether biased economic policies violate the prohibition of intervention is one of the few central questions of this study for which some guidance by case law exists. In the proceedings leading up to the ICJ's 1986 judgment, Nicaragua alleged that the United States had violated, among other norms, the prohibition of intervention by adopting economic measures including a trade embargo, a withdrawal of aid, and a reduction of imports.³⁸² The court

section 6.1.1 below. On the example mentioned see Editorial Board, *Why Congo's election on Sunday will be a travesty* (The Washington Post, 28 December 2018). See also Council of the EU, *Democratic Republic of the Congo: Council extends sanctions for one year* (10 December 2018). For a list of persons targeted by EU sanctions, including the presidential candidate in question at the time of the election, see Council Implementing Regulation (EU) 2017/904 of 29 May 2017 implementing Article 9(2) of Regulation (EC) No 1183/2005 imposing certain specific restrictive measures directed against persons acting in violation of the arms embargo with regard to the Democratic Republic of the Congo [2017] OJ L 1381/1, 5. As for the addressees of Switzerland's sanctions, see the database of the State Secretariat for Economic Affairs.

382 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, paras 22-23, 244: '22. In the economic field, Nicaragua claims that the United States has withdrawn its own aid to Nicaragua, drastically reduced the quota for imports of sugar from Nicaragua to the United States, and imposed a trade embargo; it has also used its influence in the Inter-American Development Bank and the International Bank for Reconstruction and Development to block the provision of loans to Nicaragua. 23. As a matter of law, Nicaragua claims, inter alia, that the United States['] [...] actions amount to intervention in the internal affairs of Nicaragua, in breach of [...] rules of customary international law forbidding intervention [...]. [...] 244. As already noted, Nicaragua has also asserted that the United States is responsible for an "indirect" form of intervention in its internal affairs inasmuch as it has taken, to Nicaragua's disadvantage, certain action of an economic nature. The

concluded, however, ‘that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention.’³⁸³ Although the ICJ’s elaborations on the matter do not mention an upcoming election, the conduct in question is certainly characterized by political aspects.³⁸⁴

While it may be generally true that trade policies are allowed to be politically motivated, there are limits to this. As stressed by Damrosch, it is conceivable that the intensity of economic measures reaches a tipping point at which one could speak of coercion: ‘some economic sanctions programs might in fact prevent the people of the target from exercising free political choice. An example would be the case of sanctions so crippling as to undermine the economic foundations for the exercise of political freedoms.’³⁸⁵ This view is in line with the general view on coercion by economic measures: in principle, states are free to choose with whom to establish trade relations, yet in exceptional cases, where sanctions are so severe as to affect a state’s vital interests or restrict the exercise of its sovereignty, the prohibition of intervention can nonetheless be violated.³⁸⁶

Yet, in order for biased economic policies to be so disproportionately intense as to undermine an electorate’s ability to make free political choices within an election, the target state would presumably have to be somewhat dependent on its economic ties with the interfering state. Should its economic conditions make the target state sufficiently susceptible to the preferences of a foreign state, rendering one political programme effectively unfeasible and

Court’s attention has been drawn in particular to the cessation of economic aid in April 1981; the 90 per cent reduction in the sugar quota for United States imports from Nicaragua in April 1981; and the trade embargo adopted on 1 May 1985. While admitting in principle that some of these actions were not unlawful in themselves, counsel for Nicaragua argued that these measures of economic constraint add up to a systematic violation of the principle of non-intervention.’

383 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 245. See also Damrosch 1989, 34.

384 On the United States’ involvement in Nicaragua see Joyner/Grimaldi 1985, 631–641. See also Damrosch 1989, 47: ‘[t]he World Court correctly found that the United States had not intervened in Nicaragua’s internal affairs by suspending favorable economic relations after the Nicaraguan Government took a pro-Soviet turn, for even if one purpose of the sanctions was to weaken a hostile government, there would be no basis for forcing the United States to remain in an unwanted economic liaison with an ideological adversary.’

385 Damrosch 1989, 47.

386 Odendahl 2012, 336–337. See also Kunig 2008, paras 25–26. This is not to say that there would then be a duty to establish comprehensive new trade relations with a given state, but perhaps there is a duty not to cease existing, vital economic cooperation completely overnight, or at least not to adopt sanctions with disproportionate adverse effects on the society of the target state.

another indispensable, one could argue that the requirement of coercion is fulfilled. Usually, however, economic welfare will depend on many factors, and so will voters' choices. The mere prospect of slight changes in future welfare caused by the threats or promises of a foreign state can hardly coerce an electorate into voting in a certain way. Deeming biased economic policies impermissible under the international law of non-intervention should thus be reserved to situations where their economic implications are overwhelming.

5.3. Application of the law to informational means of interference

Furthermore, a violation of the prohibition of intervention may be established if an example of informational means of interference – criticism or endorsement, the dissemination of false or misleading information, or the disclosure of private information – reaches the threshold of coercion. The following sections assess the respective scenarios in light of the criterion of coercion, but only after providing the necessary contextualization.

The implications of non-intervention for informational means of foreign electoral interference have received considerable scholarly attention since the 2016 US presidential election. Although the publications in question tend to emphasize cyber aspects rather than informational aspects,³⁸⁷ part of the conduct they discuss corresponds to the dissemination of false or misleading information and the disclosure of private information. Criticism or endorsement, in contrast, do not seem to have been at the centre of attention in recent times.

As is true for economic means of interference, informational means of interference affect the opinion-forming process leading up to an election.³⁸⁸ This process may also be guided by domestic laws enacted by the target state to regulate the informational surroundings of elections. As discussed earlier, such legislative measures can be seen as a legitimate use of the state's freedom of choice with respect to its political system, provided that they comply with international human rights law. In addition, voters can be expected to critically reflect on the influences received during the opinion-forming process, be they of foreign or domestic origin. Yet here, too, interference by informational means may reach a tipping point at which it becomes too overwhelming to expect the electorate to resist. The two-pronged understanding discussed in the context of economic means of interference³⁸⁹ – coercion as either a

387 See footnote 188 above and the accompanying text. For an exception see for example Baade 2018.

388 This is in contrast to interference that targets voting, or the opinion-*collecting* process. See section 2.2.3.3 above.

389 See section 5.2 above.

contravention of (human rights-compatible) domestic electoral laws or disproportionate intensity – can thus be applied to informational means of interference as well. What this means for specific examples will be discussed next.

5.3.1. The element of coercion and criticism or endorsement

Statements of opinion such as criticism or endorsement by foreign officials or state-linked media outlets may run counter to domestic electoral laws, for example, if the target state has prohibited all election-related public messaging on election day or the day before,³⁹⁰ if the statements incite violence,³⁹¹ or if they constitute hate speech³⁹² according to the applicable legal framework. Beyond such cases, domestic restrictions on election-related statements of opinion – false³⁹³ and private³⁹⁴ information will be discussed later – might easily come into conflict with international guarantees of the freedom of expression and are thus not covered by the protection afforded by non-intervention.³⁹⁵ This generally leaves considerable room for criticism and endorsement by foreign state-linked actors that will not contravene the rules a target state justifiably enacted to regulate the informational surroundings of its electoral processes.

In addition, one might assume that criticism or endorsement from abroad could become overwhelmingly compelling by virtue of their nature and scope – say, their timing, the influence of the person who utters them, and their content. Yet even the very clear-cut example introduced at the outset³⁹⁶ – a president himself publicly antagonizing the incumbent government of another country, home to many voters with ties to that president’s own country, around a month before the election – arguably does not meet this threshold. After all, such statements are in the public domain and can be critically reflected on, disagreed with, and rejected by voters. The secrecy of the vote³⁹⁷

390 On such ‘silence periods’ see footnote 1180 below.

391 Such laws are generally compatible with the freedom of expression and reflect Article 20(2) of the ICCPR: ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’

392 See McGoldrick 2022, 224–226. In fact, Article 4(a) of the ICERD requires state parties to declare hate speech a punishable offence. See also Article 4(c) of the ICERD on public authorities and public institutions as potential authors of hate speech. On the significance of this provision see Thornberry 2010, esp 104–105. I am grateful to Professor Matthias Mahlmann for first making me aware of this norm.

393 See section 5.3.2 below.

394 See section 5.3.3 below.

395 See Article 19 of the ICCPR. On the freedom of opinion and expression in international human rights law see McGoldrick 2022, 218–226.

396 See footnote 175 above and the accompanying text.

397 This is one of the few binding requirements for elections in international law – see section 10.3.2.5 below.

also prevents potential repercussions. Furthermore, international law contains no indication that such statements of opinion are unacceptable per se. To be sure, certain forms of ‘propaganda’ have long been prohibited,³⁹⁸ notably if they support violent action³⁹⁹ or insult the ‘institutions, leaders, and people’ of a state.⁴⁰⁰ Generally, however, official criticism of another state, its policies, and its conduct is permissible under international law,⁴⁰¹ further indicating that it does not constitute disproportionately intense interference.⁴⁰²

Crucially, foreign electoral interference is usually not an attempt to ‘overthrow the existing political order’⁴⁰³ of a state. It is about influencing developments *within* an existing political order. Even offensive statements, while perhaps not laudable, can easily be resisted by the electorate and hardly determine

398 On ‘propaganda for war’, ‘defamatory propaganda’, and ‘subversive propaganda’ see Whitton 1971, 15-22. See also Larson 1966, 443-449. On propaganda for war see also Article 20(t) of the ICCPR.

399 When it comes to drawing the line between permissible and impermissible support by states for political activities in other states, scholars usually rely on a distinction between violent movements and peaceful campaigns. See Kunig 2008, para 4. See also Streinz 2018, 236. See also Odendahl 2012, 338. See also – slightly broader – Jamnejad/Wood 2009, 374 (emph add): ‘[i]f [a broadcast] is deliberately false and *intended to produce dissent or encourage insurgents*, the non-intervention principle is likely to be breached.’ Even when an initially peaceful political movement spirals out of control and turns violent, it is considered inappropriate to blame foreign commentators for their earlier support of the campaign in question if they could not have expected the escalation: O’Malley 2003, 330. On support for violent movements being impermissible, see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 241: ‘[t]he Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching.’

400 See the definition of ‘defamatory propaganda’ by Whitton 1971, 18.

401 See already Wright 1960, 532: ‘[t]here has regularly been diplomatic protest when governments or high officers indulge in libelous or propagandistic utterances which would weaken or disrupt the internal order of a friendly state. [...] Official criticism of the policy of such a state or of its non-observance of international law or treaty are in a different category, and are, of course, permissible.’ See more recently Wheatley 2020, 187: ‘[t]here is widespread agreement in the literature that providing the citizens of another country with factual information, including information critical of the government of that state, [...] does not constitute a prohibited intervention.’ See also Schmitt 2021, 748: ‘[t]raditional messaging setting forth a State’s position on a foreign election is not coercive.’

402 See also Baade 2018, 1365: ‘[m]ere criticism of the internal politics of another state, and be it biased, is not prohibited intervention’. Note that Kunig – to whom Baade refers for making this statement – mentions that criticism needs to be ‘substantiated by facts’: Kunig 2008, para 24. On false information see section 5.3.2.

403 See the definition of ‘subversive propaganda’ by Whitton 1971, 15.

voting behaviour. While certain domestic electoral laws – as well as international bans on hate speech and incitement to violence – will have to be respected, official criticism and endorsement from abroad in the context of an election are generally not in violation of non-intervention.

5.3.2. The element of coercion and the dissemination of false or misleading information

As regards the incompatibility of the dissemination of false or misleading information with (human rights-compliant) domestic electoral laws, only a few clear-cut examples come to mind. They include, again, the contravention of silence periods during which all election-related messaging is forbidden,⁴⁰⁴ certain defamatory statements,⁴⁰⁵ or hate speech that includes false information such as Holocaust denial.⁴⁰⁶ In addition, there are other, more general bans on the dissemination of false information. Yet, while there is at least one significantly older example,⁴⁰⁷ many recent bans on the spread of ‘fake news’ have questionable motives,⁴⁰⁸ to say the least. Such laws will often be prone to abuse and represent undue restrictions on speech,⁴⁰⁹ falling foul of international human rights law standards and thus not within the set of laws foreign states need to respect by virtue of non-intervention.

Even in the absence of pertinent domestic laws, one might also argue that the dissemination of false or misleading information by foreign state-linked actors becomes disproportionately intense, thereby preventing the electorate from making free political choices. Some authors have argued for the coerciveness of spreading false information in the run-up to an election. While

404 See footnote 1180 below.

405 Like many restrictions on speech, defamation laws can easily come into conflict with the freedom of expression and should thus be applied ‘as narrowly as possible’ – McGoldrick 2022, 223–224.

406 See McGoldrick 2022, 224–226. See also footnote 392 above. As confirmed by the European Court of Human Rights in 2019, Holocaust denial does not deserve protection by the freedom of expression and can thus be prohibited by states. For the court’s judgment and more aspects of Holocaust denial see footnote 1183 below.

407 As early as 1881, France enacted a law that made it ‘illegal to disturb public peace through the publication, dissemination, or reproduction of fake news in bad faith’. For this English translation see US Library of Congress – Law Library, *Initiatives to Counter Fake News in Selected Countries* (April 2019), 30. To compare the original and the current version of the French text see *Loi du 29 juillet 1881 sur la liberté de la presse*, esp Article 27. See also Couzigou 2021, 103. I am grateful to Professor Philippa Webb for first making me aware of this law.

408 See for example International Press Institute (IPI), *Tracker on Press Freedom Violations Linked to COVID-19 Coverage*. For more details see footnote 1182 below.

409 On freedom of expression and the chilling effect see Townend 2017. For more detailed considerations on laws that regulate speech, see section 15.2.1.2 below.

not everyone writing on the matter agrees,⁴¹⁰ those who affirm a violation of non-intervention usually rely on the fact that the spreaders of false information often act in disguise.⁴¹¹ Yet, ‘deception’ needs to be distinguished

410 Baade, for example, held that false news – ‘if its placement or dissemination were attributable to a state’ – violate the prohibition of intervention, whereas distorted news – ‘[m]ere framing and presentation of true facts’ – do not (Baade 2018, 1364). Schmitt wrote, on the one hand, that ‘actions [...] like espionage, slanted media reporting by Russian controlled media, and the purchase of advertising to sway the electorate in favor of a particular candidate, are [...] not coercive and do not qualify as a prohibited intervention’ (Schmitt 2018, 50). On the other hand, Schmitt suggested that ‘[a] cyber operation that generated false messages purportedly from [a political] party and attempted to sway votes or alter the party’s actual messaging in a significant way also would qualify [as prohibited intervention]’ (Schmitt 2018, 52). Schmitt generally concluded that there is a ‘significant grey zone’ as to which forms of foreign electoral interference are permissible and which are not (Schmitt 2018, 53). See also Schmitt 2021, 746–750, esp 748: ‘[a]s it stands, the law is not sufficiently clear about whether, and if so when, information operations can qualify as coercive.’ Hollis, referring to the context of the 2016 US presidential election, stated that foreign ‘social media efforts are even harder to label as coercion [than the obtainment and subsequent release of private information] since, at best, all they did was impact people’s opinions, which may or may not have impacted some number of subsequent votes’ (Hollis 2018, 41). Sander, after discussing the matter in more detail than others, acknowledged that ‘it is difficult to conclude with any confidence whether or not cyber influence operations on elections constitute prohibited forms of intervention under international law’ (Sander 2019, 24). Tsagourias advanced an understanding under which ‘deep fakes’, for example, are impermissible (Tsagourias 2020, 54): ‘[t]o the extent that such operations are designed and executed in such a way as to manipulate the cognitive process where authority and will are formed and to take control over peoples’ choices of government, they would constitute intervention.’ Koh stated that ‘illegal coercive interference in another country’s electoral politics – including the deliberate spreading of false news – constitutes a blatant intervention in violation of international law’ (Koh 2017, 50). In the context of this statement, Koh also referred to the Tallinn Manual 2.0. Yet, while the Tallinn Manual in its first version mentioned ‘false news [being] spread’ as an example of prohibited intervention (Schmitt 2013, 45), its successor omits this example in a significantly more detailed assessment of non-intervention (Schmitt/Vihul 2017, 312–327). This shift has been highlighted earlier: Baade 2018, 1364, fn 53; Sander 2019, 23. For one more view see Wheatley 2020, 191–192: ‘[w]hen evaluating the coerciveness of a fake news story attributable to a foreign power, we must ask two questions: (1) Was the message communicated with the intention of deceiving the target audience into believing a falsehood? [...] (2) Would a reasonable observer judge that the communication was intended to influence the target’s decision-making to such an extent that they would be left without a meaningful choice about what to think, and therefore what to do? If the answer to both is in the affirmative, the communication violates the principle of non-intervention.’

411 See for example Baade 2018, 1364: ‘[s]hould [...] false news be planted covertly by a state – that is, without revealing that its source is a state – this would be another factor indicating a violation of the principle because it deprives the addressees of critical information to assess the information’s trustworthiness.’ Schmitt, too, is of the view that ‘the covert nature of the troll operation deprived the [...] electorate of its freedom of choice by creating a situation in which it could not fairly evaluate the information it was being provided’ (Schmitt 2018, 51). See also Schmitt 2021, 749–750, esp 749, fn 33 and the accompanying text. Tsagourias stresses the example of ‘deep fakes’, or situations

from coercion.⁴¹² While deception can be resisted, the notion of coercion suggests the opposite.

Spreading false or misleading information on social media may be a potent tool to influence some parts of public discourse, but it is hardly enough 'to manipulate the cognitive process where authority and will are formed and to take control over peoples' choices of government'⁴¹³. After all, there are other sources of information that are much more difficult to manipulate. While there have been cases of government⁴¹⁴ or newspaper⁴¹⁵ websites as well as of verified social media accounts being successfully hacked,⁴¹⁶ such examples are relatively rare and usually short-lived. These exceptions aside, there often is a variety of reliable sources of information voters can turn to, such as public broadcasters committed to neutrality or other independent media that are broadly available and adhere to standards of journalistic integrity.⁴¹⁷ This decisively limits the potency of disinformation campaigns on social media and represents a means for the electorate to resist foreign attempts at deception. Where to turn to for information is – ideally at least – a rational decision that voters ultimately have to make for themselves.⁴¹⁸ It is certainly regrettable if voters choose to inform themselves only via social media or propagandistic foreign media outlets instead of consulting more reliable sources of information and, as a consequence, fall for foreign disinformation. Yet, no one is forced to do so. Whenever there are generally available sources of reliable information voters can resort to, one can hardly speak of coercion.⁴¹⁹

in which, 'during an electoral campaign, imageries, voices or videos of politicians are simulated in order to discredit them' (Tsagourias 2020, 53–54). The aspect of 'impersonation' (Ohlin 2018, 1, 7) is also at the centre of Ohlin's argument against foreign electoral interference in the form of 'covert social media influencing campaigns' (ibid, 6): 'the real harm of election interference flows from outsiders participating in the political process of another polity but pretending to do so as insiders' (ibid, 15).

412 As is correctly implied by Ohlin 2018, 7: '[t]he key mechanism here was deception, not coercion.' See also Ohlin 2020, 82: '[t]rue, the Russians sought to influence the outcome of the election and moreover they did so with deception. But deception is not the same thing as coercion.'

413 See for this formulation Tsagourias 2020, 54.

414 Agence France Presse, US government agency website hacked by group claiming to be from Iran (The Guardian, 5 January 2020).

415 BBC, 'Anonymous' hack Singapore newspaper's website (1 November 2013).

416 Julia Carrie Wong & Kari Paul, Twitter hack: accounts of prominent figures, including Biden, Musk, Obama, Gates and Kanye compromised (The Guardian, 16 July 2020); Max Fisher, Syrian hackers claim AP hack that tipped stock market by \$136 billion. Is it terrorism? (The Washington Post, 23 April 2013).

417 For more considerations on the role of reliable journalistic media see section 15.3 below.

418 On the responsibility of voters in the opinion-forming process see section 15.4 below.

419 For a different conclusion see Baade 2018, 1364.

Importantly, this may not always be the case. Conditions in certain states may make them more vulnerable to false or misleading information spread from abroad. If the media landscape is scarce or dominated by sources that are biased, unreliable, or simply too expensive for the general public, the opinion-forming process might be more susceptible to being impacted by disinformation on social media or in freely available foreign media. Unless the population of the target state happens to be ‘epistemically isolated’⁴²⁰, disinformation efforts would arguably still have to be of a certain scale and come with a certain degree of sophistication in order to be coercive. Yet, if the informational surroundings of an election are such that the efforts by a foreign state to spread false or misleading information appear disproportionately intense in relation to the reliable sources of information available, one can indeed speak of coercion.

A particularly important factor for determining the intensity of interference is timing. Even in the presence of reliable sources of information, the spread of falsehoods will be more potent if there remains no time for rectification.⁴²¹ During critical stages of the electoral process, if voting has already begun or is about to begin, there may not be enough time left for the electorate, authorities, the media, fact-checking initiatives, and the campaigns concerned to react appropriately, correct false information, and rectify misconceptions.⁴²² Such circumstances can be an additional factor contributing to false information effectively dominating public discourse and its spread eventually amounting to coercion.

Like other conduct treated in this study, spreading false or misleading information is definitely not a laudable thing for foreign states to do. However, domestic actors do not always tell the truth either, and a robust democracy will be able to endure the circulation of lies to a certain extent. How high information costs voters can be expected to bear is, again, a matter of scale. To the extent that the target state has not categorically – and justifiably – banned certain forms of false information through human rights-compatible electoral laws, the scope of the interference needs to be weighed against the resilience of the target state’s informational environment. How low one sets the bar for coercion also depends on how much trust one puts in voters’ individual capabilities and the collective robustness of a democracy. If false or misleading

420 This term is used by Ohlin 2017, 1588.

421 On ‘when to drop a bombshell’, see Gratton/Holden/Kolotilin 2018 (capitalization removed).

422 A similar line of reasoning is employed – with appropriate caution – in the jurisprudence of the Swiss Federal Supreme Court: BGE 135 I 292, para 4.1. I am grateful to Professor Daniel Moeckli for pointing this out.

information only accounts for a manageable share of online public discourse, it is certainly not coercive. If, however, a foreign state manages to credibly mimic reliable sources of information, drown out other existing media, and set the tone within the opinion-forming process through falsehoods that remain uncorrected, the conclusion will change.

5.3.3. The element of coercion and the disclosure of private information

The obtainment and subsequent release of private information – viewed from the perspective of non-intervention – is perhaps the aspect of foreign electoral interference under international law best covered by recent academic literature. Yet, again, the publications available offer differing conclusions.⁴²³ This section once again relies on the now familiar two-pronged understanding – the requirement of coercion being fulfilled either by contravention of (human

423 Ohlin, looking at a case in point, judges that, while it was ‘certainly corrosive, it is genuinely unclear whether it should count as coercive’ (Ohlin 2017, 1593; see also Ohlin 2020, 80–81). Sander offers the general verdict for ‘cyber influence operations’ quoted above: ‘it is difficult to conclude with any confidence whether or not cyber influence operations on elections constitute prohibited forms of intervention under international law’ (Sander 2019, 24). Hamilton seems to implicitly regard the requirement of coercion as fulfilled when affirming a violation of non-intervention by ‘cyber covert action’ (Hamilton 2017, 196). Tsagourias writes that the ‘hacking and release of confidential information’ – in the same way as ‘social-media enabled disinformation’ – targets ‘the cognitive environment which enables the making of choices that are subsequently reflected in the type of government that emerges from the process’ (Tsagourias 2020, 54). Tsagourias concludes that the interference in question ‘met the two conditions of unlawful intervention’ (ibid). Schmitt at least finds it possible to argue that the ‘hacking and release’ of genuine but private information ‘tainted the electoral process’, resulting in the ‘electorate’s freedom of choice [...] being thwarted’ (Schmitt 2018, 51). Hollis, in contrast, suggests treating the hacking of private data as a ‘case of espionage’ and states that a specific timed release of private information in the context of the 2016 presidential election ‘perhaps [...] involved coercion, but it is not clear what the threatened consequences were, let alone who its targets were’ (Hollis 2018, 41). Wheatley offers the following view (Wheatley 2020, 189): ‘[t]here is one exception to the general rule that “just providing the facts” is not unlawful: that is where the outside power inundates the information environment in the target state with a single political narrative, drowning out all other voices.’ Finally, Kilovaty, adding that it is ‘it is immensely difficult to define the boundary between coercive and non-coercive actions’ (Kilovaty 2018, 168), thinks it is best to simply disregard the requirement of coercion (ibid, 174): ‘I argue that the norm against non-intervention is violated when one state commits a highly disruptive cyber-attack against another. Such an attack, which I call doxfare, violates the norm against non-intervention even when the attack does not meet outdated notions of “coercion.”’ See also Kilovaty 2021a. As indicated by the author, this represents a departure from international law. As stated by the ICJ in 1986 and later reiterated, coercion is not only an integral part of the norm, it ‘defines, and indeed forms the very essence of, prohibited intervention’ (*Military and Paramilitary Activities in and against Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14, para 205). On the requirement of coercion and the practical consequences of giving it up, see section 4.3.2 above. See also footnote 38 above and the accompanying text.

rights-compliant) domestic electoral laws or by virtue of disproportionate intensity –, albeit with respect to the actual publication of private information only, separating the genuinely informational aspects from possible earlier extraction by technical means.⁴²⁴

The disclosure of private information by foreign actors may contravene the domestic electoral framework if there are, again, silence periods during which no election-related public messaging is allowed;⁴²⁵ moreover, this can be the case if there are pertinent privacy laws protecting candidates and other individuals involved⁴²⁶ or laws that forbid the publication of material that was obtained illegally.⁴²⁷ All of these examples of domestic legal rules need to be compatible with international human rights law in order to be protected by non-intervention. The freedom of expression requires silence periods to be short⁴²⁸ and any limitations on publishing to take into account the public interest in the person or content concerned, among other factors.⁴²⁹ Yet, even a candidate running for high public office may be entitled to a residual amount of privacy that a state's electoral laws can validly protect. If, as a consequence, domestic actors must not publish certain content, foreign actors can be expected to play by these rules as well. If a foreign state circumvents human rights-compliant domestic privacy laws regardless, there is a case for coercion, because that state did not respect the rules another state has legitimately chosen to guide its electoral process.

In addition, the disclosure of private information might impair the freedom of political choices without running counter to domestic electoral laws. Generally, the unauthorized surfacing of sensitive information or incriminating

424 On technical means of interference and the international law of non-intervention see section 5.4 below.

425 See footnote 1180 below.

426 On privacy as a potential limitation on the freedom of expression more generally see McGoldrick 2022, 223.

427 For similar considerations see Schmitt 2018, 51: 'it can be argued that the hacking and release tainted the electoral process by introducing information that, albeit genuine, was acquired by means that are expressly prohibited under U.S. domestic law, as well as the law of most other States – namely, the unlawful penetration and exfiltration of private data. [...] In this sense, the electorate's freedom of choice was being thwarted.'

428 See with respect to bans on the publication of polls and the freedom of expression Boumghar 2010, 549: 'Dans ce contexte, l'interdiction de la publication de sondages quelques jours, voire quelques semaines, avant des élections est un sujet délicat.'

429 On relevant factors for striking the correct balance between privacy and the freedom of expression in cases of politicians or other public figures, see McGoldrick 2022, 223: 'whether the expression contributes to a debate of general interest; how well known the person concerned is; the nature of the activities that are the subject of the report and how they link to the role of the person concerned; the prior conduct of the person concerned; how the information was obtained and its veracity; the content, form, and consequences of publication; and finally the severity of the sanction imposed.'

material is not limited to situations with foreign involvement. To the contrary, leaks and the like are arguably part of the new normal of politics, with or without foreign interference. If the information published is accurate – as opposed to a ‘tainted leak’⁴³⁰ –, it also contributes to the ‘epistemic robustness’⁴³¹ of public discourse.⁴³² One could even argue that, generally speaking, more information puts the electorate in a better position for political choices, which would make it in voters’ – albeit perhaps not in candidates’ – interest to have as much information as possible in the public domain.⁴³³

However, there are limits to this argument. Depending on the timing and the environment in which the information is released, a certain publication may become so all-consuming that the interference amounts to coercion. This could be the case, for example, if the release occurs shortly before the end of the opinion-forming process, so that voters are informed by it but there remains no time for the media to put it into context and for those concerned to respond and explain their position.⁴³⁴ Furthermore, even if there is still time left, a general lack of contrasting views and opinions due to a scarce media environment could also increase the susceptibility of the opinion-forming process to publications of private information.⁴³⁵ It will presumably be easier to influence public opinion with a leak incriminating or embarrassing to a campaign if voters do not have access to a certain diversity of perspectives and potential counter-criticism. In contrast, if there is a more robust and pluralist informational environment, it will be possible to put the material unearthed into context and share different views on it.

Beyond cases of publications that are justifiably prohibited by human rights-compliant domestic electoral laws and (potentially last-minute) revelations that overwhelmingly disrupt will formation, the disclosure of private information will usually not be coercive. The preceding obtainment may or may not violate legal rules, depending on whether it entails unlawful intrusion or authorized forms of access.⁴³⁶ The publication of private but accurate

430 See footnote 217 above and the accompanying text.

431 Tenove/Buffie/McKay/Moscrop 2018, 11.

432 On the epistemic goals of democratic deliberation see section 14.1.3.4 below.

433 On hacking and leaking in the public interest see E. Gabriella Coleman, *The Public Interest Hack* (limn, Issue 8: Hacks, Leaks, and Breaches, 2017).

434 For previous considerations on the relevance of timing see footnotes 421–422 above and the accompanying text.

435 For previous considerations on the relevance of the media environment see section 5.3.2 above, especially footnote 420 and the accompanying text.

436 There are manifold ways beyond cyber operations to gain access to information not intended for wider circulation. For example, college yearbooks have proven to be a publicly available source of information incriminating to political actors. See Nick

information as such, however, if in conformity with domestic laws, in the public interest, and under circumstances that allow for fair public deliberation about it, will hardly thwart the free political choices of an electorate.

5.4. Application of the law to technical means of interference

Finally, a violation of the prohibition of intervention may also be established if an example of technical means of interference – extraction of private information, computational amplification of communication, or compromising of election infrastructure – reaches the threshold of coercion. While all three examples are technical in nature, their functions differ significantly. The first two serve to enable or enhance informational means of interference and thus concern the opinion-*forming* process, albeit only indirectly, given their auxiliary nature. The third example, in contrast, concerns the process of voting itself, or the opinion-*collecting* process. Given that none of these examples of interference by technical means directly affects the opinion-forming process, the test applied so far⁴³⁷ – coercion as either a contravention of (human rights-compliant) domestic laws regulating electoral campaigns or disproportionately intense influence on will formation – is not applicable anymore. This does not mean that the autonomy of a state cannot be constrained otherwise. The following sections assess the implications of technical means of interference under the international law of non-intervention, discussing the first two examples of (auxiliary) technical means of interference together.

5.4.1. Non-coercive: auxiliary technical means of interference

The prohibition of intervention is violated if coercion is applied *‘in regard to’*⁴³⁸ choices that must remain free ones. The choices in question here are those offered to voters within elections. With respect to these political choices, neither the extraction of private information nor the computational amplification of communication as such constrain the autonomy of the state in a significant way. They may lay the groundwork for informational means of interference and contribute to them eventually becoming coercive. However, when considered in isolation from other means in combination with which they might

Anderson & Susan Svrluga, Photos of blackface, KKK robes and nooses lurk alongside portraits in old college yearbooks (The Washington Post, 8 February 2019). Alternatively, a newspaper could be handed sensitive information anonymously, or someone may be in possession of incriminating material from previous personal contact.

437 See sections 5.2 and 5.3 above.

438 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205 (emph add).

occur, these two examples of technical means of interference arguably cannot violate the prohibition of intervention.

As regards the extraction of information in particular, its ultimate aim may be the release of the information obtained and, thereby, the exertion of influence on the opinion-forming process. Yet, as long as the information is not released, no influence on voters is exerted.⁴³⁹ Other rules of national or international law may be violated by such conduct,⁴⁴⁰ but the prohibition of intervention as it pertains to interference in elections remains untouched. Similarly, the computational amplification of communication offers a way to enhance different informational means of interference. It may arguably be unsettling for voters to be micro-targeted by a foreign state or to be communicating with state-linked social bots. Such tools may also increase the scale of the informational means they amplify, helping these means reach the threshold of coercion. In and of itself, however, the computational amplification of communication does not have the potential to constitute coercive interference.⁴⁴¹

Both the extraction of private information and the computational amplification of communication are relevant forms of interference and potentially important components of composite acts.⁴⁴² Yet they can only amount to coercion in combination with other conduct. Whether and when the threshold of coercion is reached is thus best determined in the context of the informational means they enable or enhance, in which case the above considerations apply.⁴⁴³

439 See also Hollis 2018, 41: '[i]t would seem, for example, that there was no coercion in the [Democratic National Committee] hack that formed part of Russia's 2016 [influence operation]; rather, that [influence operation] constituted a case of espionage.'

440 In theory, this could be an indicator for coercion in the form of disproportionate intensity, as discussed in section 4.3.2 above. However, if no voters have been influenced yet, such influence cannot be disproportionate either.

441 In principle, the same could be said of economic means of interference – that they are only auxiliary means to make campaigns more effective and that, as such, they possess no informational content that can influence voters' opinions. However, money is such a fundamental component of politics that economic influence deserves to be treated as a separate category of potentially coercive interference. This importance is evidenced, *inter alia*, by the prevalence and prominence of campaign finance laws. Depending on technological and societal developments, technological tools affecting the opinion-forming process might one day attain a similar level of importance, and laws on the use of technology in electoral campaigns might become as common as campaign finance laws. If so, the legal implications might change as well. Foreign states' circumvention of (human rights-compliant) domestic laws regarding the use of technology in election campaigns might then perhaps amount to coercion, as might the disproportionately intense use of technological tools by foreign states to influence an election.

442 On composite acts see section 6.2 below.

443 See section 5.3 above.

5.4.2. Coercive: compromising election infrastructure

The prohibition of intervention protects a state's free choices in areas such as, *inter alia*, its political system. The act of compromising election infrastructure targets the integrity of the procedure that represents the principal mechanism of state-wide political decision-making. It is thus hard to imagine a clearer case of a violation of non-intervention.⁴⁴⁴

444 There is also consensus in academic literature that the manipulation of voting procedures constitutes coercive interference. In an often-cited 2016 speech, then legal adviser to the United States Department of State Brian J. Egan made the following remarks (Egan 2017, 175): '[the prohibition of intervention] is generally viewed as a relatively narrow rule of customary international law, but States' cyber activities could run afoul of this prohibition. For example, a cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would be a clear violation of the rule of non-intervention.' Harold Hongju Koh, one of Egan's predecessors as the US State Department's legal adviser, seems to share that opinion. Koh held that 'even if the Russians did not actually manipulate polling results, illegal coercive interference in another country's electoral politics [...] constitutes a blatant intervention in violation of international law' (Koh 2017, 450). The experts convened under the auspices of NATO to draw up the Tallinn Manual 2.0 decided to illustrate the content of non-intervention by giving the following first example (Schmitt/Vihul 2017, 313): '[t]his Rule addresses situations in which a State intervenes by cyber means in the "internal or external affairs" [...] of another State, for example, by using cyber operations to remotely alter electronic ballots and thereby manipulate an election.' In addition, Michael N. Schmitt, general editor of the Tallinn Manual 2.0, wrote the following in a later publication (Schmitt 2018, 50): '[b]locking voting by cyber means, such as by disabling election machinery or by conducting a distributed denial of service attack, would [...] be coercive. In both of these situations, the result of the election, which is the expression of the freedom of choice of the electorate, is being manipulated against the will of the electorate.' See also Schmitt 2021, 747. Tsagourias discussed operations *not* consisting of 'interference with the electoral administration, for example, interference with electoral registers to delete voters' names as well as [...] interference with the electoral infrastructure, for example, interference with the recording or counting of votes or the blocking of voting machines thus cancelling an election' and made the following determination (Tsagourias 2020, 49-50): 'since [they] did not amount to such interference, they do not breach the non-intervention norm.' Moynihan offered the following conclusion (Moynihan 2019, 40): '[i]f the perpetrating state attempts to alter the results in order to put pressure on the target state to compel an outcome (such as the election result, or fall-out from that result) this would appear to be coercive and thus to meet the criteria for breach of the non-intervention principle.' Wheatley also concluded that '[c]yber operations targeting the underlying [information and communications technologies] used in elections, whether successful, or not, constitute prohibited interventions in internal affairs [...]' (Wheatley 2020, 186). Finally, the starkest formulation is perhaps the following (Corn/Taylor 2017, 208): '[t]he quintessential example of a violation of the principle of nonintervention is one state coercively interfering in the internal political process of another state, such as by altering the votes recorded and thereby affecting the results of an election.' In short, '[e]veryone agrees that [if a] government tampered with the ballot boxes, or with electronic voting, this would count as a violation of international law' (Ohlin 2017, 1594). See also Ohlin 2020, 68.

Whereas interference in the opinion-*forming* process can never fully predetermine how voters cast their ballots, interference in the opinion-*collecting* process aims at directly changing the election outcome by preventing members of the electorate from voting or having their vote accurately captured, counted, and communicated.⁴⁴⁵ Voters may thus be left with not even a residual possibility of resisting the interference in question, given that it concerns events beyond their control. One might say that interference in the process of will formation is – at most – an example of *vis compulsiva*, while compromising election infrastructure falls within the category of *vis absoluta*.⁴⁴⁶ Whether voters unknowingly rely on manipulated official voting instructions, whether the shape of the electorate is modified after databases have been hacked into, or whether votes are altered somewhere between being cast and appearing in the final results, such circumstances prevent the electorate from fully and freely expressing its will and, consequently, from exercising political autonomy.

Various ways to compromise election infrastructure exist already, and the future likely holds new technical means and currently unknown avenues to do so. Yet, the exact techniques employed to interfere with the opinion-collecting process are of subordinate importance. Any technical means of foreign electoral interference that jeopardize election results' representativeness of the electorate's will are coercive. Such forms of foreign electoral interference always unduly constrain a state's autonomy and, accordingly, violate the prohibition of intervention.

6. Additional legal ramifications beyond the core aspects of non-intervention

The focus thus far has been on the core legal aspects of the prohibition of intervention. However, the link between foreign electoral interference and the

445 See section 2.2.3.3 above.

446 For a summary of this distinction – in a somewhat different context – see Darbi 2020, 63–64: '[c]oercion traditionally (since Aristotle) distinguishes “vis absoluta” and “vis compulsiva” [...]. The first refers to the immediate coercion on an individual, making him/her a “tool,” so that this cannot be judged as an act of the coerced person anymore. [...] The second, “vis compulsiva” is coercion through influence on the will or more precisely the action goals of the acting person. By changing the desirability of his/her options through imposing different consequences, alternative behavior is forced. While the acting individual will change his/her action goals because his/her intrinsic preference has become unattractive by the imposed sanctions, he/she still decides voluntarily and following his/her own preferences, even though he/she acts under pressure.' For the (translated) original considerations see Aristotle 1906, 58–65. See also footnote 306 above.

international law of non-intervention comes with further ramifications that merit consideration.

6.1. Circumstances precluding wrongfulness and their pitfalls

What would normally amount to a violation of the prohibition of intervention can, under certain circumstances, be justified. Most notably, the wrongfulness of acts can be precluded if they follow an authorization by the United Nations Security Council, an internationally wrongful act by the target state, or an invitation by the legitimate government of the target state.⁴⁴⁷ In other words, the concepts most relevant to the matter at hand are collective security, self-help, and consent.⁴⁴⁸ The following sections discuss the extent to which said concepts apply to foreign electoral interference.

6.1.1. Collective security: sanctions authorized by the UN Security Council

Within the United Nations system, the Security Council has the ‘primary responsibility for the maintenance of international peace and security’⁴⁴⁹. To this end, the Security Council may authorize appropriate measures, forcible or non-forcible, whenever it determines ‘the existence of any threat to the peace, breach of the peace, or act of aggression’⁴⁵⁰. Non-forcible measures are enshrined in Article 41 of the UN Charter and may include, inter alia, the ‘complete or partial interruption of economic relations’⁴⁵¹. Once authorized by the Security Council, such measures are to be carried out by the member states of the UN.⁴⁵²

447 See generally Jamnejad/Wood 2009, 377–380.

448 Further justificatory circumstances have been suggested, yet – in addition to the controversies surrounding the validity of some of them – they do not appear pertinent to foreign electoral interference. For an overview of suggested justifications of intervention see Kunig 2008, paras 28–47.

449 Article 24(1) of the UN Charter.

450 Article 39 of the UN Charter.

451 Article 41 of the UN Charter. Carter suggests grouping economic sanctions into the following categories: ‘uses of or limits on a) bilateral government programmes [...], such as foreign assistance, fishing rights, and aircraft landing rights; b) exports from the sender State(s); c) imports from the target country or other target entity; d) private financial transactions, such as bank deposits and loans; and e) the economic activities of international financial institutions’ (Carter 2011, para 6). On the specific notion of ‘boycott’ see also Joyner 2009 (capitalization removed).

452 See the wording of Article 41 of the UN Charter. See also Carter 2011, para 18 (emph add): ‘[w]hen the Security Council decides on economic sanctions, the *principal responsibility* for actually implementing the sanctions is on the Member States.’

As regards the potential justificatory effect of authorizations by the UN Security Council on cases of foreign electoral interference, two examples of economic means of interference might conceivably count as ‘authorized forms of coercion’⁴⁵³ in the name of collective security: targeted adverse economic measures and biased economic policies. The former partly overlaps with the individual-oriented sanctions the UN Security Council may call upon states to apply, whereas the latter partly overlaps with state-oriented economic sanctions.⁴⁵⁴

However, the legality of authorizations by the UN Security Council entails questions in its own right. To be sure, measures taken under Chapter VII of the UN Charter are explicitly excluded from the reach of Article 2(7) of the UN Charter and its specific prohibition of intervention addressed to the organization. In principle, the obligation ‘to accept and carry out the decisions of the Security Council’⁴⁵⁵ also prevails over states’ ‘obligations under any other international agreement’⁴⁵⁶. Still, the powers of the Security Council are not completely without legal limits. The following five categories of norms have been suggested to impose pertinent limitations: *ius cogens*,⁴⁵⁷ the purposes and principles of the United Nations, the entire UN Charter, (at least some)⁴⁵⁸ human rights, or simply the whole body of general international law.⁴⁵⁹ Furthermore, it has been suggested that economic sanctions in particular should observe certain international legal standards such as necessity or proportionality and that the ‘level of coercion must be correlated with [the] predictable consequentiality of economic effects’.⁴⁶⁰

Even just in light of the almost undisputed⁴⁶¹ limitation on the Security Council’s powers represented by *ius cogens* and the strongly supported⁴⁶² limitation represented by human rights, it is doubtful, at the very least, whether

453 d’Aspremont 2013, 3. For the final version of the publication see d’Aspremont 2015.

454 On the evolution ‘from global to smart sanctions’ see Pellet/Miron 2013, paras 29-35. See also Carter 2011, paras 7-11. See also d’Aspremont 2015, 142-144.

455 Article 25 of the UN Charter. The article also contains the clause ‘in accordance with the present Charter’.

456 Article 103 of the UN Charter.

457 See also Pellet/Miron 2013, para 51: ‘[i]us cogens rules no doubt impose limitations to the Security Council’s action and constitute essential parameters to assess the legality of its resolutions under Chapter VII.’

458 That is, ‘at the very least those guaranteed by the Universal Declaration of Human Rights’: Moeckli/Fasel 2017, 28.

459 Moeckli/Fasel 2017, 24-29.

460 Reisman/Steveck 1998, 126-140, esp 128 (capitalization removed).

461 Moeckli/Fasel 2017, 26-27.

462 Moeckli/Fasel 2017, 28.

an authorization under Chapter VII can effectively preclude the wrongfulness of coercive foreign electoral interference. As will be explained later,⁴⁶³ examples of foreign electoral interference that violate the prohibition of intervention will also violate the right of peoples to self-determination and citizens' electoral rights. Electoral rights are part of the catalogue of rights enshrined in the Universal Declaration of Human Rights⁴⁶⁴ and the right of peoples to self-determination forms part of *ius cogens*⁴⁶⁵, which makes both norms substantial hurdles to the preclusion of an intervention's wrongfulness.

As previously mentioned,⁴⁶⁶ the reasons for targeting someone with sanctions may very well factor into the assessment of whether the ensuing interference amounts to an undue restriction of a state's autonomy and hence to coercion. However, if certain measures called for by the UN Security Council still need to be regarded as coercive – and thus impermissible – forms of foreign electoral interference, this might result in a norm conflict for states supposed to implement them. With a view to proportionality and the peremptory norm of self-determination at stake, it is probably best to design sanctions in a way that leaves electoral processes intact whenever possible.

6.1.2. Countermeasures: responses to internationally wrongful acts

Countermeasures have been defined as follows: 'State actions, or omissions, directed at another State that would otherwise violate an obligation owed to that State and that are conducted by the former in order to compel or convince the latter to desist in its own internationally wrongful acts or omissions.'⁴⁶⁷ What would usually be in violation of non-intervention can be justified if it

463 For a compact discussion of this see section 13.1 below.

464 UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/217(III), Article 21: '(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. [...] (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.' See also footnote 458 above.

465 UNGA, Report of the International Law Commission, Fifty-third session (23 April-1 June and 2 July-10 August 2001) (2001) UN Doc A/56/10(SUPP), IV. State Responsibility, E. Text of the draft articles on Responsibility of States for internationally wrongful acts, 2. Text of the draft articles with commentaries thereto, Commentary to Article 40, para 5. See also *ibid*, Commentary to Article 41, paras 5 and 8. See also footnote 457 above.

466 For example, responding to human rights abuses by a foreign official who also happens to be a candidate in an election is certainly a better – and a legally relevant – reason to impose sanctions than the pursuit of political self-interest. See section 5.2.2 above, especially footnote 381 and the accompanying text.

467 Schmitt 2014, 700.

constitutes an admissible response to another unlawful act.⁴⁶⁸ It is not unthinkable that certain examples of foreign electoral interference are motivated by what is perceived as a preceding injustice, perhaps even a previous instance of falling victim to foreign electoral interference.⁴⁶⁹

The international law concerning countermeasures is reflected in the ILC's Articles on Responsibility of States for Internationally Wrongful Acts⁴⁷⁰ and sets out a number of important limits for such acts. To begin with, countermeasures require an internationally wrongful act, that is, a breach of an international obligation and a successful attribution of that breach to a state.⁴⁷¹ The state the international obligation was owed to – the 'injured state' – may then take countermeasures against the 'responsible state' under the following set of conditions.⁴⁷² Firstly, countermeasures must not affect certain obligations, such as to refrain from the use of force, to protect fundamental human rights, and to respect peremptory norms of general international law.⁴⁷³ Secondly, countermeasures must meet the principle of proportionality.⁴⁷⁴ Thirdly, certain procedural rules need to be adhered to.⁴⁷⁵ Lastly, there are temporal restrictions, including a requirement of temporariness.⁴⁷⁶ The last aspect means that countermeasures must – 'as far as possible'⁴⁷⁷ – be reversible, as has also been emphasized by the ICJ in a 1997 judgment⁴⁷⁸ and the ILC in

468 For an application of the concept of countermeasures in the context of non-intervention see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, paras 248-249.

469 On the extensive history of foreign electoral interference see section 1.2 above.

470 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, esp Articles 22 and 49-54. See also Paddeu 2015, para 10: '[t]he ASR regime is now seen as the authoritative statement of the law of countermeasures, though it is worth pointing out that the ASR's provisions constitute a combination of customary law and progressive development [...]'].

471 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 49(1). See also Schmitt 2014, 703. See also Paddeu 2018, 261-262.

472 See for this terminology Schmitt 2014, 703.

473 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 50. See also Paddeu 2018, 263-264.

474 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 51. See also Paddeu 2018, 263. For a detailed scholarly assessment of the proportionality of countermeasures in international law see also Franck 2008.

475 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 52. See also Paddeu 2018, 264-266.

476 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Articles 49 and 53.

477 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 49(3).

478 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, para 87: '[the court] is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing

its commentary on its state responsibility framework.⁴⁷⁹ The aim of countermeasures, after all, ‘is the restoration of a condition of legality as between the injured State and the responsible State, and not the creation of new situations which cannot be rectified whatever the response of the latter State to the claims against it.’⁴⁸⁰

It becomes clear from this enumeration of requirements that foreign electoral interference is not suited as a countermeasure. It has already been mentioned in the previous section that coercive forms of interference will also violate a peremptory norm of international law,⁴⁸¹ the right of peoples to self-determination.⁴⁸² The extent to which foreign electoral interference can reach into a core area of the state – the organization and distribution of political power – renders its proportionality questionable as well. Furthermore, the requirement of reversibility raises additional problems. Once acts of foreign electoral interference are committed, they might be difficult to reverse. Even if voting has not yet begun, campaigns may have gained decisive advantages, opinions may have been formed, or trust in the electoral process may have been broken. The exact measures needed to nullify the impact of previous ones may be impossible to determine. It is thus advisable not to resort to foreign electoral interference as a countermeasure when responding to internationally wrongful acts by other states.

6.1.3. Consent: solicitation of foreign electoral interference

A further avenue for precluding the wrongfulness of otherwise unlawful acts is the target state’s consent.⁴⁸³ In the context of the international law of non-intervention, such cases are sometimes referred to as ‘intervention by

State to comply with its obligations under international law, and that the measure must therefore be reversible.’

479 UNGA, Report of the International Law Commission, Fifty-third session (23 April-1 June and 2 July-10 August 2001) (2001) UN Doc A/56/10(SUPP), IV. State Responsibility, E. Text of the draft articles on Responsibility of States for internationally wrongful acts, 2. Text of the draft articles with commentaries thereto, Commentary to Article 49, para 9: ‘[...] inflicting irreparable damage on the responsible State could amount to punishment or a sanction for non-compliance, not a countermeasure as conceived in the articles. The phrase “as far as possible” in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.’

480 *ibid.*, para 7.

481 See footnote 465 above.

482 For a compact discussion of this see section 13.1 below.

483 For general considerations on consent as a circumstance precluding wrongfulness, see Paddeu 2018, 131-174.

invitation'.⁴⁸⁴ However, if a state consents to interference, this is technically not a wrongful act that needs justification. Instead, there is no coercion in the first place and hence no intervention.⁴⁸⁵ While the justificatory effect of consent as such is often uncontroversial, the question of who can give 'valid consent'⁴⁸⁶ is more difficult. In the context of elections, consenting to involvement by foreign states could mean soliciting foreign interference – at least if the government giving consent is itself running for re-election.⁴⁸⁷

Can an incumbent government give valid consent to acts of foreign electoral interference that benefit its own re-election campaign or the campaign of political allies? Given that the very purpose of an election is to determine who should hold governmental authority, the question of who – if anyone – has legitimate authority to give valid consent to foreign interference in this process is particularly delicate. Under general international law, the wrongfulness of otherwise unlawful acts is precluded if the actions in question are 'within the limits' of the target state's valid consent.⁴⁸⁸ Validity, in turn, encompasses several aspects. Firstly, consent needs to come from an actor authorized by the legitimate government.⁴⁸⁹ Secondly, consent must be 'freely given and clearly established'⁴⁹⁰, that is, not 'vitiating by coercion'⁴⁹¹. Thirdly, as Article 26 of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts clarifies for all circumstances potentially precluding wrongfulness, peremptory norms of general international law must be complied with.⁴⁹²

484 See for example Jamnejad/Wood 2009, 378. See also d'Aspremont 2006, 906. The term 'intervention by invitation' is also used with respect to armed interventions, which are guided by the international law on the use of force. See for example Fox 2015. This term may actually be associated with military interventions more frequently than with non-military interventions: Nolte 2010, para 1.

485 Jamnejad/Wood 2009, 378: '[a]ction taken with a state's consent is an expression, not a subordination, of its will.'

486 See for this notion UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, Article 20.

487 For the most prominent example in recent times see Guardian Staff, *Trump-Ukraine impeachment scandal: timeline of key events* (The Guardian, 9 October 2019). See also Ohlin 2020, 191-213.

488 UNGA, Report of the International Law Commission, Fifty-third session (23 April-1 June and 2 July-10 August 2001) (2001) UN Doc A/56/10(SUPP), IV. State Responsibility, E. Text of the draft articles on Responsibility of States for internationally wrongful acts, 2. Text of the draft articles with commentaries thereto, Commentary to Article 20, para 1.

489 *ibid*, paras 4-5.

490 *ibid*, para 6.

491 *ibid*, para 4.

492 *ibid*, para 7.

As regards the legitimacy of governments,⁴⁹³ the traditional conception has been convincingly challenged by Jean d'Aspremont, who proposed a distinction between the legitimacy of *origin* and the legitimacy of *exercise*.⁴⁹⁴ Under this view, '[a] legitimately elected government can lose its legitimacy and be barred from speaking and acting on behalf of the state because its exercise of power conflicts with substantive elements of democracy.'⁴⁹⁵ This represents an additional hurdle for a government's authority to consent to foreign interference.⁴⁹⁶

Yet, even if a government passes this test and exerts power in a generally democratic way, it remains doubtful as to whether that government can validly consent to foreign electoral interference. Once again, coercive forms of foreign interference – those that need justification or consent in the first place – will also violate a peremptory norm of international law,⁴⁹⁷ the right of peoples to self-determination,⁴⁹⁸ in which case valid consent is precluded.⁴⁹⁹ Moreover, it is worth recalling that allowing a government to solicit foreign electoral interference would mean allowing it to compromise the very process on which its authority to consent rests.

Governmental legitimacy arguably cannot go so far as to justify a distortion of the process meant to be its own source. Any conduct by members of the government in the context of electoral campaigns must be seen as acts in their personal capacity as candidates rather than acts in their official capacity. A government's power to authorize foreign interference needs to end at the doorstep of electoral processes, the starting point of the mechanism that serves to (re-)establish its democratic legitimacy.⁵⁰⁰ Therefore, like collective security and countermeasures, consent is not a promising route to preclude the wrongfulness of coercive forms of foreign electoral interference.

493 On this topic see also Franck 2000. On governmental *illegitimacy* see also Roth 1999.

494 d'Aspremont 2006, 881-884.

495 d'Aspremont 2006, 910. On d'Aspremont's understanding of the 'substantive elements of democracy' see *ibid*, 895-899.

496 In fact, the practical relevance of the legitimacy of exercise becomes particularly obvious in the specific context of interventions by invitation – see d'Aspremont 2006, 906-909.

497 See footnote 465 above.

498 See section 13.1 below.

499 See footnote 492 and the accompanying text.

500 For states that have not done so yet, banning the solicitation of foreign electoral interference and thereby establishing internal legal limits to consent is thus indeed worth considering. See on this suggestion Ohlin 2020, 201-203; Ohlin 2021, 73. Like any electoral laws, such a ban would have to be carefully calibrated in order not to unduly restrict political activity. On legislative and other responses to foreign electoral interference see section 15 below.

6.2. State responsibility, non-state actors, and attribution

The understanding of foreign electoral interference underlying this study assumes some level of state involvement.⁵⁰¹ Yet, this does not preclude non-state actors from playing a role, too. Any such involvement of foreign non-state actors raises the question of who, if anyone, can be held responsible for breaches of the prohibition of intervention. The ‘modern framework of state responsibility’⁵⁰² is set out in the ILC’s Articles on Responsibility of States for Internationally Wrongful Acts⁵⁰³. According to Article 2, internationally wrongful acts consist of two elements: a breach of an international obligation and a successful attribution of the conduct in question to a state. ‘Attribution’, in turn, refers to the process ‘by which international law establishes whether the conduct of a natural person or other such intermediary can be considered an “act of state”, and thus be capable of giving rise to state responsibility’⁵⁰⁴. Reflecting customary international law,⁵⁰⁵ the ILC’s framework mentions eight different constellations of attribution: ‘Conduct of organs of a State’ (Article 4), ‘Conduct of persons or entities exercising elements of governmental authority’ (Article 5), ‘Conduct of organs placed at the disposal of a State by another State’ (Article 6), ‘Excess of authority or contravention of instructions’ (Article 7), ‘Conduct directed or controlled by a State’ (Article 8), ‘Conduct carried out in the absence or default of the official authorities’ (Article 9), ‘Conduct of an insurrectional or other movement’ (Article 10), ‘Conduct acknowledged and adopted by a State as its own’ (Article 11).⁵⁰⁶

Some acts of foreign electoral interference may come directly from state organs⁵⁰⁷ or similar entities, such as criticism or endorsement by members of government, publications by state broadcasters, financial support by public

501 See section 2.1 above.

502 Crawford 2013, 45.

503 Annexed to UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83.

504 Crawford 2013, 113.

505 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 401: ‘[g]enocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State’s own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility.’

506 UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex.

507 A state organ includes ‘any person or entity which has that status in accordance with the internal law of the State’ (ibid, Article 4(2)), regardless of its position and character ‘as an organ of the central Government or of a territorial unit of the State’ (ibid, Article 4(1)).

financial institutions, sanctions and economic policies implemented by governmental bodies, or cyber operations by intelligence agencies. In such cases, attribution will be relatively straightforward under Article 4 or Article 5. The latter ‘is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs, as well as situations where former State corporations have been privatized but retain certain public or regulatory functions.’⁵⁰⁸ In other instances, state involvement may be less obvious, for example when it comes to publications by private media outlets, financial support by businesses and individuals, or cyber operations by actors not officially linked to a government. In such cases, attribution might still be successful under Article 8 if those behind the conduct in question acted ‘on the instructions of, or under the direction or control’ of a state. Whereas formal empowerment is required in the context of Article 5, a *de facto* link suffices with respect to Article 8.⁵⁰⁹ Together, these avenues of attribution cover a broad range of situations and allow various examples of foreign electoral interference to be attributed to a state involved. Specific cases may of course pose challenges, and whether or not attribution is ultimately successful needs to be determined on a case-by-case basis. Generally, however, international law is well-equipped to grasp situations with a non-state actor in the foreground and a state in the background.⁵¹⁰

In addition, the ILC’s framework for state responsibility is also capable of dealing with composite acts.⁵¹¹ Article 15 holds that ‘[t]he breach of an international obligation by a State through a series of actions or omissions defined

508 UNGA, Report of the International Law Commission, Fifty-third session (23 April-1 June and 2 July-10 August 2001) (2001) UN Doc A/56/10(SUPP), IV. State Responsibility, E. Text of the draft articles on Responsibility of States for internationally wrongful acts, 2. Text of the draft articles with commentaries thereto, Commentary to Article 5, para 1.

509 Ryngaert 2015, 168-169. It should be noted that the exact degree of control required is disputed. Since the traditional test of ‘effective control’ is sometimes seen as overly restrictive, some have argued for a lower bar, expressed by the formula ‘overall control’. See Ryngaert 2015, 173; Crawford 2013, 146-157.

510 For the sake of completeness, it is worth noting that recent studies have suggested a new framework of ‘shared responsibility’ in international law. See Nollkaemper/Jacobs 2013; d’Aspremont/Nollkaemper/Plakokefalos/Ryngaert 2015; Nollkaemper 2018; Nollkaemper/d’Aspremont/Ahlborn/Boutin et al 2020. See also the following edited volumes in the series ‘Studies on Shared Responsibility in International Law’: Nollkaemper/Plakokefalos/Schechinger 2014; Nollkaemper/Jacobs/Schechinger 2015; Nollkaemper/Plakokefalos/Schechinger/Kleffner 2017. Without going into detail, the central idea can be defined as follows (Nollkaemper 2014, 7): ‘shared responsibility refers to situations where a multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the contributing actors.’

511 See generally Crawford 2013, 265-269. On ‘transnational composite acts’ in the context of international human rights law see Altwicker 2018, 594-597.

in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.’ This is important for the present context because it means that a combination of acts that are below the threshold of coercion when regarded in isolation may nonetheless amount to coercive interference when taken together. A comprehensive, multi-faceted campaign of foreign electoral interference by a state could thus violate the prohibition of intervention – or the other norms treated in this study – even though the respective individual means employed are not impermissible as such.

6.3. Enforcement and a potential disincentive

When a breach of the prohibition of intervention is alleged, those concerned may want to pursue institutional avenues to have this finding confirmed. The most obvious choice for inter-state disputes on questions of general international law is the International Court of Justice. Its statute provides several avenues for the court to exercise contentious jurisdiction.⁵¹² All of them require that the states concerned have given their consent to the proceedings before the court in one way or another – either beforehand or ad hoc. Usually, one would expect difficulties to arise mainly from the potential lack of consent by the party that allegedly breached an international obligation. With respect to foreign electoral interference, however, there is a distinct structural issue: the potential lack of consent by the target state to initiate proceedings.

In cases where foreign influence was exerted in the interest of the winning campaign, there could be a lack of incentives to initiate proceedings.⁵¹³ If a government won election or re-election and has discretion to bring litigation, it may not want to question its own democratic legitimacy. The newly (re-) elected government may have solicited foreign interference itself,⁵¹⁴ it may have tacitly accepted it, or it may only learn about it after the election. In any case, the fact that its campaign was successful might be enough of a disincentive to triggering an enquiry into the integrity of the electoral process. The requirement of consent to settling a dispute at the international level applies not only to the state potentially responsible for breaches of international law, it also entails discretion for the injured state whether to initiate proceedings or not.⁵¹⁵ In a dissenting opinion to a 1980 judgment of the ICJ, Judge Tarazi stressed

512 On the competence of the court see Articles 34-38 of the ICJ Statute, esp Article 36 for avenues to establish the court’s contentious jurisdiction.

513 I am grateful to Professor Alex Mills for raising this point.

514 On soliciting foreign electoral interference see section 6.1.3 above.

515 Noortmann 2005, 111.

that ‘any State is free to ignore the possibility of the judicial solution of a dispute, either by omitting to refer it to the International Court of Justice, or by refusing to submit to the court’s jurisdiction, to the extent that the circumstances of the case enable it so to refuse’.⁵¹⁶ There exists, of course, an obligation to settle international disputes by peaceful means, both in the UN Charter⁵¹⁷ and in customary international law⁵¹⁸. However, a state may also decide to leave a dispute unsettled altogether.⁵¹⁹

When a government has benefitted from foreign electoral interference, it is not inconceivable that those in power might prefer not to initiate proceedings against the state that potentially breached the international obligation to respect the prohibition of intervention. Some governments might still choose to do so, of course, out of respect for electoral integrity or the rule of law. Yet it is probably fair to assume that other governments might be reluctant to bring a dispute against the state that helped them achieve or retain power.

Conclusion of Part II

The prohibition of intervention provides the most well-trodden path to assess the permissibility of foreign electoral interference under international law. The conduct of elections falls within the *domaine réservé*, thus interfering in them meets the first requirement for prohibited intervention. Accordingly, the political choices within elections must remain free ones. Whether the second requirement – coercion – is satisfied depends on the means of interference employed. Coercion represents a significant threshold, at least if one trusts in voters’ capability to critically reflect on information they receive, to resist a certain amount of influence, and not to take every foreign bait. Yet, under

516 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, Dissenting opinion of Judge Tarazi (translation), 64.

517 Article 2(3) and Articles 33-38 (Chapter VI) of the UN Charter.

518 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 290: ‘[t]he Court has however also to recall a further principle of international law, one which is complementary to the principles of a prohibitive nature examined above, and respect for which is essential in the world of today: the principle that the parties to any dispute, particularly any dispute the continuance of which is likely to endanger the maintenance of international peace and security, should seek a solution by peaceful means. Enshrined in Article 33 of the United Nations Charter, which also indicates a number of peaceful means which are available, this principle has also the status of customary law.’

519 Noortmann 2005, 111: ‘state practice provides ample evidence of unsettled disputes, notwithstanding the existence of a dispute settlement provision.’

certain criteria, foreign electoral interference can indeed become coercive and thus impermissible under the international law of non-intervention.

Firstly, the threshold of coercion is reached if an example of foreign electoral interference is in *contravention of human rights-compliant domestic electoral laws*. States are entitled to set out legal rules that guide their electoral processes, at least within the limits of international human rights law. Foreign states can in turn be expected to abide by the same rules as domestic actors. If foreign electoral interference somehow violates or circumvents such a domestic electoral legal framework, it unduly constrains the target state's autonomy and thus amounts to coercion. Secondly, even in the absence of a contravention of domestic laws, foreign electoral interference can amount to coercion if it is *disproportionately intense*. Foreign influence may reach a point at which it is simply too overwhelming to expect the electorate to resist. The tolerance level required is context-sensitive and depends on three factors: the scope of the interference, the resilience of the political conditions in the target state, and, where relevant, whether the interfering state acts with good reasons. While a sufficiently robust democracy can be expected to produce free political choices even in the presence of a certain amount of foreign influence, coercion is a matter of scale and foreign electoral interference may in some instances become so overly constraining that it essentially represents *force majeure*. Thirdly, foreign electoral interference is impermissible if it includes a *manipulation of voting procedures*. Any attempt – by compromising election infrastructure – to prevent voters from casting their ballot or having their vote accurately captured, counted, and communicated is coercive because it risks depriving the electorate of the opportunity to fully and freely express its will.

The first two criteria mentioned – coercion as either a contravention of human rights-compliant domestic electoral laws or disproportionate intensity – concern the *opinion-forming* process, apply to economic and informational means of interference, and are relative to the extent that they depend on the situation in the target state. In contrast, the third criterion concerns the *opinion-collecting* process, applies to a technical means of interference – the compromising of election infrastructure –, and is absolute, given that it is independent of the political conditions in the target state. This means that determinations regarding the coerciveness – and hence the impermissibility – of all examples of economic and informational means of interference identified in this study need to be made on a case-by-case basis. On an abstract level, no final assessment is possible for financial support, targeted adverse economic measures, biased economic policies, criticism or endorsement, the dissemination of false or misleading information, and the disclosure of private information. With respect to technical means of interference, however, general

determinations are possible. Whereas the extraction of private information and the computational amplification of communication do not as such constitute coercive interference in the electoral process, compromising election infrastructure does.

Once a breach of the prohibition of intervention is established, certain additional legal aspects become relevant. To begin with, the interfering state may want to justify its actions. However, none of the circumstances precluding wrongfulness discussed – collective security, countermeasures, and consent – represents a particularly promising avenue to do so. Furthermore, examples of foreign electoral interference might involve non-state actors, which raises questions related to attribution and state responsibility. Yet, the international legal framework for attribution provides the means to deal with situations involving both different actors and multiple acts. Finally, it is worth mentioning that enforcement, while possible, might be disincentivized by political realities. A government that was successfully (re-)elected with foreign help might not want to trigger an international enquiry into the integrity of the process on which its democratic legitimacy rests. As a consequence, the most successful examples of foreign electoral interference might not become the subject of proceedings before the ICJ.

To conclude, despite many intricacies, none of the requirements of the international law of non-intervention represents an insurmountable hurdle to establishing an internationally wrongful act. Foreign electoral interference can meet all of them, albeit far from easily. When it does, foreign electoral interference is also foreign electoral intervention.

Part III
**Foreign Electoral
Interference and the
International Law
of Self-Determination:
*A Peoples' Perspective***

7. The international law of self-determination

The following text is enshrined in Article 1(1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: '[a]ll 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.' While the norm was not mentioned in the Universal Declaration of Human Rights, the drafters of the two covenants that would become the legally binding embodiment of the UDHR gave the right of peoples to self-determination priority over every other civil, political, economic, social, and cultural right. Not only is the concept of self-determination prominently positioned in the framework of international human rights law, it is also of obvious relevance to questions about foreign electoral interference.⁵²⁰ After all, elections are about determining which political future an electorate aspires to for itself. But are the outlines of the norm precise enough? Is the right of peoples to self-determination capable of yielding self-standing answers about the permissibility of foreign electoral interference? And if yes, what are these answers? The following pages offer a peoples' perspective on foreign electoral interference by looking through the lens of the international law of self-determination.

7.1. Scope

The idea of self-determination is reflected in several international legal documents, as will be shown below. Given that they stem from different authors and from different times, one might think that several legal concepts of self-determination exist in parallel. A while ago, some commentators also voiced the opinion that self-determination should be regarded as a principle rather than a right and that it is 'essentially miscast in the role of a legal right which can

520 As early as 1989, Lori Fisler Damrosch referred to self-determination in her by now familiar article on 'nonintervention and nonforcible influence over domestic affairs' (capitalization removed). See Damrosch 1989, 36, 48. More recently, Ohlin has argued that the notion of self-determination is 'a far better rubric for analyzing' foreign electoral interference than the concepts of sovereignty and non-intervention. See Ohlin 2017, 1580. See also Ohlin 2020, 117, 216; Ohlin 2021a, 243-246. Others are more sceptical regarding the fruitfulness of self-determination. For some additional accounts with varying views see Hollis 2018, 43; Schmitt 2018, 55-56; Sander 2019, 43-45; Lahmann 2020, 203-206; Tsagourias 2020, 51-52; Boulos 2021, 150-154; Keitner 2021, 191-193; Schmitt 2021, 756.

be made an operative part of either domestic or international systems'^{521, 522} As will be outlined in the following pages, this position is no longer tenable. Instead, there is sufficient continuity within the evolution of this concept to regard the different sources as contributing to one single legal right that forms an integral and central part of today's international legal order. It is the sum of these different sources that is understood as 'the international law of self-determination' here.

7.2. Sources

There are three main dimensions to the development of the modern international law of self-determination, which roughly correspond to three types of sources: the mentions in the UN Charter of 1945, the enshrinement in shared Article 1(1) of the ICCPR and the ICESCR in 1966, and the resolutions of the UN General Assembly – most notably the Friendly Relations Declaration of 1970 – indicative of a gradual entry into customary international law.⁵²³ The following sections discuss these three strands in turn.

7.2.1. The Charter of the United Nations

Article 1(2) of the UN Charter holds that one of the United Nations' purposes is '[t]o develop *friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace'⁵²⁴. Furthermore, Article 55 reads as follows:⁵²⁵ '[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and *friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*, the United Nations shall promote: [...]'. Thus, as the text suggests in both cases, self-determination of peoples is a precondition for – or 'inextricably linked'⁵²⁶ with – friendly relations among nations. While the mention in Article 55 may be of rather declaratory nature, the inclusion of self-determination in Article 1(2) is more consequential. It clarifies that self-determination is to be

521 Emerson 1960, 307.

522 For an overview of outdated but nonetheless interesting early juristic opinion see Umozurike 1972, 177-180.

523 On the evolution of self-determination as a legal concept, including historical developments preceding the adoption of the UN Charter, see Oeter 2012, paras 3-22; Cassese 1995, 11-162; Thürer 1984, 114-125.

524 Emph add.

525 Emph add.

526 Oeter 2012, para 1.

considered one of the fundamental structural principles of the United Nations system and the international legal order in general.⁵²⁷ While the article was certainly intended to have programmatic force, it is less clear whether self-determination could already be regarded as a legal right at the time.⁵²⁸ At the very least, the concept henceforth occupied a prominent place in the most central document of international law.

7.2.2. International human rights law

Doubts about the nature of self-determination as a legal right were dispelled when the two UN human rights covenants were adopted in 1966.⁵²⁹ As mentioned before, the ICCPR and the ICESCR both stipulate the right of peoples to self-determination in their common Article 1.⁵³⁰ At the time of writing, 177 states have ratified at least one of the two covenants.⁵³¹

7.2.3. Customary international law

Several resolutions of the UN General Assembly and other declarations under the auspices of the UN have also contributed to the genesis of the right of peoples to self-determination.

A crucial step was the adoption of Resolution 1514 (XV) on 14 December 1960, the ‘Declaration on the granting of independence to colonial countries and peoples’.⁵³² Paragraph 2 of the resolution is almost identical in wording to Article 1(i) of the ICCPR and the ICESCR: ‘[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’⁵³³

527 Oeter 2012, paras 1-2.

528 Oeter 2012, para 1.

529 See Schabas 2019, 16, para 13. The covenants both entered into force ten years later, in 1976.

530 The full text of the article reads as follows: ‘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. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.’

531 Count based on the OHCHR dashboard as of 16 September 2022.

532 UNGA Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV).

533 *ibid*, para 2 (emph add).

Although not the first resolution on the matter,⁵³⁴ this declaration evidenced the growing sentiment against colonial rule as well as the accelerating process of decolonization.⁵³⁵ Moreover, the ICJ opined in 2019 that this resolution ‘has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption’.⁵³⁶

Another important step was the adoption of Resolution 2625 (XXV). On 24 October 1970, the UN General Assembly passed the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’ – the Friendly Relations Declaration.⁵³⁷ It also mentions the right to self-determination, yet in a more extensive formulation than before: ‘[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, *without external interference*, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.’⁵³⁸ According to the ICJ, ‘[b]y recognizing the right to self-determination as one of the “basic principles of international law”, the declaration confirmed its normative character under customary international law.’⁵³⁹

While already firmly established in international treaties and customary international law, the right of peoples to self-determination was subsequently developed further.⁵⁴⁰ In particular, it was reiterated – and broadened⁵⁴¹ – in the Vienna Declaration, adopted by the 1993 World Conference on Human

534 See already UNGA Res 637 (VII) (16 December 1952) UN Doc A/RES/637(VII); UNGA Res 738 (VIII) (28 November 1953) UN Doc A/RES/738(VIII); UNGA Res 1188 (XII) (11 December 1957) UN Doc A/RES/1188(XII).

535 Oeter 2012, para 8.

536 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 152.

537 UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

538 *ibid.*, para 1 (emph add).

539 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95, para 155. For an early claim that the right of peoples to self-determination had acquired customary international law status, see Ermarcora 1974, 28, para 25.

540 See Cassese 1995, 277–312.

541 In both cases, the text refers to ‘self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory *without distinction of any kind*’ (emph add), with the latter clause replacing the earlier wording ‘without distinction as to race, creed or colour’ of the Friendly Relations Declaration. See on this Cassese 1995, 306. See also Moeckli/Reimann 2020, fn 62.

Rights,⁵⁴² and in the 1995 Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.⁵⁴³

In sum, the right of peoples to self-determination is indeed ‘one of the essential principles of contemporary international law’.⁵⁴⁴ Not only does it have *erga omnes* character, meaning it is binding on all states,⁵⁴⁵ it is also among the peremptory norms of *ius cogens*.⁵⁴⁶ While certain aspects of the right of peoples to self-determination may still be controversial, its existence as a legal right is now beyond dispute. The question has rather become what exactly the norm encompasses.⁵⁴⁷ While answers may differ depending on the source one relies on, the different stipulations of the right of peoples to self-determination should not be regarded as conflicting. Instead, treaty law and customary international law can be seen as cumulative.⁵⁴⁸

7.3. Substance

The right of peoples to self-determination is commonly divided into an external and an internal dimension, at least regarding its political aspects. This distinction is sometimes attributed to the works⁵⁴⁹ of Antonio Cassese.⁵⁵⁰ While Rupert Emerson had mentioned it earlier,⁵⁵¹ the two authors may not have had exactly the same dichotomy in mind.⁵⁵² Although it is not necessarily meant to capture all aspects of the right of peoples to self-determination, the distinction between an internal and external dimension continues to be used.⁵⁵³ The

542 World Conference on Human Rights, Vienna Declaration and Programme of Action (1993) UN Doc A/CONF.157/23, para I.2.

543 UNGA Res 50/6 (24 October 1995) UN Doc A/RES/50/6, para 1.

544 *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29. The Canadian Supreme Court referred to it as a right ‘so widely recognized’ that it is ‘considered a general principle of international law’: Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 114.

545 *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, para 29.

546 See footnote 465 above.

547 See already Thürer 1984, 125.

548 Cassese 1995, 162.

549 See especially the following early works: Cassese 1979, 137; Cassese 1981, 96–101.

550 See for example Schabas 2019, 24, para 32.

551 Emerson 1971, 465.

552 For a comparison of the two views see Rosas 1993, 230–231.

553 See the following publications which (to varying degrees) rely on this dichotomy: Schabas 2019, 24–27, paras 32–37; Shaw 2021, 260–261; Oeter 2012, 327–329, paras 28–32; Gaeta/Viñuales/Zappalà 2020, 66–71; Crawford 2019, 131; Craven/Parfitt 2018, 215; Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 126. For an alternative – yet not incompatible – enumeration of components see Rosas 1993, 229–230.

following sections discuss the collective nature of the right as well as the different dimensions of political self-determination. In contrast, the economic, social, and cultural aspects of the right to self-determination are less relevant to the questions at hand.⁵⁵⁴

7.3.1. Collective nature

The right to self-determination, unlike the other rights protected by the ICCPR and the ICESCR, is a collective right of peoples, not a right of individuals.⁵⁵⁵ The question of who constitutes a people has been the cause of some controversy. Populations living under colonial rule are clear cases – the ‘core area’ of self-determination.⁵⁵⁶ This includes not only legally recognized colonies but any people factually living under alien subjugation comparable to colonial rule.⁵⁵⁷ Beyond this core area, the picture is less clear.

The UN Human Rights Committee has never defined the term ‘people’, neither in its limited jurisprudence⁵⁵⁸ on Article 1(1) of the ICCPR nor in its comparatively short general comment⁵⁵⁹ on the right to self-determination.⁵⁶⁰ One of the most extensive discussions of the matter was offered in 1981 by Aureliu Cristescu, then Special Rapporteur of the (Commission on Human Rights) Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁵⁶¹ Cristescu summarized that the ‘term “people” denotes a social entity possessing a clear identity and its own characteristics’ and that it ‘implies a relationship with a territory, even if the people in question has been wrongfully expelled from it and artificially replaced by another population’.⁵⁶² As

554 On these aspects see for example Schabas 2019, 27-28, paras 38-43.

555 See Schabas 2019, 17-18, paras 15-17.

556 Oeter 2012, 325, para 23.

557 Schabas 2019, 24, para 31.

558 The Human Rights Committee does not accept complaints concerning Article 1(1) under the Optional Protocol to the ICCPR, since it regards only complaints by individuals – and not peoples – as admissible thereunder. See on this section 9.1 below.

559 UN Human Rights Committee, ‘General Comment 12: Article 1 (Twenty-first session, 1984)’ in Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (1994) UN Doc HRI/GEN/1/Rev.1.

560 See Joseph/Castan 2013, 154, para 7.03.

561 UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1981)* UN Doc E/CN.4/SUB.2/404/REV.1. For considerations on the beneficiaries of the right see *ibid.*, 37-43.

562 *ibid.*, 41, para 279. In addition, Cristescu mentions that ‘[a] people should not be confused with ethnic, religious or linguistic minorities, whose existence and rights are recognized in article 27 of the International Covenant on Civil and Political Rights.’

regards such shared characteristics, ICJ Judge Cañado Trindade gave possible examples in a 2010 separate opinion: ‘traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people’.⁵⁶³ Cristescu further concluded that the right to self-determination should be seen as applying to states as well – in contrast to minorities, which are distinct from peoples⁵⁶⁴: ‘States – that is to say, peoples constituted as States – are the holders of the right to equality and self-determination, and they cannot be deprived of it because they have formed an independent State’.⁵⁶⁵ This is in line with the view that the right of peoples to self-determination is a ‘permanent right’ that does not cease to exist once a people frees itself from foreign domination.⁵⁶⁶ Although this may not always have been the case, international custom towards the end of the twentieth century suggests an increasing recognition of the right to self-determination of the peoples of sovereign states.⁵⁶⁷ In fact, Hans Kelsen once even wrote – referring to the UN Charter – that this is the only possible reading of the term ‘people’.⁵⁶⁸

While there may still be a lack of ‘terminological precision as to what constitutes a “people” in international law’,⁵⁶⁹ this is not entirely unintentional. It is important to note that the initial reason for the lack of a definition of ‘peoples’ was to prevent an overly *narrow* understanding as opposed to an overly *wide* one. The drafters of the human rights covenants stressed that ‘the term “peoples” should be understood in its most general sense and that no definition was necessary’.⁵⁷⁰ In fact, the term ‘nations’ was deleted from an earlier

563 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, Separate opinion of Judge Cañado Trindade, para 228.

564 See on this matter Oeter 2012, 326–327, paras 26–27. See also Nowak 1993.

565 UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 42, para 286.

566 See Schabas 2019, 18–19, paras 18–19.

567 Cassese 1995, 302–312. For Cassese’s corresponding understanding of Article 1(1) of the ICCPR and the ICESCR see *ibid.*, 59. See also the clause ‘and thus possessed of a Government representing the whole people belonging to the territory’ in UN documents of 1993 and 1995, cited in footnotes 541–543 above.

568 Kelsen 1951, 50–53. See on Kelsen’s view also Thüner 1976, 87–89; Saxer 2010, 276–278, esp fn 354.

569 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, Separate opinion of Judge Cañado Trindade, para 228.

570 UNGA, *Draft International Covenants on Human Rights*, Annotation prepared by the Secretary-General (1955) UN Doc A/2929, 42, para 9. See also *ibid.*: ‘[t]he word “peoples” was understood to mean peoples in all countries and territories, whether independent, trust or non-self-governing.’

draft, since ‘peoples’ was considered more comprehensive.⁵⁷¹ Any restrictive interpretation of the notion of ‘peoples’ should thus be based on compelling reasons in order not to unduly exclude certain groups from the protection of the right to self-determination.

7.3.2. Internal dimension

The internal dimension of the right of peoples to self-determination was concisely described by the Supreme Court of Canada in an often-cited formulation as ‘a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state’.⁵⁷² This internal aspect of self-determination is often linked to democratic concepts. In the words of the ICJ, ‘the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned’.⁵⁷³ According to Christian Pippan, internal self-determination boils down to the postulate of representativeness of government.⁵⁷⁴ Consequently, the right to self-determination is closely related to the political rights enshrined in Article 25 of the ICCPR⁵⁷⁵ as well as to other rights essential for democratic processes, such as the freedoms of opinion, expression, assembly, and association.⁵⁷⁶ It is thus understandable that democracy and self-determination have been called ‘two sides of the same coin’⁵⁷⁷ and that Thomas Franck based the claim of an emerging right to democratic governance in part on the right of peoples to self-determination^{578, 579} Finally, it is worth noting that the internal dimension of self-determination is said to have its origins in 1966, when the ICCPR and the ICESCR were adopted: ‘they enshrined a right of the whole population of each contracting State to internal self-determination, that is, the right to freely choose their rulers’.⁵⁸⁰

571 UNGA, Draft International Covenants on Human Rights, Report of the Third Committee (1955) UN Doc A/3077, 22, para 63.

572 Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 126.

573 *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12, para 55.

574 Pippan 2016, 503–505.

575 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 2.

576 Cassese 1995, 53–54; Schabas 2019, 26, para 35; Moeckli/Reimann 2020, fn 54 and the accompanying text.

577 Vidmar 2010; Oeter 1998.

578 Franck 1992, 57–60. On Franck’s influential claim see footnotes 325–331 above and the accompanying text.

579 For further discussions of the relationship between (internal) self-determination and democratic governance see Oeter 2012, 331–332, para 38; Roth 2018; Thornberry 1993; Pippan 2016; Salmon 1993.

580 Cassese 1995, 65.

7.3.3. External dimension

The external dimension of the right of peoples to self-determination is best summarized by the following paragraph of the Friendly Relations Declaration:⁵⁸¹

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Accordingly, the external dimension refers to the status of a people in international relations. While internal self-determination encapsulates the standard way by which a people may determine its political, economic, social, and cultural destiny, the external dimension is supposed to come into play only in extraordinary circumstances. These include colonial rule or other forms of oppression, as well as cases in which ‘a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development’.⁵⁸² When a people is prevented from exercising self-determination internally, this can give rise to a right to ‘remedial secession’⁵⁸³, whereby self-determination is exercised externally as an ultima ratio.⁵⁸⁴ Under what exact circumstances such a right to unilaterally secede exists – beyond the context of decolonization – remains highly disputed.⁵⁸⁵ However, at the very least, this system of alternativity between exercising the right either internally

581 UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV), para 1. See also Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 126.

582 Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 138.

583 For a detailed account of this concept see van den Driest 2013.

584 Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 138. See also Schabas 2019, 25, para 34. See also the often-cited formulation in *Loizidou v Turkey* [GC] App no 15318/89 (ECtHR, 18 December 1996), Concurring opinion of Judge Wildhaber, joined by Judge Ryssdal: ‘[u]ntil recently in international practice the right to self-determination was in practical terms identical to, and indeed restricted to, a right to decolonisation. In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.’

585 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403, para 82. See also Schabas 2019, 25, para 36.

or externally demonstrates that there is an inherent connection between the different dimensions of the right of peoples to self-determination.⁵⁸⁶

8. Foreign electoral interference and the international law of self-determination

The right of peoples to self-determination has been called ‘perhaps the most dynamic and, at the same time, one of the most disputed principles of modern international law’.⁵⁸⁷ It has also been said to be of ‘such a broad scope that it can reach out to areas that seem, at first sight, to be totally unsubjected to any international legal regulation’.⁵⁸⁸ While the outlines of the right to self-determination are indeed somewhat blurred, an application to foreign electoral interference is far from implausible. After all, the Friendly Relations Declaration explicitly states that peoples need to be able to freely determine their political status ‘without external interference’.⁵⁸⁹ The following sections will therefore apply the international law of self-determination to the examples of foreign electoral interference identified at the outset.⁵⁹⁰ While the focus will first be on the core legal aspects of self-determination, selected additional ramifications will receive attention later.⁵⁹¹

8.1. Common aspects

Certain preliminary questions concern all forms of foreign electoral interference equally, regardless of the specific means employed: whether the electorate of the target state constitutes a ‘people’ in possession of the right to self-determination, whether elections count as a determination of a people’s ‘political status’, and whether foreign interference affects the internal or the external dimension of the right.

8.1.1. ‘People’ and the electorate

It has been argued that the question of which groups ultimately count as *peoples* and what level of self-determination they are entitled to is best left to

586 See also Moeckli/Reimann 2020, 7.

587 Thürer 1984, 113: ‘Das Selbstbestimmungsrecht der Völker stellt vielleicht das dynamischste und zugleich eines der umstrittensten Prinzipien des modernen Völkerrechts dar.’

588 Cassese 1995, 255-256.

589 UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV), para 1.

590 See section 2.2 above.

591 See section 9 below.

specific cases.⁵⁹² One such case is that of foreign electoral interference. Does the electorate of a state targeted by foreign electoral interference constitute a people in the sense of the right to self-determination?⁵⁹³

To begin with, an electorate certainly fulfils the requirements of a clear identity and shared characteristics.⁵⁹⁴ At the very least, members of an electorate – normally the adult citizens of a state⁵⁹⁵ – share the right to vote and, consequently, a political future to some extent. Given their ties to a single state, they might have some further characteristics in common, such as language or culture⁵⁹⁶ and a relationship with the territory of that state.⁵⁹⁷ Moreover, the electorate can be clearly identified by looking at who is enfranchised and who is not. A second argument for regarding the electorate as a people could be that the right to self-determination is said to apply to peoples constituted as states,⁵⁹⁸ even though the electorate is neither perfectly identical to the citizenry nor to

592 Ermacora 2000, 293. See also Joseph/Castan 2013, 161, para 7.15: '[t]he right [to self-determination] can be conceptualized as a sliding scale of different levels of entitlement to political emancipation, constituting various forms of [internal self-determination] up to the apex of the right, the right of [external self-determination], which vests only in exceptional circumstances. [...] Different "peoples" are entitled to different "levels" of self-determination.'

593 I would argue that the circle of individuals concerned by foreign electoral interference corresponds to those entitled to vote in the election in question, that is, the electorate. Alternatively, assuming that foreign interference actually succeeds in tilting an election, one might also argue that only those who voted for losing candidates or parties are affected. Yet, if the election outcome is in fact (partly) a result of foreign interference, even the voters who supported the winning side are arguably concerned, given that they did not (entirely) determine the outcome themselves. Furthermore, any understanding wider than the electorate is hardly tenable, since those not entitled to vote do not have a say in the determination of the election outcome in the first place. Foreign electoral interference might very well affect their political future, yet they are not impacted *in their ability to determine* their political future.

594 On this requirement see footnote 562 above and the accompanying text.

595 The permissibility of restrictions on the right to vote for adult citizens is very limited, at least under the ICCPR. See Schabas 2019, 713–718, paras 33–41. See also section 10.3.2.3 below.

596 For a mention of these characteristics see Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 125.

597 On this requirement see footnote 562 above and the accompanying text.

598 See section 7.3.1 above, especially footnotes 565–568 and the accompanying text. For arguments in favour of regarding the entire populations of states as peoples, see Saxer 2010, 276–278, esp 277 and fn 357. See also UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 42, para 286; Thürer 1984, 126; Cassese 1995, 59–61; Hannum 1996a, 49. The Supreme Court of Canada found it necessary to emphasize that this reading – the entire population of a state constituting a people – is not necessarily the only way to interpret the term 'people', which means the court regards said interpretation as the standard one:

the population of a state.⁵⁹⁹ The decisive factor, however, is the intertwining of Article 1 and Article 25 of the ICCPR.⁶⁰⁰ The UN Human Rights Committee has emphasized this connection,⁶⁰¹ as have academics⁶⁰² and the drafters of the human rights covenants.⁶⁰³ In the case of *Gillot v France*, the Human Rights Committee expressly interpreted Article 25 of the ICCPR in light of Article 1.⁶⁰⁴ If the electoral rights stipulated in Article 25 are seen as an expression of Article 1, then the electorate must arguably be within the circle of potential beneficiaries of Article 1 and, accordingly, of the right to self-determination.

Considering the dynamic nature of the concept of self-determination, the intent of the drafters of the UN human rights covenants – ‘that the term “peoples” should be understood in its most general sense’⁶⁰⁵ –, and the close link between Article 1 and Article 25 of the ICCPR, it seems safe to conclude that the electorate affected by foreign electoral interference can be regarded as a bearer of the right to self-determination.

8.1.2. ‘Political status’ and elections

Another general question is the following: do elections fall under what is meant by the free determination of the *political status* of a people? While

Supreme Court of Canada *Reference Re Secession of Quebec* [1998] 2 SCR 217, (1998) 37 ILM 1340, para 124. For a different view see Schmitt 2018, 55–56. See also – less clearly opposed – Schmitt 2021, 756.

599 Not all residents of a state are necessarily citizens, nor are all citizens necessarily voters. The electorate usually excludes at least minors and potentially further groups of citizens. On the disenfranchisement of citizens see footnote 595 above. Furthermore, the electorate usually excludes non-citizens as well. In 2019, the ‘stocks of foreign population [...] in OECD countries and in Russia’ ranged from 0.6 percent to 16.3 percent, with the exceptions of Switzerland (24.2 percent) and Luxembourg (47.3 percent). See the data collected by the OECD: *International Migration Outlook 2020*.

600 I am grateful to Niko Pavlopoulos for raising this point.

601 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 2.

602 See for example Schabas 2019, 26, para 35; Cassese 1995, 53; Rosas 1999, 442. See also the publications listed in footnote 579 above. Ohlin at least mentions the link between self-determination and Article 21 of the UDHR: Ohlin 2020, 91–92.

603 See UNGA, Draft International Covenants on Human Rights, Report of the Third Committee (1955) UN Doc A/3077, 14, para 40: ‘[i]f self-determination constituted a collective right, it nevertheless affected each individual. To be deprived of the right of self-determination entailed the loss of individual human rights. Article 23 of the draft Covenant on Civil and Political Rights guaranteed the free expression of the will of the electors in elections. The same idea was expressed in paragraph 3 of article 21 of the Universal Declaration of Human Rights. There was little difference between voting in an election and voting in a plebiscite.’

604 *Gillot v France* Communication no 932/2000 (UN Human Rights Committee, 15 July 2002) UN Doc CCPR/C/75/D/932/2000, para 13.4.

605 See footnote 570 above and the accompanying text.

other aspects of the right to self-determination have received considerable attention in the literature, the clause ‘political status’ does not seem to be the subject of much controversy.

It is clear that something as fundamental and far-reaching as an independence referendum, for example, concerns the political status of a people.⁶⁰⁶ However, one can legitimately ask whether every single election in a democracy represents a determination of the electorate’s ‘political status’.⁶⁰⁷ According to Aureliu Cristescu, “‘political status’ [...] comprises both international status and domestic political status’.⁶⁰⁸ In other words, it concerns the two aspects referred to as the internal and the external dimension of the right of peoples to self-determination:⁶⁰⁹ firstly, the right ‘to choose and develop the domestic political system which they desire and which corresponds to their aspirations and political objectives’, and secondly, ‘their right to independence, and their right to decide their own destiny in the international community’.⁶¹⁰

In practice, certain elections are of more profound importance than others. At times, the election of a new president or prime minister may mark a drastic change of direction, as may be the case when the distribution of power in parliament is dramatically altered. At other times, elections may simply lead to a continuation of the agenda of previous governments. What is decisive, however, is that every election does in principle offer an *opportunity* for a political change of course.⁶¹¹ If voters opt for continuity, that decision still represents a determination of their political future to the extent that the existing political status is confirmed. Even if a specific election does not bring about any structural change, it is still a means – in fact, the most important one – to do so.⁶¹² Every election is thus an act of political self-determination. Consequently, foreign electoral interference concerns the determination of a people’s political status.

606 On independence referendums and self-determination, see Moeckli/Reimann 2020.

607 I am grateful to Joseph Crampin for raising this question.

608 UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 46, para 303.

609 See sections 7.3.2 and 7.3.3 above.

610 UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 46, para 303.

611 I am grateful to Professor Daniel Moeckli for raising this point.

612 I am grateful to Professor Matthias Mahlmann for valuable contributions to this argument.

8.1.3. Applicable dimension and the bridging role of self-determination

A third question of general nature is whether the internal or the external dimension of the right of peoples to self-determination is concerned in the context of foreign electoral interference.

For one, elections are a means to determine a people's political future 'within the framework of an existing state'⁶¹³, the right to self-determination is closely associated with individual political rights,⁶¹⁴ and self-determination also shares a mention with political rights in the ICCPR⁶¹⁵ – an instrument that primarily regulates the relationship between states and human rights-holders⁶¹⁶. All of this suggests that the internal dimension is applicable. Conversely, foreign electoral interference concerns a people's status in international relations⁶¹⁷, the right to self-determination is linked equally closely to the prohibition of intervention,⁶¹⁸ and self-determination also shares a mention with non-intervention in the Friendly Relations Declaration⁶¹⁹ – an instrument that primarily concerns the relationship between states⁶²⁰. These factors suggest

613 See footnote 572 above.

614 See footnotes 600–604 above and the accompanying text.

615 See Articles 1(t) and 25 of the ICCPR.

616 See the preamble of the ICCPR: '[c]onsidering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms, [...]'

617 On this being the content of the external dimension of self-determination, see section 7.3.3 above.

618 See for example Rosas 1993, 250–251, who sees 'non-interference' as an aspect of the (external) self-determination of peoples. Thüerer, in contrast, links the prohibition of intervention to *internal* self-determination: Thüerer 1984, 126–127. Beitz wrote that '[t]he negative aspect of state autonomy is expressed by the principle of nonintervention' while '[t]he positive aspect of state autonomy is expressed by the principle of self-determination' (Beitz 1999, 92). On the relationship between non-intervention and self-determination see also UN, The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 26–28, paras 179–194. See also Cassese 1995, 55. Tsagourias, too, suggests 'aligning the principles of non-intervention and self-determination' in the specific context of foreign electoral interference (Tsagourias 2020, 52). To support this argument, Tsagourias refers to (part of) the following pertinent statement by Crawford 2006, 128: '[w]here a self-determination unit is a State, the principle of self-determination is represented by the rule against intervention in the internal affairs of that State, and in particular in the choice of the form of government of the State.' See Tsagourias 2020, 51.

619 UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV), para 1.

620 See the name of the declaration *ibid*: 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States [...]' (emph add).

that the external dimension may be applicable. In sum, neither dimension of the right of peoples to self-determination fully captures the issue of foreign electoral interference, yet both are relevant. After all, the internal and the external dimension are interconnected,⁶²¹ and independence in international relations also presupposes internal self-government.⁶²²

Two conclusions can be drawn from this. First, the dichotomy between the two dimensions commonly used to portray the substance of self-determination might have limitations.⁶²³ Second, and more important to the questions at hand, it becomes clear that self-determination can function as a bridge between the other two concepts treated in this study. The notion of self-determination encapsulates something that is inherent to both non-intervention and electoral rights. Although only two of the three concepts have been covered so far, the fact that self-determination is closely linked to both other norms reveals that the three concepts share an underlying idea. Non-intervention, self-determination, and electoral rights all carry a notion of political autonomy.⁶²⁴ While the inter-state prohibition of intervention and citizens' electoral rights might appear far apart at first sight, the right of peoples to self-determination can bridge the gap between them, including when it comes to assessing the implications of foreign electoral interference. After all, one of the functions of a concept as fundamental, broad, and dynamic as self-determination is to guide the interpretation of other concepts related to it.⁶²⁵ This also holds vice versa: non-intervention and electoral rights can similarly guide the interpretation of self-determination. Its bridging role makes the right of peoples to self-determination the centrepiece within a systematic interpretation of the three legal concepts assessed in this study.⁶²⁶

621 See footnote 586 above.

622 See UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 46, para 303: '[t]he right of peoples to determine their own international status implies both internal self-government and external independence.' See also *ibid*, 51, para 319: 'if a people that had obtained its independence was subsequently deprived of internal self-determination, the principle [of equal rights and self-determination of peoples] would be completely undermined.' See also Rosas 1993, 250: '[a]t the very end of the day, all elements of self-determination are "internal", in the sense that the popular will must be taken into account.'

623 See also Rosas 1993, who writes of the "'language games" of self-determination' (*ibid*, 250) and provides an alternative typology of the aspects of self-determination (*ibid*, 230).

624 See on this section 13.1 below.

625 See Thürer 1984, 132.

626 A compact recapitulation of the interplay between the three concepts follows in section 13.1 below.

8.2. Application of the law to economic and informational means of interference: ‘freely determine’

The other requirements being satisfied, an infringement of the right of peoples to self-determination could be established if foreign electoral interference prevented an electorate from *freely* determining its political status. This may be the case if the opinion-forming process becomes the target of economic or informational means of interference, such as financial support, targeted adverse economic measures, biased economic policies, criticism or endorsement, the dissemination of false or misleading information, or the disclosure of private information.

The threshold is, again, whether political decision-making remains *free*. Article 1(1) of the ICCPR holds that all peoples, by virtue of the right to self-determination, ‘freely determine their political status’.⁶²⁷ According to Antonio Cassese, the meaning of ‘freely’ is twofold.⁶²⁸ Firstly, ‘Article 1(1) requires that the people choose their legislators and political leaders free from any manipulation or undue influence from the domestic authorities themselves.’⁶²⁹ Secondly, ‘Article 1(1) requires that a State’s domestic political institutions must be free from outside interference.’⁶³⁰ The latter reading ‘prohibits States from meddling in the affairs of another contracting State, in a manner that seriously infringes upon the right [to self-determination] of that State [...]’.⁶³¹ This raises the familiar question of when exactly foreign electoral interference impairs the opportunity to make free political choices.

As discussed earlier,⁶³² the international law of non-intervention holds that certain choices, including the choice of a political system, ‘must remain *free ones*’.⁶³³ Coercive interference is wrongful when it concerns ‘matters in which each State is permitted [...] to decide *freely*’.⁶³⁴ This test is not all that

627 The full text reads as follows: ‘[a]ll 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.’

628 See Cassese 1995, 52–55. In a similar vein, Thüerer wrote – in German – that the notion of ‘freely’ prohibits *external interference* and requires the determination of a people’s political status and the development of the internal order to be an expression of a *democratically* formed will: Thüerer 1976, 111.

629 Cassese 1995, 53 (italics removed).

630 Cassese 1995, 55.

631 Cassese 1995, 55.

632 See section 4.3 above.

633 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205 (emph add).

634 *ibid* (emph add).

different from the key question that presents itself in the context of the international law of self-determination. Both norms, the prohibition of intervention and the right of peoples to self-determination, essentially share the same requirement when applied to foreign interference in elections: free political decision-making.⁶³⁵

Considering the close relationship between the prohibition of intervention and the right of peoples to self-determination,⁶³⁶ the identical wording of their core demand,⁶³⁷ and the absence of any indication that ‘free’ decision-making should have a different meaning in the context of the two respective norms, the same conclusions can be drawn regarding the permissibility of specific examples of foreign electoral interference. Thus the determinations made in the context of the international law of non-intervention apply here as well.⁶³⁸ This means that foreign interference in the opinion-forming process by economic or informational means is impermissible if it is either in contravention of (human rights-compliant) domestic electoral laws or disproportionately intense.⁶³⁹

In fact, the international law of self-determination lends considerable additional support to the first element of this two-pronged test, including its exception: the obligation for foreign states to respect domestic electoral laws, unless these violate human rights. The right of peoples to self-determination,

635 Since ‘coercion’ is the opposite of ‘free’ choices in the context of non-intervention, the notion also becomes indirectly relevant to the interpretation of self-determination. Under the view taken here, relying on self-determination is not a way to ‘escape [...] the formalistic and doctrinal requirements for illegal interventions, including the requirement of coercion’ (Ohlin 2017, 1598). Rather, through the shared reliance on the notion of ‘free’ political decision-making, the threshold of ‘coercion’ – its antithesis – bears relevance to both non-intervention and self-determination when interpreted contextually. In fact, the notion of coercion reappears in the context of electoral rights, too – see footnote 800 below and the accompanying text. For a compact discussion of the commonalities of all three concepts see section 13.1 below.

636 See section 8.1.3 above, especially footnote 618 and the accompanying text.

637 The ICJ’s judgment articulating non-intervention is also available in French. The corresponding passage is the following: ‘L’intervention interdite doit donc porter sur des matières à propos desquelles le principe de souveraineté des Etats permet à chacun d’entre eux de se décider *librement*. [...] L’intervention est illicite lorsque à propos de ces choix, qui doivent demeurer *libres*, elle utilise des moyens de contrainte.’ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205 (emph add). The French version of Article 1(1) of the ICCPR reads as follows (emph add): ‘Tous les peuples ont le droit de disposer d’eux-mêmes. En vertu de ce droit, ils déterminent *librement* leur statut politique et assurent *librement* leur développement économique, social et culturel.’

638 For the respective determinations see sections 5.2.1, 5.2.2, 5.2.3, 5.3.1, 5.3.2, and 5.3.3 above.

639 This two-pronged test is developed and explained in sections 5.2 and 5.3 above.

itself a human right, is said to encompass ‘a right [...] freely to choose and develop the *domestic political system* which they desire and which, in their view, corresponds to their aspirations and political objectives’.⁶⁴⁰ Here, too, domestic laws receive protection, but only if they are in accordance with (other) human rights.⁶⁴¹ Interestingly, election laws are precisely what many states confined themselves to when reporting to the UN Human Rights Committee about the measures they had adopted to give effect to Article 1 of the ICCPR.⁶⁴² It is also worth noting that several resolutions by the UN General Assembly – using the language of self-determination – stress the right of peoples to independently regulate their electoral processes.⁶⁴³ It thus becomes even more evident in the context of self-determination than in the context of non-intervention that human rights-compliant domestic electoral laws must not be contravened by foreign electoral interference.

Furthermore, in one of its resolutions, the General Assembly mentions that foreign electoral interference is particularly problematic if it concerns ‘developing countries’.⁶⁴⁴ This suggests that power asymmetries can exacerbate the problems raised by foreign electoral interference, which lends some additional support to the relevance of disproportionate intensity, the second criterion of impermissibility discussed in the context of non-intervention.⁶⁴⁵

640 UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 46, para 303 (emph add).

641 See *ibid*, 51, para 319 (emph add): ‘This aspect of the principle covers, for every State, a number of rights, namely: the right to adopt whatever political, economic and social systems it sees fit; the right to adopt the legal system it desires, whether of constitutional law, private international law, administrative law or any other form of law, *without any limitation other than respect for human rights*; [...]’

642 UN Human Rights Committee, ‘General Comment 12: Article 1 (Twenty-first session, 1984)’ in Note by the Secretariat, *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* (1994) UN Doc HRI/GEN/1/Rev.1, para 3.

643 See for example UNGA Res 58/189 (22 December 2003) UN Doc A/RES/58/189 (italics in the original): ‘1. *Reaffirms* that all peoples have the right to self-determination [...]; 3. *Reaffirms* the right of peoples to determine methods and to establish institutions regarding electoral processes and, consequently, that there is no single model of democracy or of democratic institutions and that States should ensure all the necessary mechanisms and means to facilitate full and effective popular participation in those processes; [...]’. For a collection of similar resolutions see footnote 336 above.

644 UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147, para 3.

645 For a previous discussion of this resolution in the context of non-intervention see footnote 365 above and the accompanying text. The resolution uses the language of both non-intervention and self-determination. In particular, paragraph 3 of Resolution 44/147 refers to the Friendly Relations Declaration, which contains both norms,

The right of peoples to self-determination certainly has a distinct nature⁶⁴⁶ and comes with its own formal legal implications.⁶⁴⁷ However, with respect to its substantive demands as they pertain to foreign electoral interference, the norm protects the same opportunity of the electorate to make free political choices as the prohibition of intervention – or, in other words, the same degree of political self-determination.

8.3. Application of the law to technical means of interference: ‘self’-determination

An infringement of the right of peoples to self-determination could furthermore be established if an electorate were prevented from freely determining its political status by technical means of foreign electoral interference, such as the extraction of private information, the computational amplification of communication, or the compromising of election infrastructure.

What is true for economic and informational means also applies here:⁶⁴⁸ the notion of ‘free’ political decision-making is a common feature of both non-intervention and self-determination, which means that the determinations made in the context of the former are valid in the context of the latter as well. Accordingly, the extraction of private information and the computational amplification of communication are – in and of themselves – not impermissible under the international law of self-determination, since such means can only influence electoral processes in combination with other conduct, not alone.⁶⁴⁹ In contrast, compromising election infrastructure is impermissible under the international law of self-determination, since it targets the integrity of the procedure that allows the electorate to fully and freely express its will.⁶⁵⁰

In fact, the concept of self-determination illustrates particularly well why certain examples of compromising election infrastructure are problematic. Whenever some voters are prevented from making their voice heard, it is no longer the entire electorate that determines the outcome of the election. The

the prohibition of intervention and the right of peoples to self-determination. For the former resolution see UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147. For the latter see UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).

646 Not only is the right to self-determination a collective right of peoples, it is also among the peremptory norms of *ius cogens* and is of *erga omnes* character. See footnotes 545 and 546 above and the accompanying text.

647 See section 9 below.

648 See section 8.2 above.

649 See section 5.4.1 above.

650 See section 5.4.2 above.

notion of *self*-determination arguably requires that all members of the people in question may participate in the determination of their political status.⁶⁵¹ Any technical interference in the opinion-collecting process that alters the circle of members having the opportunity to effectively take part in the process of self-determination also alters the shape of the respective ‘self’.⁶⁵² This may bolster the conclusions previously drawn in the context of non-intervention.

9. Additional legal ramifications beyond the core aspects of self-determination

The focus thus far has been on the core legal aspects of the right of peoples to self-determination. However, the link between foreign electoral interference and the international law of self-determination comes with additional ramifications that deserve attention.

9.1. The lack of a complaint procedure for peoples’ rights

The first – and arguably most important – issue concerns enforcement. In what has been called ‘judicial self-restraint’,⁶⁵³ the UN Human Rights Committee regards complaints by peoples under the Optional Protocol to the ICCPR as inadmissible. Articles 1 and 2 of the Optional Protocol mention only ‘individuals’ as potential victims of convention rights violations but not peoples.⁶⁵⁴ This led the Human Rights Committee to systematically declare complaints regarding Article 1(1) of the ICCPR inadmissible. That jurisprudence began implicitly in 1984,⁶⁵⁵

651 On the postulate of representativeness of government inherent to self-determination see footnote 574 above and the accompanying text.

652 A similar point is formulated by Ohlin 2020, 98.

653 Schabas 2019, 22, para 26.

654 Article 1 (emph add): ‘[a] State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from *individuals* subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.’ Article 2 (emph add): ‘[s]ubject to the provisions of article 1, *individuals* who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.’

655 *AD v Canada* (inadmissibility decision) Communication no 78/1980 (UN Human Rights Committee, 29 July 1984) UN Doc CCPR/C/22/D/78/1980. See also *Kitok v Sweden* Communication no 197/1985 (UN Human Rights Committee, 27 July 1988) UN Doc CCPR/C/33/D/197/1985, para 6.3.

was explicated in 1990,⁶⁵⁶ and, despite criticism,⁶⁵⁷ confirmed as recently as 2017⁶⁵⁸.⁶⁵⁹ This does not mean that the right of peoples to self-determination cannot be the subject of proceedings at the international level; possible avenues include contentious cases⁶⁶⁰ and advisory proceedings⁶⁶¹ before the ICJ as well as inter-state procedures⁶⁶² before the Human Rights Committee. As mentioned before,⁶⁶³ the Human Rights Committee has also taken Article 1(1) into account as a yardstick for the interpretation of other convention rights in the context of individual complaints.⁶⁶⁴ However, as of today, there is no path for potential victims to initiate a complaint procedure as peoples.

9.2. State responsibility, state obligations, and further cross-cutting issues

The right of peoples to self-determination is a human right, albeit a collective one. For questions of attribution, international human rights law follows the rules of general international law.⁶⁶⁵ This means that the elaborations on state responsibility in the context of non-intervention are valid here as well.⁶⁶⁶ In contrast, international human rights law contains distinct rules for state obligations and, in particular, the extraterritorial application of treaties. Questions

656 *Ominayak (Lubicon Lake Band) v Canada* Communication no 167/1984 (UN Human Rights Committee, 26 March 1990) UN Doc CCPR/C/38/D/167/1984, paras 13.3, 32.1.

657 See for example Cassese 1995, 141-145; Joseph/Castan 2013, 164. It is also interesting to note the following excerpt from the drafting history of the human rights covenants: '[i]f self-determination constituted a collective right, it nevertheless affected each individual. To be deprived of the right of self-determination entailed the loss of individual human rights.' UNGA, Draft International Covenants on Human Rights, Report of the Third Committee (1955) UN Doc A/3077, 14, para 40.

658 *Tiina Sanila-Aikio v Finland* (admissibility decision) Communication no 2668/2015 (UN Human Rights Committee, 28 March 2017) UN Doc CCPR/C/119/D/2668/2015, para 6.3.

659 See on this development Schabas 2019, 20-22, paras 23-26.

660 See for example *East Timor (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90.

661 See for example *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

662 See on this procedure Article 41 of the ICCPR.

663 See footnote 604 above and the accompanying text.

664 See for example *Gillot v France* Communication no 932/2000 (UN Human Rights Committee, 15 July 2002) UN Doc CCPR/C/75/D/932/2000, para 13.4. See also the collection of such cases by Schabas 2019, 22, fn 70.

665 Altwicker 2018, 599.

666 See section 6.2 above.

surrounding these issues will be addressed in the context of electoral rights,⁶⁶⁷ the enforcement of which faces at least one less obstacle compared to the right of peoples to self-determination, given that individual rights can be the subject of admissible complaints to the Human Rights Committee.⁶⁶⁸ However, it is important to keep in mind the special nature of the self-determination norm and the potential implications of its characteristics: it is ‘one of the essential principles of contemporary international law’,⁶⁶⁹ it applies not just to ‘every citizen’⁶⁷⁰ of a state but to ‘all peoples’⁶⁷¹, it belongs to the peremptory norms of *ius cogens*,⁶⁷² and it has *erga omnes* character, meaning it is binding on all states.⁶⁷³ Lastly, violating this norm cannot be justified.⁶⁷⁴ This makes self-determination one of the most powerful normative demands within the international legal order.

Conclusion of Part III

While the international law of self-determination is clearly a helpful framework for assessing the permissibility of foreign electoral interference, self-determination is best seen as one of several pertinent and interconnected concepts. The key insight from the foregoing considerations may be the emergence of the bridging role that the self-determination norm can play between the other two concepts guiding the legal assessment of this study. The fact that both non-intervention and electoral rights can be seen as expressions of the concept of self-determination and its respective dimensions lends crucial support to a harmonious interpretation of the three concepts’ requirements for elections.

As a consequence of such an interpretation, the determinations on the permissibility of specific examples of interference made with respect to the prohibition of intervention retain their validity. Self-determination and non-intervention both employ the notion of ‘free’ decision-making and there is nothing

667 See section 12.1 below. See also section 12.2 below, which is relevant to self-determination, too.

668 See section 9.1 above.

669 See footnote 544 above and the accompanying text.

670 Article 25 of the ICCPR. See also section 12.1.3.2 below.

671 Article 1(t) of the ICCPR (emph add).

672 See footnote 546 above and the accompanying text.

673 See footnote 545 above and the accompanying text.

674 Circumstances precluding wrongfulness are usually not applicable in case of violations of peremptory norms of international law. See section 6.1 above, especially footnotes 457, 459, 473, 492, and the accompanying text.

to indicate that this notion should be interpreted differently in the respective contexts. To the contrary, the international law of self-determination reinforces several previous findings. The right of a people to independently regulate its electoral processes – through human rights-compliant domestic laws – and the impermissibility of attempts to alter the shape of the ‘self’ in self-determination – by preventing members of the electorate from making their voice heard – become particularly obvious in the context of self-determination.

In other words, the criteria for unlawful conduct remain unchanged: interference in the opinion-forming process must not *contravene human rights-compliant domestic electoral laws* nor be *disproportionately intense*, while interference in the opinion-collecting process must not include any *manipulation of voting procedures*. When it comes to assessing the permissibility of foreign electoral interference, self-determination is thus less of an alternative to non-intervention and more of one of several cumulative avenues to be pursued.

Although the normative demands of non-intervention and self-determination may overlap in substance, the findings of this chapter nonetheless have distinct implications, given the peculiar nature of the right of peoples to self-determination. On the one hand, it is a particularly potent concept, due to its wide recognition as a centrepiece of international law, its status as a peremptory norm, and its *erga omnes* character. Specifically, the fact that self-determination belongs to the category of *ius cogens* is an important hurdle for any attempt to justify foreign electoral interference by circumstances precluding wrongfulness. On the other hand, it must also be noted that there exists a fundamental deficit when it comes to enforcing self-determination, namely that the UN Human Rights Committee does not regard complaints about violations of peoples’ rights as admissible. This considerably limits the practical significance of the right.

In sum, the right of peoples to self-determination, while being a central normative demand of the international legal order and providing crucial added value on a doctrinal level, may find its most important role as the pivotal component in a system of mutually reinforcing legal concepts with the common objective of protecting free political decision-making in elections.

Part IV

**Foreign Electoral
Interference and the
International Law
of Electoral Rights:
*An Individuals'
Perspective***

10. The international law of electoral rights

Article 21(3) of the Universal Declaration of Human Rights states that ‘[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’⁶⁷⁵ The text of the UDHR has also inspired the drafting process of corresponding provisions within the various subsequently adopted international human rights instruments.⁶⁷⁶ Would it therefore not be surprising if the mechanisms of international human rights law were silent on the issue of foreign electoral interference? Does foreign electoral interference not constitute a distortion of free voting procedures? And is there a point at which the authority of government ceases to be based on the will of the people? The following pages offer an individuals’ perspective on foreign electoral interference by looking through the lens of the international law of electoral rights.⁶⁷⁷

10.1. Scope

Electoral rights, as understood here,⁶⁷⁸ are the provisions which more or less explicitly require states to hold elections, which protect the right to vote and to stand in elections, and which stipulate certain basic requirements for the conduct of elections. They are thus a subset of political rights. Political rights, in turn, have been defined in different ways, sometimes broader, sometimes narrower.⁶⁷⁹ In fact, it is doubtful whether a clear and tenable distinction

⁶⁷⁵ UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/217(III).

⁶⁷⁶ See Rosas 1999, 437–448, esp 448: ‘Article 21 has obviously provided a stimulus for a number of treaty-based provisions relating to political rights.’

⁶⁷⁷ For brief earlier mentions of Article 25 of the ICCPR in the context of foreign electoral interference see Koh 2017, 450–451, esp fn 154; Sander 2019, 35–36; Lahmann 2020, 221; Schmitt 2021, 755; Van De Velde 2021, 224. See also Jones 2019, 48–50.

⁶⁷⁸ The notion of electoral rights has been used in different ways. For a relatively broad understanding of ‘electoral rights’, with the notion figuring in the title of a study that adopts a ‘human rights approach to how the electoral process is conducted’, see Dickson/Hardman 2017, esp 1. For a narrower understanding of ‘electoral rights’, in which the term describes the rights as stipulated in Article 3 of the Protocol to the ECHR, see De Meyer 1993, esp 553.

⁶⁷⁹ See for example Kälin/Künzli 2009, 466: ‘[p]olitical rights, understood in a broad sense, are designed to enable people to communicate as freely as possible with others and to enjoy, as far as possible, equality of opportunity under the law to participate in shaping their social context. Political rights in a narrow sense [...] guarantee citizens both the

exists between civil and political rights.⁶⁸⁰ Irrespective of such categories, various human rights are relevant in the context of elections, at least indirectly.⁶⁸¹ Electoral rights, however, are only those that directly concern elections.⁶⁸² They usually come as a pair: the right to vote and the right to be elected.⁶⁸³ In contrast, in the example of the Protocol to the European Convention on Human Rights, there is one single ‘right to free elections’.⁶⁸⁴ While norms such as the freedom of expression and the freedom of assembly are undoubtedly important for political and electoral processes, they are not included in the understanding of electoral rights employed here.⁶⁸⁵ Only the right to vote in elections (of a certain type), the right to stand in elections (of a certain type), and the right to elections (of a certain type) are.

10.2. Sources

Several major instruments of international human rights law protect electoral rights. The focus will later lie on the substance of one provision in particular, Article 25 of the ICCPR.⁶⁸⁶ Nevertheless, it is worth providing an overview of the different provisions, if only to show their similarity.

right to vote under equal conditions and at regular intervals in free elections and the right to stand for election.’

680 See on this *Pierre-Bloch v France* App no 24194/94 (ECtHR, 21 October 1997), Dissenting opinion of Judge De Meyer (italics in the original): ‘[t]he distinction between civil rights and political rights is strange in itself if one considers the etymology of the two adjectives, seeing that the Latin words from which the former is derived (*civile*, *civis*, *civitas*) and the Greek words from which the latter is derived (*politikon*, *polis*, *politeia*) mean the same thing.’ See on this Moeckli 2020, 192-194.

681 For a particularly long list – one with 21 entries – of election-related international legal obligations of states vis-à-vis their citizens see Davis-Roberts/Carroll 2010, 422-425.

682 While the concept of (international legal) electoral *rights* advanced here may be comparatively narrow, the understanding of domestic electoral *laws* advanced in this study is rather wide. See for example footnotes 913-914 below, the references therein, and the accompanying text.

683 See for example Article 25(b) of the ICCPR and the other provision portrayed in section 10.2 below.

684 See Article 3 of the Protocol to the ECHR and footnote 702 below.

685 This is not to say that electoral rights (and the right of peoples to self-determination) are the only human rights that can be affected by foreign electoral interference. For example, some authors have mentioned potential violations of the right to privacy: Ohlin 2017, 1582-1586; Hollis 2018, 42-43; Schmitt 2018, 56; Sander 2019, 38-39; Schmitt 2021, 755. Such questions, while certainly legitimate, are beyond the focus of this study for the reasons explained in section 3.2 above.

686 On the reasons for this see section 10.3 below.

10.2.1. Global human rights instruments

The cornerstone of the international law of electoral rights, and of human rights law in general, is the Universal Declaration of Human Rights (UDHR). Not only was its Article 21 the first of the now several electoral rights stipulations in international human rights instruments, its formulation has also remained one of the most comprehensive ones.⁶⁸⁷ The provision reads as follows:⁶⁸⁸

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The UDHR was adopted by the United Nations General Assembly on 10 December 1948⁶⁸⁹ and, due to its nature as a General Assembly resolution, is not binding as such.⁶⁹⁰ However, the wording of Article 21 did visibly inspire the drafters of the ICCPR,⁶⁹¹ who included electoral rights in Article 25 of the covenant. The provision reads as follows:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

While the order of the paragraphs was changed, a clause was omitted – ‘[t]he will of the people shall be the basis of the authority of government’ –, and some other minor changes were made, Article 25 of the ICCPR is essentially

687 Rosas 1999, 448.

688 UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/217(III).

689 *ibid.*

690 See footnote 273 above. On the legal nature of UNGA resolutions see also Thirlway 2014, 21-23 and 79-81. On the status of the UDHR in (customary) international law – as of 1996 – see Hannum 1996, 317-352.

691 On Article 25 of the ICCPR being the ‘evident counterpart’ of Article 21 of the UDHR see Rosas 1999, 437.

the legally binding restatement of Article 21 of the UDHR.⁶⁹² The ICCPR has to date been ratified by 173 states and signed by an additional six states.⁶⁹³

Moreover, the provisions of the UDHR and the ICCPR are complemented by the text of further conventions negotiated under the auspices of the UN: Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)⁶⁹⁴, Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁶⁹⁵, Article 41 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW),⁶⁹⁶ and Article 29 of the Convention on the Rights of Persons with Disabilities (CRPD)⁶⁹⁷. While the ICERD,

692 On the differences between the two formulations being ‘more symbolic than substantial’ see Rosas 1999, 440. For a comparison of the two provisions see Rosas 1999, 437–442. On Article 25 of the ICCPR being the (legally binding) ‘embodi[ment]’ of the ‘entitlement first outlined in’ Article 21 of the UDHR see Franck 1992, 64.

693 Status of ratifications as of 16 September 2022 according to the OHCHR dashboard.

694 ‘In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (c) Political rights, in particular the rights to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service; [...]’

695 ‘States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.’

696 ‘1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation. 2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.’

697 ‘States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake to: (a) Ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by: (i) Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use; (ii) Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; (iii) Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their

the CEDAW, and the CRPD have been widely ratified, the ICMW has been met with less approval so far.⁶⁹⁸

10.2.2. Regional human rights instruments

Several regional mechanisms also contain an electoral rights provision, among them the three ‘established’⁶⁹⁹ regional human rights systems of Europe, the Americas, and Africa. The European Convention on Human Rights (ECHR) – adopted shortly after the UDHR, in 1950 – does not itself restate Article 21 of the UDHR. Different formulations had been discussed during the drafting process, but all of them were eventually rejected.⁷⁰⁰ Yet, the Protocol to the ECHR – currently ratified by 45 states⁷⁰¹ – compensates for this omission and includes a pertinent norm in Article 3.⁷⁰² The American Convention on Human Rights (ACHR) – ratified by 25 states so far⁷⁰³ – stipulates electoral rights in Article 23.⁷⁰⁴ Electoral rights are also protected by Article 13 of the African

request, allowing assistance in voting by a person of their own choice; (b) Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including: (i) Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties; (ii) Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.’

698 The ICERD has been ratified by 182 states, the CEDAW by 189, the CRPD by 185, and the ICMW by only 57 – as of 16 September 2022 and according to the OHCHR dashboard.

699 Heyns/Killander 2013, 675.

700 See Lécuyer 2014, 13–14. See also Rosas 1999, 443.

701 As of 16 September 2022, all member states of the Council of Europe except Switzerland and Monaco have ratified the Protocol, according to the Council of Europe Treaty Office.

702 ‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.’ While the provision is not formulated as an individual right, the ECtHR has clarified that it needs to be interpreted as expressing ‘the “right to vote” and the “right to stand for election to the legislature”’: *Mathieu-Mohin and Clerfayt v Belgium* App no 9267/81 (ECtHR, 2 March 1987), paras 46–54, esp para 51.

703 Status of ratifications as of 16 September 2022 according to the Organization of American States.

704 ‘1. Every citizen shall enjoy the following rights and opportunities: a. to take part in the conduct of public affairs, directly or through freely chosen representatives; b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and c. to have access, under general conditions of equality, to the public service of his country. 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.’

Charter on Human and Peoples' Rights (ACHPR)⁷⁰⁵ – ratified by 54 states.⁷⁰⁶ In addition, the Arab Charter on Human Rights⁷⁰⁷ mentions electoral rights in Article 24.⁷⁰⁸ The ASEAN Human Rights Declaration⁷⁰⁹ does so, too, in Article 25⁷¹⁰.⁷¹¹ Lastly, the Charter of Fundamental Rights of the European Union (CFREU) includes certain electoral rights in Article 39⁷¹² and Article 40⁷¹³ as well. However, these are only applicable in the context of municipal elections and elections to the European Parliament.⁷¹⁴

10.2.3. Customary international law

It has already been mentioned that some have discussed the emergence of a right to democratic governance in international law,⁷¹⁵ 'based in part on custom and in part on the collective interpretation of treaties'⁷¹⁶. It has also been concluded earlier that it might be best to focus on the three – already quite

705 '1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of the country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

706 Status of ratifications as of 16 September 2022 according to the African Commission on Human and Peoples' Rights.

707 Arab Charter on Human Rights (adopted 22 May 2004) UN Doc CHR/NONE/2004/40/REV.1.

708 'Every citizen has the right: 1. To freely pursue a political activity. 2. To take part in the conduct of public affairs, directly or through freely chosen representatives. 3. To stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will. 4. To the opportunity to gain access, on an equal footing with others, to public office in his country in accordance with the principle of equality of opportunity. [...]'

709 ASEAN Human Rights Declaration (adopted 18 November 2002).

710 '(1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law. (2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.'

711 On the less 'established' regional human rights systems see Heyns/Killander 2013, 691-694.

712 '1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. 2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.'

713 'Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.'

714 See Article 51(1) of the Charter on its field of application.

715 See section 4.3.1 above, especially footnotes 325-331 and the accompanying text.

716 Franck 1992, 47.

potent – components⁷¹⁷ of that concept rather than to look for a sum greater than its parts.⁷¹⁸ As for the component of electoral rights, views on their status in customary international law differ.⁷¹⁹ Yet, even for the areas in which a customary obligation to observe electoral rights might apply,⁷²⁰ it seems that its substance corresponds to that of conventional obligations.⁷²¹

10.2.4. Soft law

For the sake of completeness, it should also be mentioned that there exists a notable body of ‘soft law’⁷²² concerning democracy and elections.⁷²³ The prime example is the Venice Commission’s Code of Good Practice in Electoral Matters.⁷²⁴ While not a binding source of electoral rights on its own, it has influenced the relevant jurisprudence of the European Court of Human Rights.⁷²⁵

717 These are ‘self-determination, freedom of expression and electoral rights’: Franck 1992, 57.

718 See again section 4.3.1 above, especially footnotes 325–331 and the accompanying text.

719 For an early sceptical view see Hannum 1996, 348 (italics removed): ‘it is apparent that many states have not accepted article 21’s guarantee of the right to participate in the political life of one’s country.’ For a more recent and more detailed analysis see d’Aspremont 2008, 269–293, esp 285: ‘l’élection « démocratique » des détenteurs effectifs du pouvoir ou de ceux qui les contrôlent est devenue, comme le respect de nombreux droits de l’homme, une exigence du droit international coutumier.’ See also Schabas 2021, 263–269, esp 269: ‘[a] customary international legal norm recognising a right to democratic governance, in the sense of the right of citizens to participate in government through periodic elections, is in the process of emerging.’

720 It is questionable whether such a customary norm could be applicable significantly more widely than the ICCPR, given that the (few) states that have not ratified the covenant might also be the ones that are persistent objectors to a customary norm. On such ‘objecteurs persistants’ see d’Aspremont 2008, 285.

721 When it comes to the content of a customary electoral rights obligation, the requirements that also appear in the text of the UDHR and that of the ICCPR resurface: elections that are ‘libres, honnêtes, périodiques, au suffrage universel et au scrutin secret’. See d’Aspremont 2008, 289–290. On these requirements see section 10.3.2 below.

722 On the (controversial) notion of soft law see Thirlway 2014, 163–171, especially the working definition on page 166: ‘a system of international commitments or obligations that are not regarded by those concerned as binding in the sense that can be enforced in the same way as those imposed by international law proper, [...] but yet are considered as something more than mere political gestures, so that there is an expectation of compliance even if there is no legal duty.’ On the ‘role of non-binding norms in the international legal system’ see Shelton 2000 (capitalization removed).

723 For a compilation of binding and non-binding international democracy instruments see Ehm/Walter 2015.

724 European Commission for Democracy Through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd Session (Venice, 18–19 October 2002), Opinion no 190/2002, CDL-AD(2002)023rev2-cor.

725 Berger/Bouchié de Belle 2012; Lécuyer 2014, 21–24. On the ‘contribution of the Venice Commission in the electoral field’ in general see Úbeda de Torres 2017.

10.3. Substance

While many international legal instruments protect electoral rights, the focus of the following sections is on Article 25 of the ICCPR and its substance. As explained at the outset, the aim of this study is to paint a picture that is as representative of the (global) international legal order as possible.⁷²⁶ Article 25 of the ICCPR is clearly the most comprehensive legally binding electoral rights provision when it comes to its material, personal, and territorial scope of application.

Even taken together, the three ‘established’⁷²⁷ regional human rights systems do not come close to the number of ratifications of the ICCPR.⁷²⁸ On top of that, Article 3 of the Protocol to the ECHR does not apply to elections of executive bodies,⁷²⁹ whereas the wording of the ICCPR knows no such restriction.⁷³⁰ Furthermore, Article 25 of the ICCPR applies to ‘every citizen’ and to elections in general while the more specialized conventions – the ICERD, the CEDAW, the ICMW, and the CRPD – only apply to specific groups and situations. In short, the ICCPR’s electoral rights provision is the only pertinent hard law source of wide and general applicability. Therefore, it can serve as a focal point for the international law of electoral rights.

That said, the following considerations might nonetheless be of some value in regional and other more specific contexts as well, given that most of the texts mentioned also contain the key postulate of ‘free’ elections.⁷³¹ On a

726 See section 3.2 above.

727 Heyns/Killander 2013, 675.

728 The Protocol to the ECHR, the ACHR, and the ACHPR combined have been ratified by 124 states, while the ICCPR counts 173 ratifications. See footnotes 693, 701, 703, and 706 above.

729 On possible exceptions see *Boškovski v “The Former Yugoslav Republic of Macedonia”* (dec) App no 11676/04 ECHR 2004-VI 379, para 1: ‘[s]hould it be established that the office of the Head of the State had been given the power to initiate and adopt legislation or enjoyed wide powers to control the passage of legislation or the power to censure the principal legislation-setting authorities, then it could arguably be considered to be a “legislature” within the meaning of Article 3 of Protocol No 1.’

730 See on this difference Schabas 2019, 708–709, para 22. The wording of Article 13 of the ACHPR is also comparatively narrow. See Rosas 1999, 444–445 and 448.

731 See the notions of ‘free’ and ‘freely’ in the following provisions: Article 21(1) and (3) of the UDHR (UNGA Res 217 A (III) (10 December 1948) UN Doc A/RES/217(III)); Article 25(a) and (b) of the ICCPR; Article 29(a) and (a)(iii) of the CRPD; Article 3 of the Protocol to the ECHR; Article 23(1)(a) and (b) of the ACHR; Article 13(1) of the ACHPR; Article 24(1), (2) and (3) of the Arab Charter on Human Rights (adopted 22 May 2004) UN Doc CHR/NONE/2004/40/REV.1; Article 25(2) of the ASEAN Human Rights Declaration (adopted 18 November 2012); Article 39(2) of the CFREU. In contrast, (only) the following provisions lack such an explicit reference: Article 5(c) of the ICERD; Article 7 of the CEDAW;

methodological note, when identifying the substance of Article 25 and its components, special attention will be given to the authoritative guidance⁷³² by the Human Rights Committee in its general comment on the provision.⁷³³

10.3.1. Article 25(a) of the ICCPR: right to take part in the conduct of public affairs

While electoral rights are specifically provided for in Article 25(b) of the ICCPR, it is nonetheless helpful to consider the article in its entirety, since the different paragraphs stand in relationship to each other. Paragraph (a) introduces the general idea of Article 25, namely the right ‘to participate in those processes which constitute the conduct of public affairs’⁷³⁴. As becomes apparent from the *chapeau* and is therefore true for all aspects of the article, this right can – but does not have to⁷³⁵ – be reserved for citizens. The ‘conduct of public affairs’ encompasses the exercise of political power, be it in a legislative, executive, or administrative context and be it at the international, national, regional, or local level.⁷³⁶ The wording of paragraph (a) clarifies that participation in such affairs can be direct or indirect. Direct forms include the exercise of power as a member of a legislative or executive organ, by voting in referendums, or by participating in popular assemblies with decision-making power.⁷³⁷ Alternatively, citizens can participate in the conduct of public affairs indirectly, that is, ‘through freely chosen representatives’. Holding elections is thus a specific way to fulfil the obligation under Article 25(a) of the ICCPR. While the requirements for the appropriate conduct of elections are left to paragraph (b), paragraph (a) establishes the basic ‘principle of sovereignty of the people’.⁷³⁸ Although various

Article 41 of the ICMW; Article 40 of the CFREU. For the text of these provisions see sections 10.2.1 and 10.2.2 above. On the requirement of ‘free elections’ see section 10.3.2.6 below. On ‘free’ political decision-making being a common objective of all three legal concepts treated in this study see section 13.1 below.

732 On the work of treaty bodies as a source of international human rights law see Chinkin 2022, 81–82, esp 81: ‘[general comments and concluding observations by treaty bodies] might be described as secondary treaty law, in that state consent can be implied from their acceptance of the treaties and the authority of the expert committees.’ For a discussion of general comments as an example of ‘secondary soft law’ see Shelton 2000a, 451 (emph add). On the Human Rights Committee in particular and the contributions of its members see Neuman 2018.

733 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7.

734 *ibid*, para 2.

735 See *ibid*, para 3.

736 *ibid*, para 5.

737 *ibid*, para 6.

738 Schabas 2019, 705, para 14.

governmental systems are compatible with paragraph (a),⁷³⁹ it is crucial that the bodies that are popularly elected exercise a significant degree of governmental power.⁷⁴⁰ Government must, according to Article 25(a) of the ICCPR, be ‘ultimately responsible to the people’⁷⁴¹.

10.3.2. Article 25(b) of the ICCPR: right to vote and right to be elected

Paragraph (b) contains the ‘election clause’⁷⁴² of Article 25. It specifically concerns electoral rights: the right to vote and the right to be elected. The former is sometimes called the ‘active’ aspect while the latter is referred to as the ‘passive’ aspect.⁷⁴³ With respect to both aspects, paragraph (b) contains requirements for the appropriate conduct of elections: ‘genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors’. These elements will be discussed in turn.

10.3.2.1. Genuine elections

To begin with, elections need to be ‘genuine’. This means that voters need to have a real choice between alternatives and therefore ‘a minimum amount of political influence’.⁷⁴⁴ In order for voters to have a ‘free choice of candidates’, it is vital that the right to stand for election without undue restrictions be effectively guaranteed.⁷⁴⁵

10.3.2.2. Periodic elections

Elections also need to be ‘periodic’. In other words, they ‘must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.’⁷⁴⁶ It

739 This includes ‘Westminster systems, “presidential” systems, bicameral systems, unicameral systems, unitary systems, and federal systems’: Joseph/Castan 2013, 731, para 22.08. Even monarchies can be compatible with paragraph (a): Schabas 2019, 705, para 15. See also Steiner 1988, 87.

740 See UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 7: ‘it is implicit in article 25 that [freely chosen] representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power.’ See also Joseph/Castan 2013, 732-733, para 22.14-22.15.

741 Schabas 2019, 705, para 14.

742 Rosas 1999, 438.

743 See for example – in the European context – Lécuyer 2014, 33.

744 Schabas 2019, 709-710, para 24.

745 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 15.

746 *ibid*, para 9.

has been suggested that intervals should not exceed five years for legislative elections and seven years for presidential elections.⁷⁴⁷

10.3.2.3. Universal suffrage

The requirement of ‘universal suffrage’ means that any restriction on the right to vote must be reasonable.⁷⁴⁸ Permissible grounds of restriction include minority and mental incapacity.⁷⁴⁹ Impermissible ones include physical disability, illiteracy, or lack of property.⁷⁵⁰ States are under an obligation to ensure that all members of the electorate can effectively exercise their right to vote.⁷⁵¹ This may require ‘voter education and registration campaigns’⁷⁵² and protection against ‘abusive interference with registration or voting as well as intimidation or coercion of voters’⁷⁵³. The right to be elected may be subjected to higher age requirements than the right to vote,⁷⁵⁴ yet, again, any restrictions ‘must be justifiable on objective and reasonable criteria’⁷⁵⁵. Generally, the idea of universal suffrage demands that ‘as many citizens as possible’ effectively enjoy electoral rights.⁷⁵⁶

10.3.2.4. Equal suffrage

Elections also need to be held by ‘equal suffrage’. This means that the ‘principle of one person, one vote must apply’.⁷⁵⁷ Irrespective of the specific electoral system a state chooses, ‘the vote of one elector should be equal to the vote of

747 See European Commission for Democracy Through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd Session (Venice, 18-19 October 2002), Opinion no 190/2002, CDL-AD(2002)023rev2-cor, para I.6. and the explanatory report on para I.6. See also Schabas 2019, 709, para 23: ‘it may be assumed that the customary span of four to six years may not be exceeded by too much.’

748 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 10.

749 *ibid*, paras 4 and 10.

750 *ibid*, para 10. See also *ibid*, para 12: ‘[p]ositive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movements which prevent persons entitled to vote from exercising their rights effectively.’

751 *ibid*, para 11.

752 *ibid*, para 11.

753 *ibid*, para 11.

754 *ibid*, para 4. See also Schabas 2019, 721-722, para 49.

755 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 15.

756 Schabas 2019, 714, para 36.

757 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 21.

another.’⁷⁵⁸ Not only must votes have equal numerical value,⁷⁵⁹ they must also have equal effect.⁷⁶⁰

10.3.2.5. Secret ballot

The secrecy of the ballot is a further requirement of paragraph (b). The Human Rights Committee stated that ‘voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process.’⁷⁶¹ This also means that ‘[t]he security of ballot boxes must be guaranteed’.⁷⁶²

10.3.2.6. Free elections

Article 25 of the ICCPR establishes the principle of ‘free elections’ in a twofold manner: firstly, by referring to ‘freely chosen representatives’ in paragraph (a), and secondly, by mentioning the ‘free expression of the will of the electors’ in paragraph (b).⁷⁶³ This requirement is of central importance for the entire electoral process.⁷⁶⁴ It concerns not only voting itself, its implications also extend to the opinion-forming process.⁷⁶⁵ Thereby, it establishes a link to other norms protected by the ICCPR, such as the freedoms of opinion, expression, assembly, and association.⁷⁶⁶ The principle of free elections also protects voters from impermissible influence and campaigns from undue impairment.⁷⁶⁷ The Human Rights Committee provided the following commentary:⁷⁶⁸

In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any

758 *ibid.*

759 Schabas 2019, 718-719, para 42.

760 Schabas 2019, 719, para 43.

761 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 20.

762 *ibid.*, para 20.

763 See already Schabas 2019, 710-711, para 26.

764 On the stages of the electoral process see footnote 150 above.

765 Schabas 2019, 710-711, para 26. See also Boumghar 2010, 548: ‘La garantie de l’expression libre de la volonté des électeurs recoupe l’honnêteté et la liberté des élections. Cette question touche le processus électoral dans son ensemble, avant, pendant et après le dépôt du bulletin de vote dans l’urne.’

766 Schabas 2019, 712, para 28. For the respective guarantees see Articles 19, 21, and 22 of the ICCPR.

767 Schabas 2019, 712, para 28.

768 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19.

candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented.

It becomes clear from this formulation that the requirement of free elections is the most far-reaching element of Article 25 in terms of substantive democratic demands.

10.3.2.7. Direct or indirect elections

Lastly, there is a requirement Article 25 of the ICCPR does not mention: direct elections. This is in contrast to other enumerations of voting principles, such as the one of the German Basic Law⁷⁶⁹ or the one of the Venice Commission's Code of Good Practice in Electoral Matters⁷⁷⁰. Under the ICCPR, it is therefore permissible to conduct elections by delegates.⁷⁷¹

10.3.3. Article 25(c) of the ICCPR: right of equal access to public service

Paragraph (c) completes the text of Article 25 by protecting the right of equal access to public service.⁷⁷² Under this norm, 'the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable.'⁷⁷³ The paragraph applies to non-elected public offices, access to

769 See the (non-binding) English translation of Article 38(1) of the Basic Law for the Federal Republic of Germany: 'Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. [...]'. For details see Franz 2019, 203. I am grateful to Nicolai T. Laing for first making me aware of this provision.

770 The code lists 'direct suffrage' as one of the 'five principles underlying Europe's electoral heritage' – see European Commission for Democracy Through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd Session (Venice, 18-19 October 2002), Opinion no 190/2002, CDL-AD(2002)023rev2-cor, paras I and I.5.

771 Schabas 2019, 710, para 25. As Schabas mentions as well (*ibid*), this is the case in the United States, where the president is elected by the Electoral College. See also Gouzoules 2017 and footnote 1 above.

772 For this heading see also Schabas 2019, 724, para 56.

773 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 23. See also *ibid*: '[b]iasing access to public service on equal opportunity and general principles of merit, and providing secure tenure, ensure that persons

which it regulates more loosely than access to elected public offices.⁷⁷⁴ Given its scope of application, paragraph (c) bears no relevance to the legal assessment that follows.

11. Foreign electoral interference and the international law of electoral rights

Article 25(b) of the ICCPR advances a specific understanding of how elections ought to be conducted. The six requirements the paragraph contains are binding legal standards that come in the form of individual rights of citizens. States that have ratified the ICCPR are under an obligation to respect, protect, and fulfil these electoral rights.⁷⁷⁵ When a foreign state interferes in an election, it may well be that it interferes with these rights as well. In the words of the Human Rights Committee, '[v]oters should be able to form opinions independently, free of [...] manipulative interference of any kind.'⁷⁷⁶ The following sections will therefore apply the international law of electoral rights to the examples of foreign electoral interference identified at the outset.⁷⁷⁷ While the focus will first be on the core legal aspects of electoral rights, selected additional ramifications will receive attention later.⁷⁷⁸

11.1. Application of the law to economic and informational means of interference: free elections

A first set of issues revolves around electoral rights and how they guide the opinion-forming process. It is difficult to imagine how foreign electoral interference by economic or informational means could impact the genuineness and periodicity of elections, the universality and equality of suffrage, or the secrecy of the ballot.⁷⁷⁹ A more pressing question is whether and when such

holding public service positions are free from political interference or pressures.' The Human Rights Committee furthermore stressed the possibility of affirmative measures and the importance of non-discrimination (*ibid*).

⁷⁷⁴ Schabas 2019, 724-725, para 56.

⁷⁷⁵ On this typology of human rights obligations see Young 2022, 134-140. See also section 12.1 below.

⁷⁷⁶ UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19.

⁷⁷⁷ See section 2.2 above.

⁷⁷⁸ See section 12 below.

⁷⁷⁹ Interference by technical means will be discussed in section 11.2 below.

forms of foreign electoral interference – financial support, targeted adverse economic measures, biased economic policies, criticism or endorsement, the dissemination of false or misleading information, or the disclosure of private information – may come into conflict with the requirement of free elections.

This question, again,⁷⁸⁰ sounds familiar. In the context of non-intervention, the question was whether choices offered within an election ‘remain free ones’⁷⁸¹ despite foreign interference.⁷⁸² In the context of self-determination, the question was whether peoples can ‘freely determine their political status’⁷⁸³ in spite of foreign electoral interference.⁷⁸⁴ The key test of the present legal assessment is whether voters and candidates can effectively enjoy their right to *free elections* in the presence of foreign interference. The requirement of ‘freely chosen representatives’⁷⁸⁵ is arguably not that different from the requirement to ‘decide freely’⁷⁸⁶ in political matters or the requirement to ‘freely determine’⁷⁸⁷ a political status. At least there is nothing to indicate that the interpretation of the requirement of free political decision-making would yield different results in the context of electoral rights than in the context of non-intervention or self-determination. To the contrary, the Human Rights Committee’s guidance on the requirement of free elections lends additional support to the two-pronged understanding discussed before:⁷⁸⁸ interference in the opinion-forming process being impermissible if it is in contravention of human rights-compliant domestic electoral laws or, alternatively, if it is disproportionately intense.

As regards the first element, domestic electoral laws, the general comment on Article 25 of the ICCPR, too, explicitly stresses the possibility of implementing ‘a framework of laws guaranteeing the effective exercise of voting rights.’⁷⁸⁹ In particular, ‘[r]easonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters

780 See already section 8.2 above.

781 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

782 See sections 5.2, 5.3, and 5.4 above.

783 Article 1(1) of the ICCPR.

784 See sections 8.2 and 8.3 above.

785 Article 25(a) of the ICCPR.

786 See for this formulation in the context of non-intervention: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

787 Article 1(1) of the ICCPR.

788 See sections 5.2, 5.3, and 8.2 above.

789 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19.

is not undermined [...]'.⁷⁹⁰ Accordingly, one avenue to safeguard free elections is to 'establish a system of fair public funding of political parties'⁷⁹¹. Such systems and domestic electoral laws in general are protected by Article 25 of the ICCPR – provided that they are in fact 'fair'⁷⁹² and not incompatible with (other) international human rights law standards.⁷⁹³ Similarly, the Human Rights Committee's elaborations on Article 25 are also characterized by a certain minimal notion of balanced political opportunities.⁷⁹⁴ The relevant paragraph of the general comment mentions 'distortion' twice, including in connection with 'disproportionate expenditure on behalf of [a] candidate or party.'⁷⁹⁵ This further bolsters the conclusion that influence on will formation can at a certain point become disproportionately intense, the second element of the two-pronged test discussed. As a consequence, the determinations made in the context of non-intervention⁷⁹⁶ – and referred to in the context of self-determination⁷⁹⁷ – also apply here.

Electoral rights and the prohibition of intervention may not appear to be closely related at first sight. However, not only do they share a close connection to the concept of self-determination⁷⁹⁸ and a reliance on the notion of 'free'

790 *ibid.*

791 Schabas 2019, 712, para 29.

792 The notion of 'fair' is used in relation to domestic electoral laws by Schabas 2019, 712, para 29. 'Fairly' also appears here: UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19.

793 This important qualification was discussed in more detail earlier – see sections 5.2, 5.3, and 8.2 above. If domestic electoral laws that are incompatible with international human rights law cannot receive protection in the context of non-intervention and self-determination, this must be all the more true in the context of electoral rights, themselves part of international human rights law. See in this context also UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 25: '[...] the full enjoyment of rights protected by article 25 [...] requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant [...]'].

794 For a further-reaching, non-legal standard of *equal opportunity of access to political influence* in the context of deliberative democracy see sections 14.1.3.1 and 14.1.3.3 below.

795 See UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19. The first mention goes as follows (emph add): '[p]ersons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may *distort* or inhibit the free expression of the elector's will.'

796 For the respective conclusions on the permissibility of examples of economic and informational means of interference see sections 5.2.1, 5.2.2, 5.2.3, 5.3.1, 5.3.2, and 5.3.3 above.

797 See section 8.2 above.

798 See footnotes 600–604 and 618 above and the accompanying text, as well as section 8.1.3 above in general.

political choices, they even come with the same antithesis to that notion. ‘Coercion’, the defining criterion of prohibited intervention,⁷⁹⁹ is also mentioned as a form of impermissible interference in the Human Rights Committee’s discussion of free elections: ‘[p]ersons entitled to vote must be free to vote [...] without undue influence or *coercion* of any kind which may distort or inhibit the free expression of the elector’s will.’⁸⁰⁰

Non-intervention and electoral rights are certainly distinct legal concepts that protect different categories of rights-holders – and the same is true for the right of peoples to self-determination. It cannot be ruled out completely, of course, that there may be certain specific election-related questions for which the respective norms would yield different results. However, as a general matter, the three concepts share a common thrust, and when applied to elections, the objective of all three norms is to protect free political decision-making. Therefore, the conclusions drawn in the context of non-intervention concerning the permissibility of different examples of foreign electoral interference by economic and informational means can once again be referred to.⁸⁰¹ Specifically, this means that all examples of economic and informational means of foreign electoral interference identified do potentially amount to a violation of the electoral rights of voters and candidates, yet they do so only under qualified circumstances.

11.2. Application of the law to technical means of interference: free elections, suffrage, and beyond

A second set of issues also concerns the *opinion-collecting* process and its protection through electoral rights. Here, the question is whether the enjoyment of electoral rights is adversely affected by technical means of foreign electoral interference – such as the extraction of private information, the computational amplification of communication, or the compromising of election infrastructure.

To begin with, the requirement of free elections applies as well, and so do the elaborations above.⁸⁰² What was deemed impermissible in the context of non-intervention and self-determination must be deemed impermissible in the context of electoral rights as well, given that the requirement of ‘freely

799 See section 4.3.2 above.

800 See UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19 (emph add).

801 See sections 5.2.1, 5.2.2, 5.2.3, 5.3.1, 5.3.2, and 5.3.3 above.

802 See section 11.1.

chosen representatives'⁸⁰³ arguably affords the same level of protection as the requirements to 'decide freely'⁸⁰⁴ and 'freely determine'⁸⁰⁵. This means that the determinations made in the respective chapters apply again:⁸⁰⁶ compromising election infrastructure as a variety of foreign electoral interference is impermissible, whereas the extraction of private information and the computational amplification of communication are – in and of themselves⁸⁰⁷ – not impermissible under the international law of electoral rights.

That said, it is also clear just from the wording of Article 25 itself that compromising election infrastructure – to prevent members of the electorate from voting or from having their vote accurately captured, counted, and communicated – cannot be permissible. After all, paragraph (b) requires the 'free expression of the *will of the electors*'⁸⁰⁸, not the expression of the will of a foreign state and its agents.⁸⁰⁹

However, the requirement of free elections is not the only argument against the permissibility of foreign electoral interference by compromising election infrastructure under the international law of electoral rights. The other requirements of Article 25(b) of the ICCPR point in the same direction. In particular, the concept of universal and equal suffrage, too, is incompatible with any form of factual disenfranchisement⁸¹⁰ of voters by technical means of interference. In fact, one can argue that electoral rights in *all* their aspects are impacted if certain members of the electorate are prevented from making their voice heard. If someone is prevented from effective participation in an election, all six requirements outlined above are concerned, since that person enjoys neither genuine nor periodic elections nor any other aspect of electoral rights. In short, electoral rights demand – in the interest of both voters and candidates – that *all* members of the electorate can duly express their will.

To conclude, compromising election infrastructure with the aim of disenfranchising voters, altering votes, or otherwise influencing the outcome of

803 Article 25(a) of the ICCPR.

804 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205.

805 Article 1(i) of the ICCPR.

806 For the respective determinations see sections 5.4 and 8.3 above.

807 On the auxiliary nature of these means of interference see section 5.4.1 above.

808 Article 25(b) of the ICCPR (emph add).

809 The results must then of course be 'respected and implemented' for the requirement of free elections to be fulfilled: UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19. See also Boumgghar 2010, 548-549, especially the remarks quoted in footnote 765 above.

810 Some of what can be achieved by compromising election infrastructure is sometimes called 'digital disenfranchisement' – see footnote 207 above.

an election is impermissible under the international law of electoral rights. The same was already found to be true in the context of non-intervention and self-determination, but it becomes even clearer in the context of electoral rights.

12. Additional legal ramifications beyond the core aspects of electoral rights

The focus thus far has been on the core legal aspects of electoral rights. However, the link between foreign electoral interference and the international law of electoral rights comes with additional ramifications that warrant attention.

12.1. State obligations and extraterritoriality

While the international law of non-intervention applies to relationships between states, international human rights law primarily regulates the relationship between states and human beings. This entails distinct implications, especially in cross-border contexts. These implications as they pertain to foreign electoral interference are discussed in the following sections.⁸¹¹

12.1.1. The nature of human rights obligations

States' human rights obligations are summarized in a 'tripartite typology': human rights must be *respected*, *protected*, and *fulfilled*.⁸¹² The negative obligation to 'respect' forbids measures that constitute an interference with human rights.⁸¹³ The obligation to 'protect' entails a duty to shield rights-holders from violations by third parties, with possible sources of harm ranging from private actors to nature.⁸¹⁴ The obligation to 'fulfil' requires states to adopt measures ensuring that human rights can be fully exercised.⁸¹⁵ In fact, electoral rights are a particularly good example to illustrate the obligation to fulfil: unless a state holds elections, the right to vote and the right to be elected cannot be exercised.⁸¹⁶ A failure to comply with these obligations results in

811 For a previous discussion of extraterritoriality in the context of foreign electoral interference see Kilovaty 2021. Here, too, Kilovaty is primarily concerned with reconceptualizing norms of international law. See already footnote 423 above. See also Schmitt 2021, 756-758.

812 Young 2022, 134-135.

813 Young 2022, 135-136.

814 Young 2022, 136-137; Mégret 2018, 97-98.

815 Young 2022, 137-138.

816 See Mégret 2018, 98.

a violation of the rights of those to whom the obligations are owed – unless of course the interference can be justified.⁸¹⁷

12.1.2. The obligations of the target state

The questions at hand concern electoral interference by a state other than the one whose elections are at stake. The government of a state can certainly unduly interfere in its own elections and thereby fall foul of the obligation to *respect* pertinent human rights. It can also fail to appropriately conduct elections in the first place and thereby fall short of its obligation to *fulfil*. However, that is not what the questions at hand are about. Far more relevant in the context of foreign electoral interference is the obligation to *protect*.⁸¹⁸

The obligation to protect aims at preventing adverse human rights impacts originating in areas beyond the state's effective control.⁸¹⁹ This includes not just non-state actors and natural phenomena⁸²⁰ but public entities such as foreign states as well.⁸²¹ To be sure, not every case of unlawful foreign electoral interference results in a failure of the target state to meet its obligation to protect.⁸²² Positive obligations to protect are 'to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources.'⁸²³ It does mean, however, that *preventable* adverse impacts on human rights can trigger the liability of the target state.⁸²⁴

817 For the most part, it is difficult to imagine good reasons for interfering with electoral rights. One previously discussed example of an exception – but not necessarily the only one – is the employment of sanctions for human rights abuses or comparable wrongdoing; see footnote 381 above and the accompanying text. On sanctions in the name of collective security and their relationship with international human rights law, see section 6.1.1 above. Generally, limitations can be justified if they are prescribed by law, pursue a legitimate aim, and are necessary (and proportionate) in a democratic society: Young 2022, 142. On limitations, the margin of appreciation, and derogations see *ibid*, 141–143.

818 See generally Lane 2018, 29–34; Ryngaert 2015, 177–181.

819 Altwicker 2018, 603.

820 Mégret 2018, 97–98. See also – in the context of the ECHR – Krieger 2022, 322–325, 326–327.

821 Altwicker 2018, 603. See also – in the context of the ECHR – Krieger 2022, 325–326.

822 See Mégret 2018, 97.

823 *O'Keefe v Ireland* [GC] App no 35810/09 ECHR 2014-I 155, para 144. See also – quoting the same formulation – Altwicker 2018, 604. For relevant jurisprudence within the United Nations system see Lane 2018.

824 See Mégret 2018, 97–98. See also – in the context of the ECHR – Krieger 2022, 327–336.

If the target state could have foreseen the interference and did not take appropriate measures to protect the rights of individuals within its territory⁸²⁵, this can amount to a violation of the obligation to protect.⁸²⁶ For example, if a state does not take necessary and feasible steps to prevent its election infrastructure from being compromised,⁸²⁷ it does not comply with its obligation to protect citizens' electoral rights and the right of peoples to self-determination⁸²⁸ from adverse interference by foreign states. This leads to the – perhaps somewhat counterintuitive – result that the state that is itself a victim of unlawful intervention⁸²⁹ can at the same time be responsible for human rights violations due to its failure to prevent foreign electoral interference.

12.1.3. The obligations of the interfering state

A more intuitive question is whether the interfering state itself can ultimately be held responsible for its actions. However, this is complicated by the fact that foreign electoral interference concerns the relationship between one state and the citizens of another. The specific problems that arise from this constellation will be discussed next.

12.1.3.1. The extraterritorial application of the ICCPR

Extraterritorial application refers to the following situation: 'at the moment of the alleged violation of his or her human rights the individual concerned is not physically located in the territory of the state party in question, a geographical area over which the state has sovereignty or title.'⁸³⁰ Foreign electoral interference is thus almost⁸³¹ by definition⁸³² a case of potential extraterritorial application. The ICCPR's territorial scope of application is regulated by Article 2(1): '[e]ach State Party to the present Covenant undertakes to respect and to ensure to *all individuals within its territory and subject to its jurisdiction*

825 On the scope of application of the ICCPR – 'all individuals within its territory and subject to its jurisdiction' – see Article 2(1). See also section 12.1.3.1 below on extraterritorial application.

826 On the obligation to protect necessarily being 'an obligation of conduct, not of result', see Altwickler 2018, 604. See also Lane 2018, 30.

827 On possible responses to foreign electoral interference see section 15 below.

828 While this chapter focuses primarily on electoral rights, the right of peoples to self-determination – a human right as well – is also concerned by these considerations. See on this section 9.2 above.

829 On why this is the case, see section 13 below.

830 Milanovic 2011, 8.

831 A possible exception is the case of absentee voters who happen to reside in the interfering state.

832 For the definition of foreign electoral interference relied on here see section 2.1.4 above.

the rights recognized in the present Covenant, [...].⁸³³ As clarified in 2004 by the ICJ, this must be read disjunctively.⁸³⁴ Consequently, the provision covers ‘both individuals present within a State’s territory and those outside that territory but subject to that State’s jurisdiction.’⁸³⁵ The extraterritorial application of the ICCPR is thus possible in principle, and the question becomes which individuals are subject to a state’s jurisdiction. Whether foreign electoral interference can establish a jurisdictional link between voters and the interfering state will be discussed below, after addressing a peculiarity of Article 25 first.

12.1.3.2. The personal scope of Article 25

Whereas the other provisions of the ICCPR use formulations like ‘everyone’ or ‘all persons’, Article 25 refers to ‘every citizen’.⁸³⁶ One could infer from this that states have obligations exclusively towards their own citizens and to no one else under this article, regardless of whether additional persons are within a state’s jurisdiction. A more convincing reading, however, is to interpret this choice of words simply as enfranchisement-related, meant to allow states to exclude non-citizens from political participation.⁸³⁷

Otherwise, under the former reading, states would be permitted to interfere with the electoral rights of non-citizens residing in their territory and, for example, prevent them from voting remotely in the elections of their state of citizenship. It would arguably be inconsistent if a state party to the ICCPR were expected to effectively guarantee electoral rights to its own citizens but, at the same time, were free to interfere with the electoral rights of the citizens of other state parties without any restrictions. Therefore, it is probably more appropriate to regard the clause ‘every citizen’ as having implications for suffrage but not for jurisdictional questions.

In short, Article 25 of the ICCPR does not require a state party to let non-citizens participate in *its own* political processes. However, Article 25 nonetheless forbids unlawful interference with the electoral rights of the citizens of other state parties when they participate in *their* elections – at

833 Emph add.

834 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, paras 107-111. In its reasoning, the court mainly referred to the object and purpose of the ICCPR, the constant practice of the Human Rights Committee, and the *travaux préparatoires* of the covenant (*ibid*, para 109).

835 *ibid*, para 108.

836 See also UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 3.

837 See Schabas 2019, 713-718, esp 713, para 34: ‘[t]he restriction to the “citizen” [...] stems from the concept of the modern nation State, namely, that only those individuals who are attached to “their” State by the special bond of citizenship may exercise political rights.’ On the requirement of universal suffrage see also section 10.3.2.3 above.

least if such foreign citizens are in the interfering state's territory or 'subject to its jurisdiction'.⁸³⁸

12.1.3.3. The effective control test

Despite extensive debate,⁸³⁹ the test to establish jurisdiction and thus extra-territorial application has so far remained 'effective control' (or related notions),⁸⁴⁰ as is also expressed in the works of the Human Rights Committee and other monitoring bodies.⁸⁴¹ Such control can be exercised either over areas or over persons.⁸⁴² In other words, the two basic models of extraterritorial application are the spatial one – 'jurisdiction as control over an area'⁸⁴³ – and the personal one – 'jurisdiction as authority and control over individuals'⁸⁴⁴.⁸⁴⁵

It seems clear that examples of foreign electoral interference do not involve control over an area.⁸⁴⁶ If anything, one could argue that certain forms of foreign electoral interference amount to control over persons – on which it

838 See section 12.1.3.1 above.

839 See for example the following monographs on the matter: Milanovic 2011; da Costa 2013; Raible 2020.

840 See Besson 2020, 1 (italics in the original): '[a] more or less consensual interpretation of that jurisdiction *qua* "effective control" has also consolidated in practice.' See also da Costa 2013, 301: '[t]he general idea is that when states exercise authority or control abroad, in relation to persons or areas, and regardless of the legality of the act, the application of human rights treaties will be triggered.'

841 See UN Human Rights Committee, General Comment no 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 10 (emph add): '[t]his means that a State party must respect and ensure the rights laid down in the Covenant to anyone *within the power or effective control* of that State Party, even if not situated within the territory of the State Party.' See also more recently UN Human Rights Committee, General Comment no 36 [124] Article 6: right to life (2019) UN Doc CCPR/C/GC/36, para 63. For a detailed analysis of the interpretation of the ICCPR's jurisdictional clause by monitoring bodies see da Costa 2013, 41–92, esp 89 (emph add): '[t]he output of the [Human Rights Committee] in its views, general comments and concluding observations suggests that despite the formula found in article 2(1) ICCPR, referring to both territory and jurisdiction, the Covenant can apply beyond the territory of states parties. For the Committee what is to be taken into account is the factual relationship between a victim of a violation of the ICCPR and a state party to it. Attention will be given to the *effective control exercised over persons or areas abroad*, and thus the Covenant will be applicable in cases where such a control is found to have been exercised.'

842 da Costa 2013, 301.

843 Milanovic 2011, 127.

844 Milanovic 2011, 173.

845 Milanovic 2011, 118–209. See also Besson 2012, esp 874–876. See also Wilde 2013, 640–649. For a helpful illustration see Besson 2012, 871. Usually, such categorizations and discussions of extraterritoriality rely on the case law of the ECtHR to a great extent. However, the practice of the Human Rights Committee shows the same dichotomy: da Costa 2013, 89.

846 There could be an exception if the interfering state happened to be an occupying power in the state in whose election it interferes.

should be noted that in the context of the right of peoples to self-determination, one would have to speak of *control over peoples*.⁸⁴⁷ However, even control in the sense of the personal model often seems to require some form of physical presence of state agents, as opposed to mere extraterritorial *effect*,⁸⁴⁸ at least in the context of the ECHR. In the case law of the European Court of Human Rights, even extraterritorial killings have not been found to trigger jurisdiction, unless the state in question exercises ‘some of the public powers normally to be exercised by a sovereign government’⁸⁴⁹ and apart from ‘isolated and specific acts involving an element of proximity’⁸⁵⁰.⁸⁵¹ In fact, the court has even taken the ongoing and reciprocal use of armed force as an argument *against* control over persons.⁸⁵² Accordingly, remote killings cannot trigger jurisdiction either.⁸⁵³ Under such a view, it is thus more than questionable that any example of foreign electoral interference could ever amount to sufficient

847 I am grateful to Professor Matthias Mahlmann for pointing this out.

848 On the distinction between extraterritorial effect and extraterritorial conduct see Alt-wicker 2018, 585.

849 *Al-Skeini and Others v the United Kingdom* [GC] App no 55721/07 ECHR 2011-IV 99, para 149. See also *ibid*: ‘[i]n these exceptional circumstances, the Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.’ The ECtHR recently reiterated and confirmed its findings: *Georgia v Russia (II)* [GC] App no 38263/08 (ECtHR, 21 January 2021), paras 113-124 and esp 141: ‘the Court considers that it is not in a position to develop its case-law beyond the understanding of the notion of “jurisdiction” as established to date.’

850 *Georgia v Russia (II)* [GC] App no 38263/08 (ECtHR, 21 January 2021), para 132. The court said this in relation to the following cases: *Issa and Others v Turkey* App no 31821/96 (ECtHR, 16 November 2004); *Isaak and Others v Turkey* (dec) App no 44587/98 (ECtHR, 28 September 2006); *Pad and Others v Turkey* (dec) App no 60167/00 (ECtHR, 28 June 2007); *Andreou v Turkey* (dec) App no 45653/99 (ECtHR, 3 June 2008); *Solomou and Others v Turkey* App no 36832/97 (ECtHR, 24 June 2008). For a more recent case from this category see *Carter v Russia* App no 20914/07 (ECtHR, 21 September 2021).

851 For commentary on the *Al-Skeini* case see Milanovic 2012. See also *ibid* on its relation to the earlier leading case: *Banković and Others v Belgium and Others* (dec) [GC] App no 52207/99 ECHR 2001-XII 333.

852 *Georgia v Russia (II)* [GC] App no 38263/08 (ECtHR, 21 January 2021), para 137: ‘the very reality of armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos not only means that there is no “effective control” over an area [...], but also excludes any form of “State agent authority and control” over individuals.’

853 See Milanovic 2012, 130 (italics in the original): ‘[w]hile the ability to kill is “authority and control” over the individual if the state has public powers, killing is not authority and control if the state is merely firing missiles from an aircraft. Under this reasoning, drone operations in Yemen or wherever would be just as excluded from the purview of human rights treaties as under *Bankovic*.’ See on this also Wilde 2013, 643, 646.

control over persons. Even compromising election infrastructure to disenfranchise voters or alter results, arguably the most intrusive example of foreign electoral interference, appears far less invasive and authoritative than killing. If taking someone's life does not amount to sufficient control over that person, how could taking someone's vote?

The Human Rights Committee, in turn, seems to have developed a somewhat broader understanding of effective control. While it has also mentioned troop presence as a pertinent example,⁸⁵⁴ its 36th general comment suggests that extraterritorial human rights obligations could be triggered as soon as there is a 'direct and reasonably foreseeable' impact on the enjoyment of a person's rights, at least in the context of the right to life.⁸⁵⁵ That is of course a lower threshold, which foreign electoral interference might meet more easily. It remains to be seen whether this formulation translates into concrete examples and case law, including beyond the right to life. If so, it could eventually pave the way for an extraterritorial application of Articles 1 and 25 of the ICCPR. If not, questions around extraterritorial application may continue to lead to results that can indeed 'seem unsatisfactory to the alleged victims'⁸⁵⁶.

To be sure, there is no lack of alternative suggestions for conceptualizing the extraterritorial application of human rights treaties. Milanovic has proposed a model in which only positive obligations are limited by the threshold criterion of jurisdiction but not negative obligations.⁸⁵⁷ Altwicker has suggested to rely on 'effective control over situations' instead of the higher threshold of effective control over areas or persons.⁸⁵⁸ Furthermore, some authors are of the opinion that positive extraterritorial obligations of states – due diligence duties to 'prevent, protect or remedy against harm'⁸⁵⁹ – should arise as

854 See UN Human Rights Committee, General Comment no 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 10 (emph add): '[t]his principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as *forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.*' See also UN Human Rights Committee, General Comment no 36 [124] Article 6: right to life (2019) UN Doc CCPR/C/GC/36, para 63 (emph add): '[t]his includes persons located outside any territory effectively controlled by the State whose right to life is nonetheless affected by *its military* or other activities in a direct and reasonably foreseeable manner [...].'

855 See UN Human Rights Committee, General Comment no 36 [124] Article 6: right to life (2019) UN Doc CCPR/C/GC/36, paras 22, 63. For commentary on the general comment see Joseph 2019.

856 *Georgia v Russia (II)* [GC] App no 38263/08 (ECtHR, 21 January 2021), para 140.

857 Milanovic 2011, 119, 209-222.

858 Altwicker 2018, 590-594.

859 Besson 2020, 2.

soon as states have effective control over actors that are *causing* human rights violations, even in the absence of effective control over the individuals *suffering* from human rights violations.⁸⁶⁰ Such suggestions may be convincing, and they certainly produce better results in terms of human rights protection. However, as of now, it is probably premature to rely on them as a matter of law.

These issues are in flux, and such a short portrayal does not capture the full picture.⁸⁶¹ Yet, it suffices to see that the issue of extraterritorial application indeed poses the biggest challenge to applying the ICCPR to foreign electoral interference,⁸⁶² albeit only as far as the obligations of the interfering state are concerned. As explained above,⁸⁶³ foreign electoral interference can still give rise to violations of the rights of voters if the target state fails to meet its obligation to protect. Lastly, such issues should not distract from the fact that there may still be a factual interference with human rights, even if there is no procedural avenue to have it confirmed.

12.2. Non-state actors and their human rights responsibilities

Whereas international human rights law contains specific rules for state obligations and jurisdiction, attribution in this context follows the lines of general international law.⁸⁶⁴ What was said above in the context of non-intervention is thus still valid here: the international law of state responsibility provides various avenues to attribute the conduct of non-state actors to a state and thereby hold that state accountable, provided that the respective criteria are met.⁸⁶⁵ A separate issue, however, is whether non-state actors are directly responsible for their impact on the enjoyment of human rights, independently of their ties to a state.⁸⁶⁶ While the focus of this study is on conduct with state involvement,⁸⁶⁷ it is nonetheless in order – for the sake of completeness – to briefly

860 See on this Besson 2020. Besson writes (*ibid*, 2, italics in the original) that such suggestions ‘conflate “control” over the human right-holder (*qua* condition for human rights jurisdiction and hence for a given human rights duty to arise in the first place) with “control” over a third party or another source of harm to the right-holder (*qua* condition for due diligence to arise and to qualify the human rights duty in existence).’

861 I am grateful to Angela Müller for discussing these matters with me.

862 See Sander 2019, 39–43; Ohlin 2017, 1585–1586; Schmitt 2018, 56–57; Hollis 2018, 42–43; Ohlin 2020, 114–116; Schmitt 2021, 756.

863 See section 12.1.2 above.

864 Altwicker 2018, 599.

865 See section 6.2 above.

866 See generally Nowak/Januszewski 2015; Clapham 2022.

867 See section 2.1 above.

consider the most important developments in regard to the human rights responsibilities of non-state actors.

Like extraterritorial application, this topic is in flux. International human rights law is traditionally state-centred,⁸⁶⁸ and states are still the main bearers of human rights obligations.⁸⁶⁹ However, among the different types of potential non-state duty bearers,⁸⁷⁰ businesses in particular have been at the centre of attention in recent years.⁸⁷¹ As mentioned earlier, businesses and other private entities can of course be involved in foreign electoral interference in manifold ways.⁸⁷² Consequently, their actions might adversely impact electoral rights and the right of peoples to self-determination.⁸⁷³ A major leap forward concerning the human rights responsibilities of businesses came in 2011, when the Human Rights Council endorsed⁸⁷⁴ the UN Guiding Principles on Business and Human Rights (UNGPs).⁸⁷⁵ In addition to reiterating states' existing

868 On the 'state-centredness' and 'transnationalization' of international human rights law see Altwicker 2018.

869 Nowak/Januszewski 2015, 141. For pertinent theoretical groundwork see Besson 2015.

870 On other non-state actors such as international organizations and armed non-state actors see Clapham 2022, 588-589 and 599-600, respectively.

871 For a starting point see Baumann-Pauly/Nolan 2016; Cismas/Macroy 2018. See also Clapham 2022, 595-599.

872 See section 6.2 above.

873 On 'the right to political life' and 'the right to self-determination' being among the rights adversely impacted by corporations, see the following report: UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie (2008) UN Doc A/HRC/8/5, esp para 52. See also the following addendum to the report: UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum, Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse (2008) UN Doc A/HRC/8/5/Add.2, esp para 23. For a previous mention of Article 25 of the ICCPR in the context of 'the human rights responsibilities of media and social media businesses' see Joseph 2018, 16, 20 (capitalization removed).

874 UN Human Rights Council, Res 17/4 Human rights and transnational corporations and other business enterprises (16 June 2011) UN Doc A/HRC/RES/17/4.

875 UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (2011) UN Doc A/HRC/17/31. On the genesis of the UNGP see Ruggie 2013.

obligation to protect,⁸⁷⁶ the UNGP also address the corporate responsibility to respect.⁸⁷⁷ In essence, companies should refrain from any infringement on human rights,⁸⁷⁸ conduct due diligence,⁸⁷⁹ and avoid complicity in human rights abuses by states or other non-state actors.⁸⁸⁰ This may very well apply to businesses such as banks, media enterprises, or tech companies that are somehow involved in foreign electoral interference by economic, informational, or technical means.

Although corporate responsibility to respect human rights comes in the form of soft law,⁸⁸¹ it is not without consequences. For example, 2011 also saw the revision of the OECD Guidelines for Multinational Enterprises.⁸⁸² They were amended by a chapter on human rights,⁸⁸³ reflecting the approach of the UNGP.⁸⁸⁴ While the guidelines and their expectations towards enterprises

876 UN Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (2011) UN Doc A/HRC/17/31, Annex, paras 1-10.

877 *ibid*, Annex, paras 11-24. For the third pillar, access to remedy, see *ibid*, paras 25-31.

878 *ibid*, Annex, para 11.

879 *ibid*, Annex, para 17.

880 *ibid*, Annex, commentary to para 17: ‘[q]uestions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties. Complicity has both non-legal and legal meanings. As a non-legal matter, business enterprises may be perceived as being “complicit” in the acts of another party where, for example, they are seen to benefit from an abuse committed by that party.’

881 On the ‘two-hard-one-soft-pillar structure’ of the UNGP see Cismas/Macropy 2018, 228-231.

882 OECD Guidelines for Multinational Enterprises (2011).

883 See *ibid*, 31: ‘States have the duty to protect human rights. Enterprises should, within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate as well as relevant domestic laws and regulations: 1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. 2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur. 3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts. 4. Have a policy commitment to respect human rights. 5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts. 6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.’

884 Wouters/Chané 2015, 244.

as such are generally non-binding,⁸⁸⁵ they require adhering states to set up National Contact Points (NCPs), which, inter alia, serve as a forum to address and resolve disputes related to the guidelines.⁸⁸⁶ While NCPs have come to be among the ‘most prominent non-judicial grievance mechanisms’⁸⁸⁷ concerning enterprises and their human rights responsibilities, the field is evolving and new avenues might open up. There are ongoing efforts for a new treaty on business and human rights,⁸⁸⁸ and the proposal for an eventual world court of human rights includes a draft statute that would allow non-state actors to recognize the jurisdiction of the court.⁸⁸⁹ Thus, what is largely soft law today might become hard law in the near or distant future.

Conclusion of Part IV

Foreign electoral interference is a human rights issue. Not only does it affect the right of peoples to self-determination; citizens’ electoral rights are concerned, too. The international law of electoral rights is best encapsulated by Article 25(b) of the ICCPR. While various international legal instruments protect electoral rights, the ICCPR provides the most comprehensive binding provision in terms of material, personal, and geographical scope. That said, the regional human rights mechanisms share the central substantive demand of Article 25 of the ICCPR: elections need to be, and remain, free.

When it comes to applying the international law of electoral rights to foreign electoral interference, this central postulate opens the door to a harmonious interpretation yet again. The international law of non-intervention holds that, in regard to certain political matters, states must be able to decide *freely*. The international law of self-determination requires that peoples *freely* determine their political status. The international law of electoral rights in turn demands that citizens *freely* choose their representatives. All three concepts thus protect *free political decision-making* in elections, and the interpretation of this

885 Wouters/Chané 2015, 243.

886 OECD Guidelines for Multinational Enterprises (2011), 68.

887 van Putten 2018, 54.

888 For a starting point see De Schutter 2015. For extensive ‘theoretical and practical considerations for a UN treaty’ see Letnar Čeranič/Carrillo-Santarelli 2018 (capitalization removed). For more recent updates see the work of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

889 On this prospect – the ‘most far-reaching and radical option of holding non-state actors accountable’ – see Nowak/Januszewski 2015, 160–161. See generally Nowak 2018. See also Articles 4(1) and 51 of the draft statute.

requirement arguably yields parallel results. This does not mean that the results of earlier legal assessments are merely imported but rather that the three concepts all independently protect a common ideal and mutually reinforce each other.

Specifically, examples of economic and informational means of interference are impermissible under the international law of electoral rights in certain qualified cases, namely if they are in *contravention of human rights-compliant domestic electoral laws* or if they are *disproportionately intense*. As regards technical means of interference, auxiliary technical means as such are not impermissible. By contrast, *compromising election infrastructure* – to prevent members of the electorate from casting their ballot or votes from being accurately captured, counted, and communicated – is unlawful. In such impermissible cases, foreign interference in elections also constitutes an undue interference with voters' and candidates' electoral rights.

Significant complexity is added by questions related to the extraterritorial application of human rights treaties. However, this only concerns the human rights obligations of the *interfering state*. Foreign electoral interference may not meet the threshold criterion of jurisdiction and hence may not trigger extraterritorial human rights obligations of the interfering state. However, electoral interference by a foreign state can still trigger the *target state's obligation to protect* the electoral rights of the citizens within its territory or jurisdiction. Furthermore, as regards the involvement of non-state actors, international human rights law contains additional soft law responsibilities, at least for businesses. These duties do not replace general international legal rules of attribution but rather provide additional avenues for holding actors involved in foreign electoral interference accountable, be it in actual courts or in the court of public opinion.

At the end of the day, both a state and a people are still sums of individuals. Elections represent a moment in which the aggregated choices of individuals become the collective choice of an electorate and, ultimately, of a state. Nevertheless, those who effectively form and express a political opinion are individual persons. It is thus important not to focus exclusively on inter-state relations and not to lose sight of how foreign electoral interference impacts the rights of every single voter. Among all the legal issues raised by foreign electoral interference, human rights violations are what should concern us most.

Part V

Evaluation:

***Beyond the Legal State
of Affairs***

13. Where the law stands: lessons from the legal assessment

The previous chapters of this study have directed attention to three legal concepts: non-intervention, self-determination, and electoral rights. Their specific implications for examples of foreign electoral interference are treated in more detail in the respective chapters. However, there are some general lessons to be learnt from the legal assessment.

13.1. The protection of political autonomy as a common objective of the three concepts

What led to somewhat repetitive considerations and conclusions resembling each other throughout the legal assessment is itself a first finding worth pointing out: the protection of free political decision-making being a common objective of the three concepts analysed. When applied to foreign electoral interference, it becomes apparent that the prohibition of intervention, the right of peoples to self-determination, and citizens' electoral rights all aim at guaranteeing the freedom of the electorate's choices. The legal assessment therefore unveils a common denominator that is perhaps best captured by the notion of political autonomy.⁸⁹⁰ When it comes to the international legal protection of that political autonomy in the context of elections, non-intervention, self-determination, and electoral rights can be seen as three sides of the same prism.

To be sure, non-intervention, self-determination, and electoral rights are distinct entitlements that belong to different categories of rights-holders. Non-intervention protects the sovereign equality of *states*,⁸⁹¹ self-determination is a right of *peoples*, and electoral rights are held by *individuals*. Yet all three concepts have an evident political dimension and can be applied to foreign electoral interference. While the respective wordings have already received considerable attention, it is worth comparing them one more time to show the textual basis of the commonality argued for here. For the prohibition of

890 On the concept of autonomy, its origin, and its meaning – roughly self-government – see Christman 2013.

891 See section 4.2.1 above.

intervention, the – by now familiar – 1986 formula of the International Court of Justice provides the most authoritative source:⁸⁹²

[The Court] notes that, in view of the generally accepted formulations, the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide *freely*. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain *free* ones.

With respect to the right of peoples to self-determination, the common Article 1(1) of the ICCPR and the ICESCR offers a succinct formulation:⁸⁹³

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.

As regards electoral rights, Article 25 of the ICCPR summarizes the obligations states need to meet:⁸⁹⁴

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through *freely* chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the *free* expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

All three formulations essentially employ the same notion by insisting on ‘free’ political decision-making. A number of further human rights instruments do so, too.⁸⁹⁵ Moreover, the term ‘coercion’ not only functions as the opposite of free choices in the context of non-intervention,⁸⁹⁶ the Human Rights Committee used it to contrast the notion of free elections in the context of Article 25 of

892 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205 (emph add).

893 Emph add.

894 Emph add.

895 See footnote 731 above.

896 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205. See also section 4.3.2 above.

the ICCPR as well.⁸⁹⁷ There exists thus a textual continuity between the legal concepts treated in this study.

However, the continuity between the three concepts is not limited to textual aspects. While non-intervention and electoral rights may not appear to be closely related at first sight, the ostensible gap between them is easily bridged by self-determination. Both non-intervention and electoral rights are closely associated with self-determination, and while non-intervention shares a mention with self-determination in the Friendly Relations Declaration, electoral rights share a common source with self-determination in the ICCPR.⁸⁹⁸ Although the right to self-determination may be somewhat elusive in and of itself, it plays an important role in articulating a central normative demand of the international legal order that is also expressed by both non-intervention and electoral rights.

A consequence of these continuities is that the results of the respective legal assessments yield shared results. It would of course be possible and indeed necessary to interpret the requirement of ‘free’ political decision-making differently in different contexts if there were an indication to do so. Yet that is not the case. To the contrary, the considerations in the context of non-intervention were upheld and reinforced in the context of self-determination and electoral rights. A systematic – or contextual – interpretation⁸⁹⁹ thus leads to shared but self-standing conclusions that mutually reinforce each other. The specific conclusions drawn will be discussed next.

13.2. Three general criteria of impermissibility of foreign electoral interference

It is not the aim of this study to make final judgments on real cases but rather to identify criteria of general validity.⁹⁰⁰ Three such criteria have repeatedly proven helpful throughout the legal assessment: the contravention of human rights-compliant domestic electoral laws, disproportionate intensity, and the manipulation of voting procedures.

The first two of these criteria are relative, insofar as they depend on conditions in the target state. They concern the opinion-*forming* process and

897 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19. See also *ibid*, para 11. See also footnote 800 above and the accompanying text.

898 See on this section 8.1.3 above. See also footnotes 600–604 and 618 above as well as the accompanying text.

899 See on this method of interpreting (international) law Ammann 2020, 202–208.

900 See section 3.4 above.

bear relevance to economic and informational means of interference. The third criterion is absolute and therefore equally valid for all target states. It pertains to the opinion-*collecting* process and concerns a technical means of interference: compromising election infrastructure.

While the development of these criteria is best visible within the legal assessment,⁹⁰¹ the following sections summarize their essence. Of course, any final determinations on the permissibility of specific instances need to be made on a case-by-case basis. Yet these criteria can serve as a roadmap for reaching final conclusions.

13.2.1. Contravention of human rights-compliant domestic electoral laws

A first general criterion of impermissibility of foreign electoral interference is the contravention of human rights-compliant domestic electoral laws that regulate the opinion-forming process in the target state.⁹⁰² As long as domestic electoral laws comply with international human rights law, they need to be respected by foreign states in their election-related conduct. Building on the work of Lori Fisler Damrosch,⁹⁰³ this suggestion has proven convincing throughout the legal assessment. International law may perhaps not ban foreign state-linked actors completely from contributing to the opinion-forming process preceding an election, yet these actors should at least be expected to abide by the same rules as domestic actors. Thereby, international law could compensate for a lack of jurisdictional reach of domestic electoral laws.⁹⁰⁴

Both the general rule that domestic electoral laws matter and the qualification regarding their human rights conformity find support in the context of all three legal concepts surveyed. The prohibition of intervention protects ‘the choice of a political [...] system’.⁹⁰⁵ However, applicable international human rights law reduces the *domaine réservé*⁹⁰⁶ to the extent that political systems incompatible with human rights are not protected by non-intervention.⁹⁰⁷ Similarly, the right of peoples to self-determination includes the right of a people ‘to adopt the legal system it desires, whether of constitutional law,

901 See sections 5.2, 5.3, 5.4, 8.2, 8.3, 11.1, and 11.2 above.

902 This argument is first developed in section 5.2 above.

903 See Damrosch 1989. For detailed references to Damrosch’s work see section 5.2 above. See also footnote 916 below.

904 See footnote 355 above.

905 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para 205. See also footnote 348 above.

906 See footnote 289 above.

907 See footnote 351 above and the accompanying text.

private international law, administrative law or any other form of law, without any limitation other than respect for human rights'.⁹⁰⁸ Furthermore, in the context of electoral rights, the Human Rights Committee emphasizes the importance of 'a framework of laws guaranteeing the effective exercise of voting rights'.⁹⁰⁹ Yet, not only must campaign finance laws be 'reasonable'⁹¹⁰ and 'fair'⁹¹¹, free elections also depend on 'the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant'.⁹¹² Hence, domestic electoral laws represent a limit to foreign electoral interference, but international human rights law is their counter-limit.

Examples of relevant domestic electoral laws include – but are not limited to – campaign finance laws establishing upper limits for donations, bans on foreign donations, campaign finance transparency laws,⁹¹³ defamation laws, privacy laws, bans on hate speech, and laws establishing silence periods.⁹¹⁴ Restrictions on speech, in particular, can easily become problematic with respect to their conformity with the freedom of expression.⁹¹⁵ Any such case will thus require close attention as to whether or not the laws in question are in fact compliant with international human rights law and therefore binding on foreign states.

Generally, however, if foreign states influence elections in a way domestic actors are not allowed to, this has the potential to create an injustice that cannot be easily remedied. The fact that foreign states may be in a position to evade consequences for their actions due to a lack of jurisdictional reach by the authorities of the target state leaves the target state and its electorate without

908 UN, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments: Study prepared by Aureliu Cristescu, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1981) UN Doc E/CN.4/SUB.2/404/REV.1, 51, para 319. See also footnotes 640–643 above and the accompanying text.

909 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19. See also footnote 789 above and the accompanying text.

910 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19. See also footnote 790 above and the accompanying text.

911 Schabas 2019, 712, para 29. See also footnotes 791–792 above and the accompanying text.

912 UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 25. See also footnote 793 above and the accompanying text.

913 On domestic electoral laws relevant to financial support as an example of economic means of interference see section 5.2.1 above.

914 On domestic electoral laws relevant to informational means of interference see sections 5.3.1, 5.3.2, and 5.3.3 above.

915 See on this footnotes 407–409 above and the accompanying text as well as section 15.2.1.2 below.

means of resistance. This represents an impediment to a polity's political autonomy to the extent that the laws it has legitimately chosen for itself are not respected. In other words, the ability of a polity and its members to be self-governing is unduly restricted.

Once a state chooses as its political system a set of electoral laws that are in compliance with internationally protected human rights, these rules should bind everyone equally. If they do not, the freedom of elections might be in jeopardy.

13.2.2. Disproportionate intensity: scope, susceptibility, and rationale

A second general criterion of impermissibility of foreign electoral interference is disproportionate intensity. This relative test involves three parameters: scope, susceptibility, and rationale.⁹¹⁶ Firstly, interference can become overwhelming by virtue of its sheer scale. Secondly, the intensity of interference also depends on how robust or vulnerable the conditions in the target state are. Thirdly, there may at times be particularly good or particularly bad reasons for interference, which can factor into the assessment as well.

These three factors go hand in hand. If the political conditions in the target state are particularly susceptible to foreign electoral interference, even a modestly scaled example of foreign electoral interference might turn out to be impermissible due to its potential to overwhelm the process of will formation. In contrast, in the presence of more resilient political conditions, even very sophisticated and large-scale examples of foreign electoral interference might leave the freedom of political decision-making intact. Furthermore, examples of foreign electoral interference may come with a specific rationale that goes beyond the mere exertion of political influence. If so, it can make a difference whether certain conduct is prohibited by international law, for example, or whether it is perhaps even protected by international legal rules. Good reasons for interference can thus increase the level of intensity target states are required to tolerate, while bad reasons can lower it.⁹¹⁷ This three-fold relativity test can provide answers on the permissibility of foreign electoral interference in the absence of pertinent domestic electoral laws.

The criterion of disproportionate intensity, too, surfaced repeatedly in the legal assessment. The fact that distinguishing between coercion and free

916 This argument is first developed in section 5.2 above. It draws on Damrosch 1989, too, albeit a bit less closely than the first criterion mentioned above. For detailed references to Damrosch's work see section 5.2.

917 One example in which this is relevant concerns candidates targeted by sanctions for human rights abuses – certainly a comparatively good rationale. See section 5.2.2 above, especially footnote 381 and the accompanying text.

decision-making is not a black-or-white question but rather a matter of scale becomes particularly visible in the context of non-intervention,⁹¹⁸ where coercion is understood as one state overly constraining the autonomy of another.⁹¹⁹ However, when the UN General Assembly stressed that interference ‘in the free development of national electoral processes, *in particular in the developing countries*’,⁹²⁰ is impermissible, it did so in the context not just of non-intervention but also of self-determination.⁹²¹ The qualification regarding ‘developing countries’ made by the General Assembly can be read as an argument for the relevance of unequal power structures for the permissibility of foreign electoral interference.⁹²² Moreover, the Human Rights Committee repeatedly relied on the notion of ‘distortion’ when it discussed the requirement of free elections in the context of electoral rights, suggesting that there ought to be a certain balance in the electoral process.⁹²³ There is thus considerable indication that the proportion of scope to susceptibility matters in the context of all three legal concepts, non-intervention, self-determination, and electoral rights.

The specific meaning of scope and susceptibility is context-sensitive. With respect to economic means of interference, scope can be determined by the sums of money involved and by their timing, for example. Susceptibility to economic means of interference may depend on factors such as the existence of a system of public funding of campaigns, the availability of opportunities for candidates to present their programmes, other means of levelling out inequalities of resources, a general scarcity of resources, or economic dependence on the interfering state. Presumably, the more important the role money is allowed to play in the electoral processes of the target state, the more potent economic means of interference will be.⁹²⁴

918 See footnotes 309–312 and 356–365 above as well as the accompanying text.

919 See footnotes 304–308 above and the accompanying text.

920 UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147, para 3 (emph add). See also footnote 365 above and the accompanying text.

921 The General Assembly held that such forms of interference ‘violate the spirit and letter of the principles established in the Charter and in the [Friendly Relations Declaration]’. The Friendly Relations Declaration (UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV)) of course mentions both the prohibition of intervention and the right of peoples to self-determination. Furthermore, see the references to self-determination in paras 1 and 2 of UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147.

922 See footnotes 644–645 above and the accompanying text.

923 See UN Human Rights Committee, General Comment no 25 [57] (1996) UN Doc CCPR/C/21/Rev.1/Add.7, para 19. See also footnote 795 above and the accompanying text.

924 See on these factors sections 5.2.1, 5.2.2, and 5.2.3 above. On possible responses to economic means of foreign electoral interference see section 15.2.1.1 below.

As regards informational means of interference, scope involves factors such as timing, the scale of distribution, the influence of the sender, the credibility of the information disseminated, and whether convincing imitation of trusted sources is involved. Susceptibility is chiefly determined by the general availability of reliable sources of information voters can resort to,⁹²⁵ be it journalistic media,⁹²⁶ fact-checking initiatives, or public broadcasters committed to neutrality.⁹²⁷ A lack of context, correction, and counterspeech will presumably increase the potency of informational means of interference.⁹²⁸

In short, the more comprehensive, persistent, and sophisticated the efforts to influence the opinion-forming process are and the worse the target state is prepared for them, the more plausible it will be to argue for disproportionate intensity. As a rule, however, disproportionate intensity should not be accepted prematurely, given that it means an electorate is not expected to be capable of independent decision-making anymore. If one trusts in voters' capability to cast their ballot based on rational choices and careful reflection of the information they receive, this is not a low threshold.

Many of today's electoral democracies are probably closer to a certain 'epistemic robustness'⁹²⁹ than to being 'epistemically isolated'^{930, 931} Yet, every democracy may have its breaking point. Elections – as well as democratic theory in general – are built on the premise that voters are capable of making well-informed choices⁹³² and can thus be trusted with the ultimate decision-making power in important matters. If voters' capabilities are to be taken seriously, it would be inconsistent to assume that they are easily coerced into voting in a certain way. Voters 'are not fools';⁹³³ neither do they change their opinion with every foreign wind.

925 It is of course ultimately up to voters what information they decide to consult. See section 15.4 below.

926 On the role of reliable journalistic media see section 15.3 below.

927 On possible responses to informational means of foreign electoral interference see section 15.2.1.2 below.

928 On these factors see sections 5.3.1, 5.3.2, and 5.3.3 above.

929 Tenove/Buffie/McKay/Moscrop 2018, 11. See also footnote 431 above and the accompanying text.

930 Ohlin 2017, 1588. See also footnote 420 above and the accompanying text.

931 On the epistemic goals of deliberation see section 14.1.3.4 below.

932 McAllister 2018, 12. On this being a premise of this study see section 3.4 above.

933 Key 1966, 7. This quote is also used by McAllister 2018, 13. The line of argumentation employed here would likely be classified as 'optimistic' with respect to its assumptions about voters' political competency – on the 'optimistic view' and empirical challenges to it, see McAllister 2018, esp 13. On the discussion and the evidence on whether there is a rational public see also Bølstad 2018.

Nevertheless, there are certain limits to what individuals should have to endure when it comes to assuming their democratic responsibility. Making informed choices in an election should not be a full-time job. If foreign electoral interference leads to information costs⁹³⁴ too high to bear, voters should not be the ones to carry this burden. The dilemma at play here is perhaps best expressed in the following words by journalist Maria Ressa: ‘[i]f you say a lie ten times, truth can catch up; but if you say a lie a million times, that becomes a truth.’⁹³⁵

A resilient democracy can be expected to resist even some large-scale influence operations targeting its opinion-forming processes. However, believing its elections to be immune to foreign interference would be wrong for any state.

13.2.3. Manipulation of voting procedures

A third general criterion of impermissibility of foreign electoral interference is the manipulation of voting procedures. This does not concern attempts to influence the opinion-*forming* process but rather interference with the opinion-*collecting* process. It pertains to technical means of interference rather than to economic or informational ones. Furthermore, this criterion is absolute to the extent that it does not depend on political conditions in the target state. Manipulating voting procedures is always impermissible under international law. Non-intervention, self-determination, and electoral rights all require free political decision-making.⁹³⁶ This requirement cannot be met if the mechanism allowing voters to express their opinion is compromised. Election results must represent the will voters intended⁹³⁷ to express. Any operation by foreign states that jeopardizes this representativeness is prohibited under the international law of non-intervention, self-determination, and electoral rights.

A manipulation of voting procedures can notably be achieved by compromising election infrastructure and thereby preventing members of the electorate from voting or having their vote accurately captured, counted, and communicated.⁹³⁸ Interference of this sort not only aims at the heart of electoral democracy, it also goes to the core of the legal concepts discussed. To begin with, in the context of *non-intervention*, it constitutes a clear example

934 On information costs – the investment voters need to make to acquire information – see footnote 377 above.

935 Today in Focus, Maria Ressa and an attack on the free press in the Philippines (The Guardian, 6 July 2020), at 16:48. For a similar statement by Ressa see also the following interview: Is Big Tech the New Empire? – Maria Ressa and Christopher Wylie (Al Jazeera, 27 March 2020), at 24:46.

936 See section 13.1 above.

937 On the reasons for this choice of words see footnote 209 above.

938 See section 2.2.3.3 above.

of coercion, given that it leaves voters with no means of resistance.⁹³⁹ Furthermore, as regards *self-determination*, not only does it prevent a people from freely determining its political status, but a factual disenfranchisement⁹⁴⁰ of parts of the electorate can even be seen as an alteration of the shape of the ‘self’ in self-determination.⁹⁴¹ Similarly, when it comes to *electoral rights*, the manipulation of voting procedures does not only affect the entitlements to free elections or universal and equal suffrage, it arguably prevents voters and candidates from enjoying any aspect of electoral rights.⁹⁴² In its perhaps most explicit formulation, international law requires that elections provide a ‘free expression of the will of the electors’ and of no one else.⁹⁴³

Determining the will of the people is the core function of an election, and elections are the primary mechanism to let an electorate express its opinion. Any distortion of this process has potentially far-reaching consequences and may deprive election results, and anyone appointed on their basis, of democratic legitimacy.⁹⁴⁴ If the results of an election are not based on the will of voters but rather the consequence of technical manipulation by foreign states, this is paternalism rather than autonomy.⁹⁴⁵ Any attempt to achieve this is in breach of international law.⁹⁴⁶

13.3. Significance of these findings

The legal assessment undertaken in this study offers neither more nor less than a judgment on which scenarios of foreign electoral interference can be seen as impermissible under the international law of non-intervention, self-determination, and electoral rights.

939 See section 5.4.2 above. On such manipulation being a form of *vis absoluta* as opposed to *vis compulsiva* see especially footnote 446 and the accompanying text.

940 On the terms ‘digital disenfranchisement’ and ‘virtual disenfranchisement’ in the context of foreign electoral interference see footnote 207 above and the accompanying text.

941 See section 8.3 above.

942 See section 11.2 above.

943 Article 25(b) of the ICCPR (emph add). See also footnote 808 above and the accompanying text.

944 On questions of legitimacy see section 14.2.3 below.

945 On ‘nonintervention, paternalism and neutrality’ and their relation to the autonomy of states see Beitz 1999, 83–92 (capitalization removed).

946 Or, to say it in the words of the UN General Assembly, in such cases, ‘any extraneous activities [...] that intend to sway the results of [national electoral] processes, violate the spirit and letter of the principles established in the [UN] Charter and in the [Friendly Relations Declaration].’ UNGA Res 44/147 (15 December 1989) UN Doc A/RES/44/147, para 3.

13.3.1. Nothing less than a prohibition of qualified conduct in international law

When applied to elections, the three concepts discussed in this study have the common objective of protecting free political decision-making. This freedom is in jeopardy if at least one of three criteria is met: the conduct in question is in contravention of human rights-compliant domestic electoral laws, it is disproportionately intense, or it includes a manipulation of voting procedures. The unlikely case of a valid justification aside, such examples of foreign electoral interference are impermissible under international law. In fact, they constitute a violation of a norm of *erga omnes* and *ius cogens* character: the right of peoples to self-determination.⁹⁴⁷

If the legal assessment undertaken in this study is correct, the election-related requirements of non-intervention, self-determination, and electoral rights need to be interpreted harmoniously.⁹⁴⁸ As a consequence, the degree of freedom of political decision-making – or the degree of political autonomy – required is the same for all three concepts. If certain conduct amounts to coercion in the context of non-intervention or if it runs counter to the requirement of free elections inherent to electoral rights, that conduct will also reach the threshold for interference with the free determination of a people's political status as required by the international law of self-determination. The three concepts, to the extent that they intersect and protect free decision-making within elections, are mutually reinforcing.

Taken together, the three criteria of impermissibility identified thus represent nothing less than a prohibition of certain forms of foreign electoral interference binding on all states.

13.3.2. Nothing more than a prohibition of qualified conduct in international law

While there is a prohibition of qualified forms of foreign electoral interference under international law, its criteria might not be met by many concrete cases. Foreign electoral interference might often not contravene domestic electoral laws, nor be disproportionately intense, nor include a manipulation of voting procedures. Various examples, while politically significant, may stay below the threshold for violating the legal rules discussed in this study. However, this does not mean that they violate no norm of international law, nor that they are desirable from non-legal perspectives. The legal assessment has been limited

947 See footnotes 545 and 546 above, respectively.

948 See section 13.1 above.

to three specific norms of international law that are particularly important, in general as well as specifically for elections. Yet there are further, more specialized norms of international law that might very well be violated by the conduct in question. Possible examples include specific legal instruments that regulate international broadcasting, economic cooperation, or cyber operations.⁹⁴⁹

Moreover, even if an example of foreign electoral interference violates neither the international legal rules discussed in this study nor any other legal norm, it is not necessarily a good thing. Just because something is legal, it is not necessarily desirable. Even if permissible, foreign electoral interference may still be problematic from political, philosophical, or other perspectives. The threshold incorporated into international law as identified in this study is not a low one. It is most pointedly summarized by the notion of coercion,⁹⁵⁰ a term already used by John Stuart Mill in an early work on non-intervention.⁹⁵¹ The criteria of impermissibility identified are neither numerous nor easily satisfied. Yet, there may very well be room for criticism of international law as it stands, and one might perhaps want to argue for better protection against foreign electoral interference than it currently provides. For example, there may be good reasons to argue that a healthy opinion-forming process requires an equal distribution of financial resources between electoral campaigns or the absence of false information circulating in the run-up to an election. At present, however, such requirements are not built into the international law of non-intervention, self-determination, and electoral rights.

The foregoing legal assessment, while identifying *nothing less* than a prohibition of certain forms of foreign electoral interference under international law, has at the same time offered *nothing more* than an analysis of the current legal state of affairs. It is thus time to step back from purely legal standards and evaluate the results from a broader perspective.

14. Taking a step back: wider implications for democracy and the international order

Separate from the question of whether foreign electoral interference is permissible under international law is the question of whether there are non-legal reasons to condemn foreign electoral interference. If so, it could be desirable

949 On the scope of the legal assessment and the exclusion of such norms see section 3.2 above.

950 On 'coercion' being a terminological commonality across two of the three legal concepts see footnotes 896-897 above and the accompanying text.

951 See footnote 35 above and the accompanying text.

to eventually work towards appropriate regulation or at least towards mitigation of its effects through other measures. Put differently: why does foreign electoral interference actually matter? While this is primarily a legal study and there are more philosophical implications than can be covered here, the following pages nonetheless attempt to grasp the central aspects of foreign electoral interference as a matter of democratic theory. After all, international law does not operate in a vacuum, nor is it set in stone.

14.1. Foreign electoral interference and democratic theory

In staking out the theoretical terrain relevant to the matter at hand, the following discussion is necessarily selective. It assesses foreign electoral interference from the viewpoint of three distinct concepts: participation, representation, and deliberation. The section on participation will discuss who may legitimately take part in electoral processes in general. The section on representation will address potential problems arising from interference in the opinion-*collecting* process. Lastly, the section on deliberation will ask whether interference in the opinion-*forming* process is compatible with the standards of good deliberation.

14.1.1. Universalism versus communitarianism: the demands of participation

Before distinguishing between different types of foreign electoral interference, a general question needs to be addressed: who may legitimately participate in the political processes that constitute democracy in the first place? The answer will be different depending on who is asked. In particular, it will depend on whether one thinks that engagement in politics is of instrumental or rather constitutive value,⁹⁵² on whether one defends a liberal or rather a republican model of democracy,⁹⁵³ and, perhaps most decisively, on whether one holds

952 See on this Michelman 1989, 451-452.

953 On this related dichotomy see Habermas 1994, 1: '[a]ccording to the "liberal" or Lockean view, the democratic process accomplishes the task of programming the government in the interest of society, where the government is represented as an apparatus of public administration, and society as a market-structured network of interactions among private persons. Here politics (in the sense of the citizens' political will-formation) has the function of bundling together and pushing private interests against a government apparatus specializing in the administrative employment of political power for collective goals. On the "republican" view, however, politics involves more than this mediating function; it is rather constitutive for the processes of society as a whole. "Politics" is conceived as the reflective form of substantial ethical life, namely as the medium in which the members of somehow solitary communities become aware of their dependence on one another and, acting with full deliberation as citizens, further shape and

universalist or rather communitarian views.⁹⁵⁴ It is probably fair to assume that communitarians will be more categorically opposed to foreign electoral interference than universalists.

If intrinsic normative value is attributed to a community,⁹⁵⁵ in this case the one constituted in a state, any form of outside participation can easily become problematic. An illustrative example is the work of Benjamin R. Barber, a proponent of communitarian democracy.⁹⁵⁶ Barber advocates for a conception of ‘strong democracy’, defined as ‘politics in the participatory mode where conflict is resolved in the absence of an independent ground through a participatory process of ongoing, proximate self-legislation and the creation of a political community capable of transforming dependent, private individuals into free citizens and partial and private interests into public goods.’⁹⁵⁷ As can already be inferred from the use of the term ‘proximate’, Barber has a distinct vision of strong democratic communities: they need to consist of ‘citizens’⁹⁵⁸. ‘Only a citizen can be a political actor’, Barber writes.⁹⁵⁹ In the education of individuals to citizens lies the primary function of political participation.⁹⁶⁰ A strong democratic community ‘owes the character of its existence to what its constituent members have in common’.⁹⁶¹ It ‘cannot remain an association of strangers because its activities transform men and their interests.’⁹⁶² In a similar vein, John Dewey wrote that: ‘[r]egarded as an idea, democracy is not an alternative to other principles of associated life. It is the idea of community life itself.’⁹⁶³ Without going into further detail on these and other authors and their ideas, it becomes clear how quickly such views collide with foreign electoral interference.⁹⁶⁴ From a communitarian perspective, the

develop existing relations of reciprocal recognition into an association of free and equal consociates under law.’ See also the German version of this text: Habermas 2009.

954 See on this Zürn/de Wilde 2016, 290-291.

955 This is the distinguishing factor between universalism and contextualism. See Zürn/de Wilde 2016, 290.

956 On Barber being viewed as a communitarian theorist see Katz 1997, 90-99. See also Schmitt 2014a, 24-27.

957 Barber 2003, 132.

958 A citizen is someone who ‘has learned how to make civic judgments and who can evaluate goods in public terms.’ Barber 2003, 158.

959 Barber 2003, 126 (italics removed).

960 Barber 2003, 157-158.

961 Barber 2003, 232.

962 Barber 2003, 232.

963 Dewey 2012, 122. Barber refers to this quote as well: Barber 2003, 119.

964 This is not to say that all forms of outside influence are *equally* problematic from a communitarian perspective. Here, too, it is certainly relevant *how* outsiders interfere.

question of legitimate outside participation thus appears relatively simple. However, communitarianism is a very particular strand of theory that this study does not aim to defend.

By contrast, the question of legitimate political participation becomes significantly more complicated if we take the universal value of human dignity as the principal reason why individuals ought to have a say in who governs them.⁹⁶⁵ Which we arguably should. Focusing solely on communities as a whole would risk overlooking the normative position of those who ultimately form and express opinions in a democracy: individual human persons. Human dignity possesses a political dimension that ‘demands that human beings are the subjects of political life’.⁹⁶⁶ As a structural principle of democratic constitutional order,⁹⁶⁷ it requires that individuals be given a ‘meaningful share in the process of political self-determination’⁹⁶⁸. Enjoying some form of *genuine and effective participation* in a democracy is one of the demands that ultimately ensue from human dignity.⁹⁶⁹ However, not every behaviour by foreign powers is necessarily an impediment to the fulfilment of this demand. In contrast to what a communitarian view suggests, outside participation does not seem inherently problematic here. Rather, foreign interference only becomes a problem if it adversely affects the participation of members of the polity targeted.

Nevertheless, all forms of external interference seem to need justification under a communitarian view, albeit perhaps to a different degree.

965 On human dignity being ‘regarded as a foundation of democracy and a normative yardstick for the structure of the state’ see Mahlmann 2012, 388. It is worth noting that John Lewis wrote of ‘ensuring dignity and democracy’ when discussing the Voting Rights Act of 1965; Lewis 2005. Lewis also referred to human dignity in an essay published posthumously: John Lewis, *Together, You Can Redeem the Soul of Our Nation* (The New York Times, 30 July 2020).

966 Mahlmann 2012, 393.

967 See Mahlmann 2008, 234–237.

968 Mahlmann 2012, 393.

969 Mahlmann 2008, 234–235. See also the 1956 judgment by the German Federal Constitutional Court cited by Mahlmann – BVerfGE 5, 85 (204–205): ‘In der freiheitlichen Demokratie ist die Würde des Menschen der oberste Wert. Sie ist unantastbar, vom Staate zu achten und zu schützen. Der Mensch ist danach eine mit der Fähigkeit zu eigenverantwortlicher Lebensgestaltung begabte “Persönlichkeit”. Sein Verhalten und sein Denken können daher durch seine Klassenlage nicht eindeutig determiniert sein. Er wird vielmehr als fähig angesehen, und es wird ihm demgemäß abgefordert, seine Interessen und Ideen mit denen der anderen auszugleichen. Um seiner Würde willen muß ihm eine möglichst weitgehende Entfaltung seiner Persönlichkeit gesichert werden. Für den politisch-sozialen Bereich bedeutet das, daß es nicht genügt, wenn eine Obrigkeit sich bemüht, noch so gut für das Wohl von “Untertanen” zu sorgen; der Einzelne soll vielmehr in möglichst weitem Umfange verantwortlich auch an den Entscheidungen für die Gesamtheit mitwirken.’ For a brief collection of relevant jurisprudence by the German Federal Constitutional Court see Mahlmann 2012, 379, fn 53.

Such is the case if the procedures allowing them to exert meaningful political influence are corrupted. From a universalist view,⁹⁷⁰ where the only normative starting points are the individual and humanity as a whole,⁹⁷¹ the question is thus less whether outside participation is categorically illegitimate and rather which forms thereof are. If the mechanisms of electoral democracy are deprived of their integrity, voters might not enjoy the form of political participation they are entitled to. The following sections will discuss whether that is the case for interference in the *opinion-collecting* process and interference in the *opinion-forming* process, asking not *who* may legitimately participate in electoral processes but *who* may participate *how*.

14.1.2. Interference in the *opinion-collecting* process: the demands of representation

Elections, and the very process of voting in particular, give members of the electorate an opportunity to make their voice heard.⁹⁷² Foreign interference in the *opinion-collecting* process has the potential to prevent that from succeeding. Whatever specific rules of enfranchisement a state may have chosen,⁹⁷³ foreign states could – by compromising election infrastructure – factually disenfranchise certain voters again. If voters are prevented from voting or having their vote accurately captured, counted, and communicated, this is presumably problematic from the perspective of most if not all theories of electoral democracy. After all, what would be the purpose of letting the people vote, if not to give them a real opportunity to effectively make their voice heard? One concept, however, is particularly helpful in articulating the theoretical problems that arise from foreign interference in the *opinion-collecting* process: the idea of representation.⁹⁷⁴

Elections are usually expected to generate some form of representation. There are of course theoretical models of democracy that do not rely on any

970 Other universal values sometimes viewed as the justification of democracy are freedom and equality. See for example Kelsen 1929, esp 3-13. For an English translation see Kelsen 2013, esp 27-34.

971 Zürn/de Wilde 2016, 290.

972 On basic theoretical aspects of elections, including their purpose and functions, see section 3.3 above.

973 Who ought to be enfranchised is a question that raises distinct problems and that has – at least from a legal point of view – been treated in section 10.3.2.3 above. For a discussion of (US) constitutional legal-doctrine on selective enfranchisement see also Michelman 1989, 458-485. For a more extensive discussion of the right to vote from the perspective of democratic theory see Beckman 2009.

974 As for its literal meaning, representation ‘entails a delegated action on the part of some on behalf of someone else’ (Urbinati 2011, 23). On etymological aspects see Pitkin 1967, 241-252.

conception of representation, most notably direct democracy with Rousseau as its ‘most authoritative theorist’⁹⁷⁵. At the same time, there are conceptions of political representation outside of democratic theory, Hobbes’s *Leviathan* being the prime – albeit controversial⁹⁷⁶ – example.⁹⁷⁷ In more recent works, too, representation is sometimes very closely associated with democracy,⁹⁷⁸ sometimes less so.⁹⁷⁹ However, *if* elections are held, governments are usually claimed to be representative ‘*because they are elected*’⁹⁸⁰. After all, the term ‘representative democracy’ is often used synonymously with indirect democracy.⁹⁸¹ Thus, while representation is not the only concept that has implications for the desirability of foreign interference in the opinion-collecting process, it is a particularly important one.

As regards its exact nature and content, representation has been the subject of extensive discussions.⁹⁸² For the purpose of this section, it suffices

975 Urbinati 2006, 61.

976 On whether Hobbes’s theory of representation is ‘anti-democratic’ or ‘proto-democratic’ see Runciman 2009.

977 On ‘Hobbes’s concept of representation’ see Pitkin 1964 and Pitkin 1964a (capitalization removed). On the ‘elements of representation in Hobbes’ see Brito Vieira 2009 (capitalization removed).

978 See for example Plotke 1997; Näsström 2006; Urbinati 2006a.

979 Barber wrote that ‘[r]epresentative democracy is as paradoxical an oxymoron as our political language has produced [...]’: Barber 2003, xxxiv. On the ‘uneasy alliance’ of representation and democracy see Pitkin 2004. On the ‘paradox of political representation’ see Runciman 2007 (capitalization removed).

980 Manin/Przeworski/Stokes 1999, 29 (emph add). The quoted phrase on its own is of course simplistic, and the authors themselves discuss various caveats. On the relationship between the concepts of representation and democracy see also Urbinati 2006, 17–59.

981 See for example Warren 2013, 269 (italics in the original): ‘[d]emocratic theorists commonly distinguish between *direct* democracy and *representative* democracy.’

982 After classic works such as ‘Considerations on Representative Government’ (Mill 1862), the contributions by Hanna Fenichel Pitkin (‘The Concept of Representation’, Pitkin 1967) and Bernard Manin (‘Principes du gouvernement représentatif’, Manin 1995; Manin 1997) are usually credited with shaping contemporary discourse and preparing the ground for what ended in a ‘new representative turn in democratic theory’ (Näsström 2011; the four works Näsström refers to are the following: Urbinati 2006; Sward 2010; Brito Vieira/Runciman 2008; Shapiro/Stokes/Wood/Kirshner 2009). Over time, various characteristics, subtypes, and dimensions of representation have been identified, illustrating the multi-faceted nature of the concept. To begin with, James Madison’s view of representatives as ‘delegates’ (see Madison 2009, 51) was contrasted with Edmund Burke’s understanding of representatives as ‘trustees’ (see Burke 2003, 159; for a juxtaposition of Burkean trustees and Madisonian delegates see Rehfeld 2009; Pitkin 1967, 191–192). Pitkin later introduced the categories of ‘formalistic’, ‘symbolic’, ‘descriptive’, and ‘substantive’ representation (Pitkin 1967). Jane Mansbridge speaks of ‘promissory’, ‘anticipatory’, ‘gyroscopic’, and ‘surrogate representation’ (Mansbridge 2003). Further conceptual and terminological distinctions include ‘indicative’ versus ‘responsive’ representation (Pettit 2010), a ‘sanctions model’ and a ‘selection model’

to focus on what has become the ‘standard account’ – or ‘standard meaning’⁹⁸³ – of representative democracy:⁹⁸⁴

First, representation is understood as a principal agent relationship, in which the principals–constituencies formed on a territorial basis–elect agents to stand for and act on their interests and opinions, thus separating the sources of legitimate power from those who exercise that power. Second, electoral representation identifies a space within which the sovereignty of the people is identified with state power. Third, electoral mechanisms ensure some measure of responsiveness to the people by representatives and political parties who speak and act in their name. Finally, the universal franchise endows electoral representation with an important element of political equality.

If foreign states compromise election infrastructure and, thereby, prevent votes from being cast or from being accurately captured, counted, and communicated, this raises problems with respect to all four aspects of this standard account. Firstly, such interference breaks the link between the represented and their representatives, interrupting the principal-agent relationship of representation. Consequently, there is no indication why the appointed would ‘stand for and act on [the] interests and opinions’⁹⁸⁵ of their constituency. Congruence between the electors and the body to be elected is therefore imperilled.⁹⁸⁶ Secondly, if the ostensible results of an election do not correspond to the will of the electorate, the state power given to elected representatives is not an expression of the people’s sovereignty. Thirdly, if electoral mechanisms fail to secure an intact link between (all) voters and their representatives, the latter are not effectively responsive to the former and there is no means for dissatisfied electors to exert control over the members of the elected body by not re-electing them. Fourthly, foreign interference in the opinion-collecting process by compromising election infrastructure also has the potential to jeopardize political equality in the target state. Whenever some members of the electorate

of representation (Mansbridge 2009), or representation as ‘being’ and representation as an ‘activity’ (Rehfeld 2006, 17).

983 For a slightly different formulation see Urbinati 2011, 23: ‘in its standard meaning representative democracy has four main features: (a) the sovereignty of the people expressed in the electoral appointment of the representatives; (b) representation as a free mandate relation; (c) electoral mechanisms to ensure some measure of responsiveness to the people by representatives who speak and act in their name; and (d) the universal franchise, which grounds representation on an important element of political equality.’

984 Urbinati/Warren 2008, 389.

985 See footnote 984 above and the accompanying text.

986 On the concept of congruence see Beyer/Hänni 2018, esp S17: ‘[t]he relationship between citizens’ ideologies, attitudes, preferences, and opinions and those of their elected representatives as well as policy outputs is covered in the concept of congruence.’

are factually disenfranchised because their vote is tampered with, the principle of ‘one person, one vote’ no longer applies.⁹⁸⁷ If some members of the electorate can make their voice heard while others – due to foreign interference – cannot, this creates a situation of political inequality.

Without going into further detail, it should have become clear that foreign interference in the opinion-collecting process is incompatible with the idea of representative democracy. If the choice made by one, several, or even all members of an electorate is not taken into account for determining the results of an election, the final outcome will not represent the true will of the full electorate. This scenario is of course not limited to foreign electoral interference. Domestic actors may manipulate voting procedures as well. However, foreign interference of this sort raises distinct problems, since it could not only lead to certain domestic voices being under-, over-, mis-, or unrepresented in the election results, it could also lead to foreign voices being illegitimately represented. While elections separate voters and their representatives to a certain extent, they are also supposed to function as a link between the two.⁹⁸⁸ That link between the represented and representatives can be broken by foreign interference in the opinion-collecting process. As a consequence, representation might not be guaranteed anymore. No further explanation should be needed to show that such scenarios are not compatible with the concept of representation. No person entitled to vote in a given state and its elections must be prevented in any way from voting or having their vote accurately captured, counted, and communicated.

While interference in the opinion-*collecting* process presents as a rather clear-cut case of undesirable behaviour, the question of who may legitimately participate in the opinion-*forming* process is more difficult. This will be the subject of the following pages.

14.1.3. Interference in the opinion-*forming* process: the demands of deliberation

In recent decades, democratic theory has been enriched by a new school of thought focused on what is called ‘deliberative democracy’. While this term is said to have been coined by Joseph M. Bessette in a 1980 publication^{989, 990} the

987 On the (legal) requirement of equal suffrage being affected by such interference see already section 11.2 above.

988 Urbinati 2011, 24: ‘[e]lections simultaneously separate and link citizens and government. They create a gap between state and society at the same time as they allow them to communicate and even conflict, but never fuse.’

989 Bessette 1980.

990 Besson/Martí 2006, xiii.

concept of deliberation is of course neither novel⁹⁹¹ nor limited to one school of thought. A minimalist definition of deliberation in the public sphere goes as follows: ‘mutual communication that involves weighing and reflecting on preferences, values and interests regarding matters of common concern’.⁹⁹²

While deliberation is also part of other – in fact most – democratic theories,⁹⁹³ the ‘deliberative turn’⁹⁹⁴ in democratic theory has led to extensive discussions about what good democratic deliberation ought to look like. To be sure, these discussions are not limited to or even focused on electoral processes. In fact, deliberation has traditionally been seen as an alternative to voting.⁹⁹⁵ Yet, in today’s large-scale democracies, deliberative democracy can be seen as enhancing and completing representative democracy, rather than being a competing concept.⁹⁹⁶ After all, ‘[d]eliberation can shape voting and voting can shape deliberation’.⁹⁹⁷

The reflections on good deliberation might thus be useful for the question at hand: how foreign states may legitimately participate in the opinion-forming process preceding an election. The aim of the following considerations is to apply the insights about good deliberation to evaluate foreign interference in the opinion-forming process. While the previous section concerned technical manipulation of voting procedures, the focus will now shift back to economic and informational means of interference and their implications for public discourse.

14.1.3.1. The standards of good deliberation

A successful deliberative process, so the assumption goes, raises the democratic legitimacy of the decisions resulting from it.⁹⁹⁸ In terms of defining the standards of good deliberation, scholarship has come a long way. In 1989, building on the work of Jürgen Habermas, Joshua Cohen provided a seminal articulation of an ‘ideal deliberative procedure’, the outcomes of which are

991 On the (early) ‘philosophic origins of deliberative ideals’ see Chambers 2018 (capitalization removed).

992 Mansbridge 2015, 27.

993 See Talisse 2012, esp 208: ‘almost all conceptions of democracy in currency involve some aspect of deliberation.’

994 See Dryzek 2000, 1-7; Goodin 2008. On ‘the origins of the deliberative turn’ see Florida 2018 (capitalization removed).

995 Mansbridge/Bohman/Chambers/Estlund et al 2010, 64. On the relationship between deliberation and voting see also Mackie 2018, 223-224.

996 Chambers 2012, 53.

997 Mackie 2018, 223-229, esp 224. On the relationship between deliberative democracy and voting see also Mansbridge/Bohman/Chambers/Estlund et al 2010, 85-90.

998 Mansbridge 2015, 43.

supposed to foster democratic legitimacy.⁹⁹⁹ This procedure has four main characteristics: ideal deliberation is *free, reasoned*, between *equal* parties, and aimed at rationally motivated *consensus*.¹⁰⁰⁰ It allows ‘no force except that of the better argument’.¹⁰⁰¹ While these elements are still recognizable in later accounts, formulations of the standards of good deliberation have evolved over time. In 2015, Mansbridge collected them in the following list:¹⁰⁰²

- Respect
- Absence of power
- Rational and emotional considerations
- Aim at consensus and at clarifying interests when interests conflict
- Orientation to common good and to self-interest when constrained by fairness
- Equal opportunity of access to political influence
- Inclusion of all affected individuals [...]
- Accountability to constituents when elected and to other participants and citizens when not elected
- Publicity/transparency in public forums [...]
- Sincerity in matters of importance [...]
- Epistemic value
- Substantive balance.

It becomes clear from this enunciation that deliberative democracy does not envision politics as an unregulated contest of competing special interests and actors who seek to gain their own advantage at the cost of others with the help of ever more resources. Rather, it has the interest of society as a whole at heart and aims at finding the rationally best possible solution for the entirety of its members by relying on a decision-making process that is as egalitarian as possible.¹⁰⁰³ While these standards of good deliberation represent

999 Cohen 1989, 21–23. On Cohen being ‘the first major theorist to specify criteria by which one might judge the democratic legitimacy of deliberation’ and on the influence of Habermas on Cohen’s work see Mansbridge/Hartz-Karp/Amengual/Gastil 2006, 4. A Habermasian term sometimes used in this context is the ‘ideal speech situation’. Yet, Habermas later clarified that this term had been misunderstood and that he had not used it in his own writings since 1972: Habermas 2018, 871. On what the ‘ideal speech situation’ does or does not have to do with the ‘real speech situation’ see also Estlund 2006, 75 (capitalization removed).

1000 Cohen 1989, 22–23.

1001 Habermas 1975, 108. Cohen cites this formulation in the context of *reasoned* deliberation: Cohen 1989, 22.

1002 Mansbridge 2015, 36. For Mansbridge’s explanation of these standards see *ibid*, 35–40.

1003 See Pettit 2006, 93.

ideals that might not always be fully achievable, they are not a purely philosophical scheme.¹⁰⁰⁴ In fact, the list overlaps with some of the criteria used to measure perceived electoral integrity.¹⁰⁰⁵ The standards of good deliberation are intended to be ‘regulative ideals’, goals that should to the fullest extent possible be realized in democratic discourse.¹⁰⁰⁶

Not all of the standards outlined above are necessarily affected by foreign electoral interference, at least not to a greater extent than by the conduct of domestic actors. Taken together, however, they provide a helpful framework for evaluating economic and informational means of foreign interference in the opinion-forming process preceding an election. The following section will first discuss the standards of good deliberation that are relevant to foreign electoral interference in general, regardless of the means employed. The subsequent sections then discuss the standards that are particularly relevant to economic and informational means, respectively. Thereby, most of the standards will be addressed, yet not all.¹⁰⁰⁷ It is important to note that these ideals are still evolving and, in some cases, contested.¹⁰⁰⁸ Moreover, the scholarship on deliberative democracy is vast and the following elaborations will hardly do justice to its complexity.¹⁰⁰⁹ Yet, along the way, it should nonetheless become clearer what specific obstacles foreign electoral interference can create to achieving successful democratic deliberation.

1004 On the influence of deliberative democratic theory on other fields see Chambers 2003.

1005 See for example ‘Newspapers provided *balanced* election news’, ‘Parties/candidates had *fair access* to political broadcasts and advertising’, ‘Parties/candidates had *equitable access* to public subsidies’, ‘Parties/candidates had *equitable access* to political donations’, and ‘Parties/candidates publish *transparent* financial accounts’ in the list of indicators used to generate the Perception of Electoral Integrity (PEI) index: Pippa Norris & Max Grömping, *Electoral Integrity Worldwide: PEI 7.0* (May 2019), 29 (emph add). For the underlying methodology see Norris/Frank/Martínez i Coma 2014. On the concept of electoral integrity see Norris 2018.

1006 See Mansbridge 2015, 32: ‘[a] regulative ideal is an ideal that is often unachievable in its full state but sets the goal that one should try to approach. [...] Being unachievable is thus not a definitive argument against an ideal.’

1007 ‘Respect’ and ‘rational and emotional considerations’ will not be addressed specifically. Respect for ‘the fundamental worth and dignity of others’ (Mansbridge 2015, 35) and the ‘use of reasons’ (ibid, 38) will be presumed. Scenarios in which these most fundamental standards of good deliberation would raise problems are perhaps not impossible but certainly very particular, and there is no need to hypothesize about them here.

1008 Mansbridge 2015, 35, 40.

1009 Despite the vastness of the literature, the collection of the standards of good deliberation by Mansbridge 2015 seems to be unparalleled. For another publication relying on Mansbridge’s analysis see Mackie 2018, 230–233.

14.1.3.2. Good deliberation and foreign electoral interference in general

Three standards of good deliberation as outlined above appear equally relevant to both economic and informational means of foreign electoral interference: ‘inclusion of all affected individuals’, ‘publicity/transparency in public forums’, and ‘orientation to common good and to self-interest when constrained by fairness’.¹⁰¹⁰ They deserve attention first.

Inclusion is an intricate issue, both for the question of enfranchisement¹⁰¹¹ and for the question of who may take part in democratic deliberation. The issue to be addressed here is not whether enfranchisement should be formally extended but whether foreign states may participate in the opinion-forming process preceding an election. Two principles¹⁰¹² compete for support among democratic theorists:¹⁰¹³ the ‘principle of coercion’ and the ‘principle of affected interests’.¹⁰¹⁴ The former, also called the ‘all-subjected principle’¹⁰¹⁵, requires giving a voice to those subjected to the coercive power of the state in question.¹⁰¹⁶ The latter, also called the ‘all-affected principle’¹⁰¹⁷, envisions participation in decision-making processes by all those whose interests are affected by the respective decisions.¹⁰¹⁸ There is a dispute on whether all interests *possibly* affected¹⁰¹⁹ or all interests *actually* affected¹⁰²⁰ should be decisive in determining the boundaries of the polity. The central underlying idea, however, is the same for both approaches: no one should be ‘determined by decision-making powers beyond their own control’¹⁰²¹ – a concept both old and fundamentally democratic.¹⁰²² In principle, this may very well apply to foreign governments, too. One could argue that a state whose interests are somehow

1010 See footnote 1002 above and the accompanying text.

1011 On the ‘boundary problem in democratic theory’ see Song 2012.

1012 For alternatives beyond this dichotomy see Karlsson Schaffer 2012.

1013 Mansbridge 2015, 37.

1014 Song 2012, 40.

1015 Näsström 2011a, 118–122.

1016 Song 2012, 40.

1017 Näsström 2011a, 122–126.

1018 Song 2012, 40.

1019 See for such an argument Goodin 2007.

1020 An argument for this view is made by Owen 2012.

1021 Näsström 2011a, 122. Näsström writes of no ‘citizens’ instead of ‘no one’, but does not seem to have citizens of only one state in mind, given that the text refers to ‘citizens around the world’ in the same paragraph.

1022 The Justinian Code, a Roman legal text, already contained the principle that “‘what touches all must be approved by all” (*Quod omnes tangit debet ab omnibus approbari*): Warren 2017, 1 (italics in the original).

impacted by the outcome of an election in another state should – from the standpoint of the all-affected principle – be allowed to at least express its views and preferences during the opinion-forming process preceding the election. On the other hand, if a foreign state – despite today’s dense web of international relations – is not affected by the outcome of an election in any conceivable way, such an expression of preference would run counter to the all-affected principle as well as to the all-subjected principle. Depending on which position one opts for, this standard of good deliberation allows for the inclusion of foreign states whose interests are concerned by the election in another state.¹⁰²³ This of course presupposes compliance with the further standards of good deliberation and thus includes only limited forms of participation. Yet, as for this first standard, the inclusion of foreign states in deliberative processes preceding an election is not categorically precluded.

A further standard of good deliberation that applies to both economic and informational means of foreign electoral interference is *publicity or transparency in public forums*. While it has come to be accepted that some sensitive matters are best deliberated upon in secrecy,¹⁰²⁴ publicity is still viewed as generally beneficial for deliberation because it helps to ensure democratic accountability.¹⁰²⁵ Not only does publicity seem ‘readily justifiable from almost any moral perspective’,¹⁰²⁶ it is also in line with the values of deliberative democracy in particular.¹⁰²⁷ One aspect seems especially important for the matter at hand: the ‘self-correcting character of deliberation’.¹⁰²⁸ Having the reasons, interests, and motivations behind certain policy proposals and political programmes in the public domain gives participants in the discourse

1023 See the illustrative conclusion by Goodin 2007, 68: ‘[t]he democratic ideal ought ideally be to enfranchise “all affected interests.” Understood in a suitably expansive “possibilistic” way, that would mean giving virtually everyone everywhere a vote on virtually everything decided anywhere.’

1024 Mansbridge 2015, 37.

1025 Guttman/Thompson 1996, 97. See also Chambers 2004, 390, 392. Chambers refers to ‘public reason’ as the primary benefit of publicity but explains the use of the concept ‘public reason’ by referring to accountability, too, *inter alia* (ibid, 390): ‘I use the term public reason here in a very generic sense; public reason involves justification and accountability directed at a public characterized by pluralism.’

1026 Gutmann/Thompson 1996, 95. On the ‘value of publicity’ and the thoughts of Immanuel Kant, John Stuart Mill, and Jeremy Bentham on the matter see Gutmann/Thompson 1996, 95-127.

1027 See Gutmann/Thompson 1996, 100-101: ‘[f]irst, only public justifications can secure the consent of citizens, whether it be tacit or explicit. [...] Second, making reasons public contributes to the broadening of moral and political perspectives that deliberation is supposed to encourage. [...] Third, reasons must be public to fulfill the potential for mutual respect that deliberation seeks by clarifying the nature of moral disagreement.’

1028 Gutmann/Thompson 1996, 101.

a more comprehensive picture, on the basis of which they can form or change their opinion.¹⁰²⁹ This casts considerable doubt on the desirability of several forms of foreign electoral interference. For example, foreign actors spreading false, private, or other forms of information while hiding or falsifying their identity entails potential deception about those actors' motives. Furthermore, if the foreign origin of funding for political campaigns or other economic means of interference is not made transparent, this obscures interests that are potentially pursued by the respective campaigns and prevents them from being taken into account by voters. In addition, lying – while also raising concerns with respect to the standard of sincerity and the epistemic goals of deliberation¹⁰³⁰ – is not compatible with the ideals of publicity and transparency for the additional reason that the falsehood of the information is deliberately hidden from the public domain. In short, any form of *covert* foreign electoral interference is antithetical to publicity as a standard of good deliberation.

Finally, the standards of good deliberation as outlined above mention *orientation to common good and to self-interest when constrained by fairness*. This standard, too, seems equally relevant to economic and informational means of foreign electoral interference. Deliberative democracy traditionally – and ideally still today – is built around consensus and the common good¹⁰³¹ as its goal, leaving no place for negotiation, bargained compromise, or the pursuit of self-interest.¹⁰³² Deliberation understood in this way represents the direct opposite of a mere aggregation¹⁰³³ of individual interests and preferences into political decisions.¹⁰³⁴ It has been contended, however, that it may not always be possible to adhere to this ideal and that interests and values may sometimes irreconcilably conflict.¹⁰³⁵ In this case, rather than ending in consensus, deliberation should at least contribute to a clarification of interests¹⁰³⁶ and structure

1029 See Gutmann/Thompson 1996, 101. See also Mansbridge 2015, 42: '[i]n a healthy deliberative system, relevant considerations are brought forth from all corners, aired, discussed, and appropriately weighed. The deliberations may not always be public, although the absence of publicity often limits deliberative capacity.'

1030 See section 14.1.3.4 below.

1031 This notion is itself controversial but has traditionally 'implied a relatively unitary conception of the common good, contested but discoverable through reason': Mansbridge 2015, 38. For an almost identical formulation see Mansbridge/Bohman/Chambers/Estlund et al 2010, 68. For a more recent account see Beerbohm/Davis 2017.

1032 Mansbridge/Bohman/Chambers/Estlund et al 2010, 66; Mansbridge 2015, 38.

1033 On aggregation as the antithesis of deliberation see for example Knight/Johnson 1994, esp 279–281.

1034 Mansbridge/Bohman/Chambers/Estlund et al 2010, 66.

1035 Mansbridge/Bohman/Chambers/Estlund et al 2010, 68; Mansbridge 2015, 38.

1036 The clarification of interests is itself a standard of good deliberation and will be treated more extensively in section 14.1.3.4 below.

the process up to the point at which non-deliberative forms of decision-making come into play.¹⁰³⁷ For example, if more powerful actors can impose an understanding of a common good on less powerful actors, consensus may in fact be less preferable in comparison with other mechanisms of decision-making.¹⁰³⁸ One non-deliberative method to produce decisions that are at least ‘relatively legitimate’¹⁰³⁹ is voting.¹⁰⁴⁰ In electoral democracies, where decisions are not reached by consensus but by a procedure that envisions some form of aggregation of individual preferences, the role of deliberation should be to guide the pre-voting period and contribute to clarifying the existing understandings of what the common good is, if anything, and where irreconcilably conflicting individual self-interests lie.¹⁰⁴¹ Two conditions are crucial for allowing the expression of individual interests. Firstly, said procedures must be fair.¹⁰⁴² Since the actors in question here – foreign states – are not included in voting procedures in the first place, this point is of no concern here. Secondly, and more importantly for the matter at hand, the non-deliberative procedures of decision-making must be preceded by an exchange as deliberative as possible.¹⁰⁴³ This means that a foreign state may promote what can genuinely be considered a conception of the common good. Alternatively, if there is no such conception in the first place, it may also promote its own self-interest, as long as the voting procedures that follow remain fair and all other standards of good deliberation are respected during the opinion-forming process. In many

1037 Mansbridge/Bohman/Chambers/Estlund et al 2010, 68; Mansbridge 2015, 38.

1038 Mansbridge 2015, 38.

1039 Mansbridge/Bohman/Chambers/Estlund et al 2010, 75.

1040 Mansbridge/Bohman/Chambers/Estlund et al 2010, 85–90; Mansbridge 2015, 38.

1041 Mansbridge/Bohman/Chambers/Estlund et al 2010, 75, 84; Mansbridge 2015, 38.

1042 Mansbridge 2015, 39. In addition, the rules guiding non-deliberative procedures – in this case the rules of voting – should ideally have been agreed on in deliberative procedures: Mansbridge/Bohman/Chambers/Estlund et al 2010, 84. It is also worth noting that citizens are expected to vote for what they consider to be in the interest of the common good rather than for what they consider to be in their self-interest – see *ibid.*, 89–90. As the authors note (*ibid.*, 89, fn 70), this is a position already articulated by John Stuart Mill. See Mill 1862, 206–207: ‘[the voter’s] vote is not a thing in which he has an option; it has no more to do with his personal wishes than the verdict of a jurymen. It is strictly a matter of duty; he is bound to give it accordingly to his best and most conscientious opinion of the public good.’

1043 Mansbridge/Bohman/Chambers/Estlund et al 2010, 75: Participants should be ‘deliberatively exploring both the common good and individual interests’. See also *ibid.*, 89: before voting, a citizen ideally should ‘first deliberate with others in the sense of actively seeking out opposing views, listening attentively to the full panoply of those views, offering justifications for his or her own views, taking seriously the objections to those justifications, and being willing to revise his or her views on the basis of the objections of others and with the goal of promoting the common good and fairness to all concerned.’

real-world cases, an interfering state will presumably aim to advance its self-interests rather than a conception of the common good. While this is generally less desirable from the viewpoint of deliberative democracy, it is not completely ruled out by the standards of good deliberation, as long as the interests in question are in fact affected and they are promoted by means consistent with good deliberation.

To conclude, the first and the third standards of good deliberation discussed in this section, *inclusion of all affected individuals* and *orientation to common good and to self-interest when constrained by fairness*, do not require pre-voting discourse to be strictly confined to the state in which the election in question takes place. At least under certain conditions, deliberation may also include foreign voices, most notably if they are affected by the political decisions to be made. In this case, much will depend on whether other standards of good deliberation are respected as well. By contrast, the second standard discussed in this section, *publicity or transparency in public forums*, rules out at least some forms of foreign electoral interference: covert ones.

14.1.3.3. Good deliberation and economic means of interference in particular

While money may be an integral part of large-scale democratic politics,¹⁰⁴⁴ this reality comes with manifold normative problems.¹⁰⁴⁵ Among other concerns, money has the potential to distort the deliberative process serving to shape public opinion before an election.¹⁰⁴⁶ Three standards of good deliberation seem particularly relevant: ‘absence of power’, ‘equal opportunity of access to political influence’, and ‘accountability to constituents when elected and to other participants and citizens when not elected’.¹⁰⁴⁷

Absence of power is one of only two standards of good deliberation that have not been challenged or revised by scholarship, the other one being ‘respect’.¹⁰⁴⁸ Yet, while this standard has not been challenged on a theoretical level, it is regularly acknowledged that a complete absence of power might not be achievable in practice,¹⁰⁴⁹ usually by referring to the writings of Michel

1044 See Christiano 2012, 241: ‘[m]oney is necessary to politics as it is to most activities in modern liberal democracies.’

1045 On money in politics see generally Christiano 2012.

1046 For this and other normative issues arising from money in politics see Christiano 2012, esp 241–242.

1047 See footnote 1002 above and the accompanying text.

1048 Mansbridge 2015, 36. See also footnote 1007 above.

1049 Mansbridge/Bohman/Chambers/Estlund et al 2010, 80: ‘[b]ecause, as Foucault points out, every human being is constituted by power relations, including coercive power

Foucault.¹⁰⁵⁰ Nevertheless, the aim of deliberative democracy remains to involve the least possible amount of coercive power¹⁰⁵¹ – that is, ‘the threat of sanction or the use of force’¹⁰⁵². Ideally, the only force present in deliberation is that of the better argument, or ‘persuasion’.¹⁰⁵³ As power cannot be eradicated completely, it should at least be distributed equally within deliberative systems.¹⁰⁵⁴ This raises questions concerning several economic means of foreign electoral interference. In Foucault’s view, relations of power are inherent to economic processes,¹⁰⁵⁵ an understanding that casts considerable doubt on the compatibility of any economic interference with deliberative democracy. Yet, even if power is understood more narrowly, as the threat of sanction or the use of force,¹⁰⁵⁶ some examples of economic means of interference as identified in this study appear problematic from the perspective of good deliberation. This certainly includes biased economic policies that come in the form of threats. If a foreign state threatens to cease or reduce vital economic aid with a view to influencing the electoral process, for example, this arguably involves such power. In fact, one could argue that any economic policies of a more potent interfering state designed to exert political influence on an economically dependent target state come with an element of domination. Generally, the political utilization of economic power asymmetries between states is not in the interest of good deliberation.

relations, and at the same time exercises coercive power over others, the absence of coercive power is a regulative ideal, impossible to achieve but serving in many circumstances as a standard against which to measure practice.’ See also Mansbridge 2015, 36.

1050 Foucault 1990, 93: ‘[p]ower is everywhere; not because it embraces everything, but because it comes from everywhere.’ For the original French wording see Foucault 1976, 122: ‘Le pouvoir est partout ; ce n’est pas qu’il englobe tout, c’est qu’il vient de partout.’

1051 It is important to distinguish between the use of the notion of coercion here and its use in the legal assessment above (see section 4.3.2). While coercion is also a constitutive element of prohibited intervention, it is prohibited by the legal norm of non-intervention only with respect to certain specific choices – those protected by the *domaine réservé*. In contrast, there is no such limitation here. Any coercive force impacting the opinion-forming process is undesirable from the perspective of deliberative democracy, not just with a view to the choices eventually resulting from public discourse, but with a view to deliberation as such. Therefore, while some conduct may not meet the legal requirement of coercion in the framework of non-intervention as a norm of international law, it may nonetheless be regarded as a coercive use of power in the context of deliberative democracy.

1052 Mansbridge 2015, 36.

1053 Mansbridge 2015, 36; Mansbridge/Bohman/Chambers/Estlund et al 2010, 80–81. See also footnote 1001 above.

1054 Mansbridge 2015, 37; Mansbridge/Bohman/Chambers/Estlund et al 2010, 82–83.

1055 Foucault 1990, 94. On Foucault’s account of (the ubiquity of) power see Philip 1983, esp 34.

1056 See footnote 1052 above and the accompanying text.

Similar considerations apply to the standard of *equal opportunity of access to political influence*. However, the economic balance relevant here is not the one between the interfering state and the target state but rather the one between political actors within the target state. The equilibrium envisioned by theorists of deliberative democracy also concerns material wealth.¹⁰⁵⁷ Generally, money has the potential to distort deliberative processes because it can disadvantage the perspectives of non-affluent participants compared to those of the affluent.¹⁰⁵⁸ From the perspective of deliberative democracy, asymmetries in resources should neither give some participants an unfair advantage over others in influencing political decision-making, nor should they lead to the exclusion of any participant due to lack of a necessary minimum of resources.¹⁰⁵⁹ However, foreign interference in the opinion-forming process by economic means might achieve just that. Any form of financial support by foreign states can exacerbate pre-existing economic asymmetries or create new ones. In addition, targeted adverse economic measures, depending on how far-reaching they are, may result in certain campaigns or candidates being under-resourced and therefore prevented from effectively making their voices heard. To be sure, economic measures of interference might not always create or exacerbate inequalities in the distribution of resources. Financial support might even benefit a previously weaker actor and therefore reduce inequalities, which would – setting other standards of good deliberation aside for a moment – be significantly less problematic, if at all. Yet, whenever economic means of foreign interference in the opinion-forming process do contribute to asymmetries in the distribution of resources, they are hardly in line with equal opportunity of access to political influence as a standard of good deliberation.

Finally, a third standard of good deliberation bears particular relevance to economic means of interference: *accountability to constituents when elected and to other participants and citizens when not elected*. To the extent that there are elected representatives in a democratic system, deliberative democracy envisions them to be accountable to their constituents.¹⁰⁶⁰ While the accountability of representatives is not a novel concept, deliberative democracy has different – arguably higher – expectations of it than other models of democracy.¹⁰⁶¹

1057 Knight/Johnson 1997, 281.

1058 Christiano 2012, 246.

1059 Knight/Johnson 1997, 293.

1060 Mansbridge 2015, 37: '[a]ccountability is now seen to apply most directly to elected legislatures and perhaps other representative bodies rather than having full force across the whole deliberative system.'

1061 In other words, 'deliberative democracy raises the stakes of democratic accountability': Gutmann/Thompson 1996, 129.

Both the range of potential constituents and the requirements for justified actions of representatives are more comprehensive than in merely procedural conceptions of representation.¹⁰⁶² Accountability is not owed exclusively to those with whom a legal relationship exists – that is, electoral constituents – but rather to anyone with whom a moral relationship exists – that is, anyone affected by the actions in question.¹⁰⁶³ Such moral constituents may also be citizens of other countries.¹⁰⁶⁴ Deliberative democracy does not provide a ‘formula for determining how to balance the claims of our fellow citizens against those of foreigners when they come into conflict.’¹⁰⁶⁵ What is decisive, however, is that representatives justify their actions by giving reasons to which constituents can either morally object or consent. Under deliberative democracy, accountability entails a continuous and reciprocal exchange between representatives and their moral constituents, or ‘reiterated deliberation’.¹⁰⁶⁶ With respect to foreign states, the creation of any accountability other than for moral reasons would be a cause for concern. If financial support by a foreign power helps a candidate get elected, this may illegitimately create a form of accountability towards that foreign state. Representatives who act in the interest of a foreign state because it supported them financially would not fit into the reason-based conception of accountability that deliberative democracy envisions. Furthermore, a representative who is indebted to a foreign state, acts in its interests, and hides political ties to it would not fulfil the duty to justify actions vis-à-vis the constituency. In short, economic means of interference in the opinion-forming process should never cause any form of accountability towards foreign states or taint accountability towards actual constituents. Elected representatives may very well be seen as accountable to moral constituents beyond state borders, yet this should only be the case for moral reasons, not as a consequence of economic ties.

To conclude, economic means of foreign electoral interference raise various concerns with respect to the standards of good deliberation. It is perhaps not completely impossible that some examples of foreign economic influence on the opinion-forming process could meet these standards. To do so, however, the conduct in question must not involve using power or politically exploiting existing power imbalances. Furthermore, it must not create or exacerbate any inequalities of opportunities of access to political influence between political

1062 Gutmann/Thompson 1996, 129.

1063 Gutmann/Thompson 1996, 128-129, 144-145. See also the elaborations on the standard of inclusion and the all-affected principle in section 14.1.3.2 above.

1064 Gutmann/Thompson 1996, 148.

1065 Gutmann/Thompson 1996, 150.

1066 Gutmann/Thompson 1996, 143-144.

actors in the target state. Nor must it create any form of accountability of elected representatives to foreign powers due to economic ties or be hidden from actual constituents and thus harm accountability towards them. In addition, as discussed earlier,¹⁰⁶⁷ any conduct would have to be justified by interests being affected, be overt, and not run counter to any defensible conception of the common good. More often than not, economic means of foreign electoral interference will presumably fall short of at least some of these requirements. Final determinations on the compatibility of a state's economic measures with the standards of good deliberation will of course have to be made on a case-by-case basis. Generally, however, the ideals of deliberative democracy are not geared towards encouraging foreign electoral interference by economic means.

14.1.3.4. Good deliberation and informational means of interference in particular

A core aspect of deliberative democracy was perhaps best articulated by Thomas Christiano: 'a deliberative process aims at achieving the truth in the subject being discussed. Citizens desire primarily to advance a view because they think it is *true*, not because it is *their* view.'¹⁰⁶⁸ Like many ideals of deliberative democracy, this might not reflect democratic discourse as found in practice. At a large scale, in particular, where electoral discourse is channelled through mass media, the standards of good deliberation might not be fully realizable.¹⁰⁶⁹ However, that is no reason to disregard them completely.¹⁰⁷⁰ Several standards of good deliberation appear relevant to informational means of foreign interference in the opinion-forming process: 'aim at consensus and at clarifying interests when interests conflict', 'sincerity in matters of importance', 'epistemic value', and 'substantive balance'.¹⁰⁷¹

The first of these standards, *clarification of conflicting interests*, has already been touched upon above.¹⁰⁷² While deliberative democracy traditionally builds on consensus, elections do not.¹⁰⁷³ Whenever consensus cannot be achieved because there is an unresolvable conflict of interests or values, deliberation should lead to 'clarification of conflict and structuring of disagreement,

1067 See section 14.1.3.2 above.

1068 Christiano 1996, 258 (italics in the original).

1069 See on this argument Rowbottom 2013. On 'political communication in media society' see also Habermas 2006 (capitalization removed).

1070 See footnote 1006 above and the accompanying text.

1071 See footnote 1002 above and the accompanying text.

1072 See section 14.1.3.2 above for previous elaborations on self-interest and the common good.

1073 See footnotes 1031-1040 above and the accompanying text.

which sets the stage for a decision by non-deliberative methods'.¹⁰⁷⁴ One such non-deliberative method is voting.¹⁰⁷⁵ Any form of pre-voting communication should thus help to lay bare the interests and values at stake, preparing the ground for a decision-making process that is as well-informed as possible. From this follows that communication needs to be accurate in terms of its content and transparent regarding its sender. Deception is hardly in line with the goal of clarification. This also means that the dissemination of false or misleading information is undesirable from the perspective of good deliberation. In contrast, open criticism or endorsement by a representative of a foreign state, for example, are not necessarily problematic in this respect, as long as they do not convey false information or pursue a hidden agenda. One could further argue that, in order to achieve maximum clarification, any form of information should be released as early as possible. For example, holding back sensitive private information until shortly before voting day, releasing it with the intent to cause maximum damage to certain candidates or campaigns,¹⁰⁷⁶ and leaving them no time to respond, will generate more chaos and confusion than clarity. The same can be true for other last-minute publications. While timing will receive additional attention in the following paragraphs, it can already be noted here that any form of communication by foreign states that contributes to complexity and obfuscation rather than clarification is not in the interest of deliberative democracy.

Some of what has been said before becomes even clearer when considering the standard of *sincerity*. While this is a contested ideal, too, sincerity is expected at least of deliberation that concerns important matters.¹⁰⁷⁷ Assuming the general importance of electoral politics, sincerity requires that deliberators 'must mean what they say and say what they mean'.¹⁰⁷⁸ Other descriptions refer to honesty and good faith¹⁰⁷⁹ or simply truthfulness¹⁰⁸⁰. No further explanation should be necessary to show how certain informational means of foreign interference in the opinion-forming process are problematic

1074 Mansbridge/Bohman/Chambers/Estlund et al 2010, 68. See also Mansbridge 2015, 38.

1075 See footnotes 1039-1040 above and the accompanying text.

1076 On 'when to drop a bombshell' see Gratton/Holden/Kolotilin 2018 (capitalization removed).

1077 Mansbridge 2015, 36. For types of deliberation requiring less sincerity see also Bächtiger/Niemeyer/Neblo/Steenbergen et al 2010, 36. For further objections to the criterion of sincerity see Neblo 2007, 540-542.

1078 Neblo 2007, 540; Bächtiger/Niemeyer/Neblo/Steenbergen et al 2010, 37.

1079 Neblo 2007, 540.

1080 Warren 2006, 168; Neblo 2007, 540; Bächtiger/Niemeyer/Neblo/Steenbergen et al 2010, 36.

in light of this standard of good deliberation. If there is anything such as ‘really bad deliberation’¹⁰⁸¹, it is arguably deliberation based on lies.¹⁰⁸² Any intentional dissemination of false information obviously contravenes the standard of sincerity. Furthermore, the publication of private information incriminating a campaign may very well be in the public interest in some instances.¹⁰⁸³ However, holding such information back only to publish it shortly before the end of the opinion-forming process may have a greater effect politically, but it is questionable whether strategic timing of this sort is compatible with the concept of sincerity.¹⁰⁸⁴ From the standpoint of sincerity, any politically relevant information should be released without delay in order to allow for actual deliberation on the matter. Statements of opinion, too, should ideally not be made near the end of the period of will formation before an election. Generally, the standard of sincerity is best respected if any information conveyed is truthful, complete, and revealed without delay. Any attempt by foreign state-linked actors to deceive, to mislead, or to conceal relevant information is not in the interest of sincerity or of good deliberation in general.

A concept related to, but nonetheless different from, sincerity is *epistemic value*. According to this standard, developed in more recent discussions on deliberative democracy, deliberation is seen to have epistemic goals.¹⁰⁸⁵ While Joshua Cohen may have been the first¹⁰⁸⁶ to expressly refer to an ‘epistemic conception of democracy’,¹⁰⁸⁷ the idea of generating knowledge through community can be traced back at least to the writings of Aristotle.¹⁰⁸⁸ Yet, not every additional utterance is necessarily beneficial to the quest for truth. The quality of deliberation is only improved if the information added contains facts or ‘perspectives needed for greater mutual understanding or a good decision’.¹⁰⁸⁹

1081 See also Neblo 2007, 528: ‘[i]f some communicative exchange were utterly perverse on key deliberative criteria we would be tempted to say that it is not a case of deliberation at all, rather than a case of really bad deliberation.’

1082 For more thoughts on ‘deliberative lies’ see Goodin 2008a (capitalization removed). On ‘what lies destroy’ (capitalization removed), see also Mahlmann 2021b, esp 452: ‘[s]trategic political lying destroys an epistemic life-world that is not only the precondition for rational decision-making and a necessary level of trust in the political system but also for a normative culture of respect.’

1083 On hacking and leaking in the public interest see footnote 433 above and the accompanying text.

1084 See already footnote 1076 above and the accompanying text.

1085 Mansbridge 2015, 39. See also Estlund 2008; Nelson 2008.

1086 Estlund/Landemore 2018, 114.

1087 Cohen 1986.

1088 On the ‘wisdom of the multitude’ and Aristotle’s contribution to the concept see Waldron 1995. See also Mansbridge 2015, 39.

1089 Mansbridge 2015, 39.

While the standard of sincerity requires discourse participants to say what they mean and mean what they say,¹⁰⁹⁰ the epistemic dimension of democratic deliberation rather requires them ‘to say what it is that [political decisions] might be correct or true about, or in what way they might be good’.¹⁰⁹¹ Thereby, the aim is to arrive ‘at good or correct answers to practical or moral political questions’.¹⁰⁹² Ideally, good deliberation renders the opinions of discourse participants not only ‘more informed’ but also ‘more likely to be right’.¹⁰⁹³ This is important because it means that not just the *intentional* dissemination of false information runs counter to the standards of good deliberation, but rather any dissemination of false information. Some questions about what is true, correct, or good are of course legitimately contested, and it is necessary to discuss them and, along the way, include views that later turn out to be wrong. However, some – in fact many – facts are ‘demonstrable and irrefutable’.¹⁰⁹⁴ In relation to such facts, the spread of verifiably false information does not contribute in any way to producing better political decisions. To the contrary, the spread of false information, especially on important matters, can cause significant harm to deliberation and the quality of the political decisions resulting from it. Whenever information is verifiably false, its dissemination – including as a means of foreign electoral interference – conflicts with epistemic value as a standard of good deliberation.

A final standard of good deliberation relevant to informational means of foreign interference in the opinion-forming process is *substantive balance*. Substantive balance refers to ‘the extent to which arguments offered by one side or from one perspective are answered by considerations offered by those who hold other perspectives’¹⁰⁹⁵. This is not a mere restatement of the standard of equal opportunity of access to political influence. What is decisive is not an equal number of public statements or public appearances by competing candidates, campaigns, or other political actors but rather a balance of considerations and reasons relevant to a certain argument.¹⁰⁹⁶ If a policy

1090 See footnote 1078 above and the accompanying text.

1091 Estlund/Landemore 2018, 118.

1092 Estlund/Landemore 2018, 118. For an alternative to this standard view see *ibid*, 119.

1093 Estlund/Landemore 2018, 123.

1094 This formulation was used in the complaint filed in a defamation lawsuit by Smartmatic on 4 February 2021, para 1: ‘[t]he Earth is round. Two plus two equals four. Joe Biden and Kamala Harris won the 2020 election for President and Vice President of the United States. The election was not stolen, rigged, or fixed. These are facts. They are demonstrable and irrefutable.’

1095 Fishkin 2011, 34; Fishkin 2011a, 251.

1096 Fishkin 2011, 35.

proposal by a political actor is countered by substantially unrelated personal denigration rather than by actual counterarguments, no substantive balance is generated.¹⁰⁹⁷ Rather, policy options should receive adequate weighing, including ‘the best considerations advocates can offer on either side’.¹⁰⁹⁸ Essentially, no issue of relevance should be left in a ‘pre-deliberative condition’¹⁰⁹⁹. The significance of this criterion for informational means of foreign interference in the opinion-forming process is twofold. Firstly, no relevant argument must be prevented from being heard by drowning it in false or irrelevant information.¹¹⁰⁰ Secondly, as mentioned before,¹¹⁰¹ new positions and information should be introduced to public discourse as soon as possible, in order to leave enough time to respond to them with competing positions, relevant counterarguments, and different perspectives.¹¹⁰² This concerns all examples of informational means of foreign electoral interference. After all, any form of communication can become so noisy and all-consuming that it puts the substantive balance of deliberation in jeopardy, or be released so late that no contrasting views can be shared. Deliberative democracy certainly does not envision ‘both-sidesism’¹¹⁰³ or ‘false balance’¹¹⁰⁴ – roughly the equal treatment of two sides of an argument despite the existence of better reasons for one side. It does

1097 Fishkin 2011, 35–36.

1098 Fishkin 2011, 36.

1099 Fishkin 2011, 35.

1100 See Fishkin 2011, 35–36: ‘[p]olitical broadcasts may consider that they offer “balance” [as opposed to *substantive* balance] when candidate (or policy advocate) A gets to criticize candidate B’s policy positions and B responds with charges about A’s personal life. The affect might be balanced for the audience; perhaps the time and attention devoted to each side are balanced. But the criticisms of B’s policy positions are left in a pre-deliberative condition. What is the country to think about a position that has been criticized without the response to those criticisms also being aired? Furthermore, if the personal charges are relevant to the political choices, what is the country to think about A’s character if the responses to those criticisms are not aired?’ See also *ibid.*, 36: ‘[t]o require substantive balance rather than mere affective balance is to say that if, for example, someone offers reasons for thinking that a policy option will not have the desired effect, and those reasons are not responded to, but the speaker’s sex life is discussed instead, balance of the sort required for deliberation has not been achieved.’

1101 See footnotes 1076 and 1084 above as well as the accompanying text.

1102 See Fishkin 2011, 37: ‘[p]ut simply, a deliberation without substantive balance would be impaired, because the considerations that weigh for and against the claims at issue would never get considered. If we are interested in conditions of public will formation where the competing arguments are aired, then substantive balance is fully as essential as information.’

1103 See for example Paul Krugman, *Both Sides Now?* (The New York Times, 18 July 2016). See also the explanation by Merriam-Webster.

1104 See for example David Robert Grimes, *Impartial journalism is laudable. But false balance is dangerous* (The Guardian, 8 November 2016).

require, however, that relevant arguments can be aired and receive serious consideration. Only then can reasons be weighed against each other, allowing for the most convincing position to eventually prevail. Therefore, any example of informational means of foreign interference in the opinion-forming process that prevents relevant substantive arguments from receiving adequate attention runs counter to substantive balance as a standard of good deliberation.

To conclude, informational means of foreign electoral interference raise several concerns regarding the quality of deliberation. In order to comply with the standards of good deliberation, any communication by foreign states would have to contribute to the clarification of interests rather than to complexity and obfuscation. It needs to be truthful, complete, and revealed without delay rather than deceive, mislead, or conceal relevant information. It must not be verifiably false, nor must it prevent relevant substantive arguments by others from receiving adequate attention. In addition, as discussed earlier,¹¹⁰⁵ contributions by foreign states would have to be justified by their interests being affected, they need to be transparent rather than covert, and they must not run counter to any defensible conception of the common good. Good deliberation aims at achieving ‘epistemic clarity’,¹¹⁰⁶ not at rewarding the voices that shout the loudest. It leaves no room for foreign states that sow chaos, spread lies, or promote last-minute scandals. By contrast, early, candid, and well-informed criticism on matters of international concern is very well compatible with the standards of good deliberation.

14.1.3.5. Intermediate conclusion

Before concluding the evaluation of foreign electoral interference in light of the demands of deliberation, a few caveats are in order. Firstly, as mentioned before, the standards of good deliberation surveyed here are contested, even within deliberative democracy scholarship. Some of them may conflict, evolve, or be the subject of controversy.¹¹⁰⁷ The foregoing assessment is therefore only an approximation of what deliberative democracy has to say about foreign interference in the opinion-forming process. Secondly, the standards of good deliberation are not the only possible yardsticks for evaluating the integrity of opinion-forming processes. Other theories of democracy may come with their own understanding of good democratic discourse.¹¹⁰⁸ However, the ideals of deliberative democracy advance a particularly rational and egalitarian vision

¹¹⁰⁵ See for these requirements section 14.1.3.2 above.

¹¹⁰⁶ Mansbridge 2015, 40.

¹¹⁰⁷ Mansbridge 2015, 35, 40. See already footnote 1008 above and the accompanying text.

¹¹⁰⁸ For different theories of democracy and elections see Katz 1997, esp 100-106. See also section 3.3 above.

of democracy and thus arguably quite a compelling one. Thirdly, the relevance of the standards of good deliberation is of course not limited to foreign electoral interference. Much of what has been said is also true for purely domestic constellations, and it is probably fair to say that no state-wide democratic discourse fully meets all standards of good deliberation, even in the absence of foreign interference. Needless to say, the sum of normative questions related to the economic and informational surroundings of elections goes beyond the issue of foreign interference, and it also exceeds the scope of this study. As regards the matter at hand, the compatibility of foreign electoral interference with the standards of good deliberation, some tentative conclusions can be drawn.

In order for foreign interference in the opinion-forming process of an election to be compatible with the standards of good deliberation, the conduct in question would have to adhere as closely as possible to the following requirements. The interfering state's interests need to be *affected* in order to justify its participation in the deliberative process. The conduct needs to be overt, that is, publicly visible and *transparent* with respect to the actors behind it. The pursuit of self-interest must not run counter to any defensible conception of the *common good*. It must not involve any form of *power*, be it applied force or the threat of sanctions. It must not create or exacerbate unequal *opportunities of access to political influence* between political actors in the target state. It must not lead to elected representatives being accountable to foreign actors for other than moral reasons, nor must it harm *accountability* to actual constituents by being hidden from them. It needs to contribute to a *clarification* of the interests at stake rather than promote complexity, chaos, or obfuscation. It needs to be *sincere* and thus reveal information accurately, fully, and without delay. It needs to be in line with the *epistemic goals* of deliberation and therefore convey only facts that are not verifiably false. Finally, it needs to respect a certain *substantive balance* within deliberation and thus must not occur too late to allow for responses, nor be so all-consuming as to prevent substantive arguments on matters of importance from receiving appropriate consideration.

These are certainly high standards, no matter for whom. Yet, assuming that everyone has the capability for sound deliberation,¹¹⁰⁹ why should one not at least try to follow these ideals? International law only contains a set of

1109 On citizens' capability to 'avoid polarization and make sound decisions' see Dryzek/Bächtiger/Chambers/Cohen et al 2019, esp 1146: '[t]he citizenry is quite capable of sound deliberation. But deliberative democratization will not just happen. Much remains to be done in refining the findings of the field and translating them into political practice. That political reconstruction itself would ideally be deliberative and democratic, involving social science but also competent citizens and leaders in broad-ranging political renewal.'

minimum standards regulating electoral processes and protecting the integrity of democratic discourse – including from malign foreign interference. However, a more ambitious vision of collective decision-making is possible, and deliberative democracy provides a blueprint that is not only convincing in theory but also readily usable in practice.

As regards specific examples of foreign electoral interference, the standards of good deliberation provide strong arguments against some behaviour that is not categorically prohibited by international law. Perhaps most notably, this includes covert funding and disinformation. Any non-transparent economic influence, any dissemination of falsehoods against better knowledge, and virtually any covert activities are incompatible with the standards of good deliberation. By contrast, none of the ideals of deliberative democracy can be held against well-informed, early, and candid criticism on matters of common concern. If, for example, an official of a state that is particularly impacted by climate change criticizes – with good reasons – the environmental policies of a candidate or party in another state that is responsible for a large share of global carbon emissions, would that not be an example of desirable transnational deliberation rather than an example of undue foreign electoral interference?

To be sure, some aspects of good deliberation may tend to be structurally absent in cases of foreign electoral interference. Firstly, the interests of foreign states will generally be affected less often than the interests of domestic constituents. Secondly, foreign states may escape the jurisdictional reach of domestic laws, allowing them to exert influence in ways domestic actors cannot and thereby act as unequal political actors. Thirdly, foreign electoral interference may in practice perhaps be driven by self-interest more often than by pursuit of the common good. However, sometimes the conduct of foreign states – if it represents argumentation rather than manipulation¹¹¹⁰ – might very well be in line with the standards of good deliberation. Any final determination will of course have to be context-sensitive and take into account all relevant circumstances. Yet, the road to legitimate participation in democratic discourse arguably leads through these ideals.

14.2. Consequences: the perils of foreign electoral interference

Before moving forward, this section integrates the results of the legal assessment and the findings of the theoretical evaluation. The history of ideas contains early considerations not only on foreign interference in government

¹¹¹⁰ I am grateful to Professor Matthias Mahlmann for valuable contributions to this argument.

but, at least since the late eighteenth century, on foreign interference in elections as well.¹¹¹¹ History shows that attempts by states to influence the outcome of elections in other states are as old as modern electoral democracy itself.¹¹¹² The evidence from political science is that foreign electoral interference can have significant effects both on voting behaviour and on the democratic system as a whole.¹¹¹³ In other words, foreign electoral interference is conceivable, it is common, and it can be effective. An understanding is thus needed of the consequences foreign electoral interference can have for democracy as well as for the international order, understood not just as a set of norms but also as a structured form of political relations and cooperation. I suggest that these consequences are threefold: a potential deficit of legality, a potential deficit of accountability, and a potential deficit of legitimacy.

14.2.1. A potential deficit of legality

The international legal concepts surveyed in this study – the prohibition of intervention, the right of peoples to self-determination, and citizens' electoral rights – all protect free political decision-making within elections.¹¹¹⁴ If the observations in the legal assessment are correct, this freedom is impaired and all the three norms are violated, at the very least, if one of the following scenarios occurs:¹¹¹⁵ the interference (in the opinion-*forming* process) is in contravention of human rights-compliant domestic electoral laws, the interference (in the opinion-*forming* process) is disproportionately intense, or the interference (in the opinion-*collecting* process) includes any manipulation of voting procedures. In such cases, foreign electoral interference is impermissible under international law and there is thus a deficit of legality.¹¹¹⁶

14.2.2. A potential deficit of accountability

Whenever there is a violation of international law, this begs the question of procedural avenues to have this violation confirmed by international courts or quasi-judicial bodies and to hold those responsible to account.¹¹¹⁷ The most

1111 See section 1.1 above.

1112 See section 1.2 above.

1113 See section 1.3 above.

1114 See section 13.1 above.

1115 See section 13.2 above.

1116 'Legality' is understood here as lawfulness, or 'conformity with international law': Wolfrum 2011, para 1.

1117 I mean accountability as a mechanism rather than a virtue here – that is, as 'an institutional relation or arrangement in which an agent can be held to account by another agent or institution': Bovens/Schillemans/Goodin 2014, 8. This roughly corresponds to

obvious bodies for the matter at hand are the International Court of Justice and the UN Human Rights Committee. The former comes to mind in the context of the prohibition of intervention, applicable between states. The latter provides a forum to assess alleged violations of the International Covenant on Civil and Political Rights, such as the right of peoples to self-determination stipulated in Article 1(1) or the electoral rights protected by Article 25. However, several notable hurdles to accountability are built into the applicable international legal framework.

Firstly, it is at the discretion of states and their governments whether or not to initiate proceedings against another state that may be responsible for interfering in their elections. Whenever the interference was in the interest of the government that won the election in question, there is a potential political disincentive for that government to open any proceedings that would cast doubt on the integrity of the process from which its governmental legitimacy derives. Such constellations may in fact make the most successful examples of foreign electoral interference the least likely to become the subject of international judicial accountability mechanisms.¹¹¹⁸ Secondly, the Human Rights Committee does not regard complaints regarding violations of peoples' rights admissible. In addition, only states can be parties to contentious cases before the ICJ. This makes it impossible for peoples to initiate proceedings before these two bodies for violations of their right to self-determination independently of the government.¹¹¹⁹ Thirdly, any interference with citizens' electoral rights by foreign governments inevitably raises complicated and as yet unsettled questions about the extraterritorial application of human rights treaties. Various avenues for reconceptualization have been proposed, and some could succeed in preventing foreign electoral interference from slipping through the cracks of international legal human rights protection. However, the effective control test relied on by judicial bodies at present is hardly met by foreign electoral interference. While this does not affect the obligation of the *target state* to *protect* individuals in its territory or subject to its jurisdiction from preventable adverse impacts on their electoral rights, it does prevent human rights obligations of the *interfering state* from arising. Questions around

the third element of the definition of accountability by Buchanan/Keohane 2006, 426: '[a]ccountability includes three elements: first, standards that those who are held accountable are expected to meet; second, information available to accountability holders, who can then apply the standards in question to the performance of those who are held to account; and third, the ability of these accountability holders to impose sanctions—to attach costs to the failure to meet the standards.'

1118 On this first issue see section 6.3 above.

1119 See on this second issue section 9.1 above.

extraterritoriality thus represent significant obstacles to accountability for foreign electoral interference under international human rights law.¹¹²⁰

Much will of course depend on the specific circumstances of a case as well as on future doctrinal developments. Generally, however, it is very well possible that for some examples of foreign electoral interference that violate international law there is no corresponding procedural avenue to hold the actors in question responsible. This would then result in a deficit of accountability.

14.2.3. A potential deficit of legitimacy

As regards questions of legitimacy, the evaluation of foreign electoral interference naturally depends on which theory of democracy one applies. If one holds communitarian views and attributes intrinsic normative value to the community constituted in a state, virtually any form of outside participation may seem undesirable. Yet that is not a view this study aims to defend. By contrast, if one holds universalist views, the answer will be more nuanced. When human dignity is taken as the ultimate reason why individuals should have a say in their political future, not every form of foreign electoral interference is necessarily problematic. Rather, problems arise whenever foreign electoral interference negatively affects the opportunity of members of a polity to enjoy a meaningful and effective form of participation. In short, foreign electoral interference is problematic if it harms the integrity of the processes allowing human individuals to make their voice heard.¹¹²¹ In electoral democracies, these processes include voting and the preceding public discourse. As discussed earlier, interference in the *opinion-collecting* process is always undesirable because it undermines the concept of representation inherent to electoral democracy.¹¹²² Interference in the *opinion-forming* process, in turn, is problematic if it runs counter to the standards of good deliberation.¹¹²³

Whenever the integrity of such processes is harmed, this has consequences for the legitimacy of the governments appointed through the elections in question. Moreover, these consequences affect international relations as well. The international legal order is traditionally¹¹²⁴ built on the premise that states are authorized to act and speak on behalf of their citizens.¹¹²⁵ It

1120 See on this third issue section 12.1 above.

1121 See section 14.1.1 above.

1122 See section 14.1.2.

1123 See section 14.1.3 above.

1124 Individuals are becoming increasingly important subjects of international law. For this paradigm shift see Peters 2016.

1125 d'Aspremont 2006, 878; Wolfrum 2011, para 6.

operates under the basic assumption that governments possess legitimacy, meaning they are justified in exercising public authority.¹¹²⁶ From this ensues a competence to enter into commitments at the international level and to create new international norms.¹¹²⁷ However, the mechanisms to create governmental legitimacy are of course located at the national level, the most obvious one being elections. To be sure, the governments of illiberal democracies¹¹²⁸ and even non-democratic governments are in practice often treated as legitimate as well.¹¹²⁹ Nevertheless, democracy has become the ‘primary basis of governmental legitimacy’¹¹³⁰. For the questions at hand, only *elected* governments are of concern. If governments are elected, there is usually an assumption that some governmental legitimacy derives *from* these elections. The greater the adverse impact of foreign electoral interference on the integrity of the electoral process, the less the election can be expected to effectively bestow governmental legitimacy. If the opinion-*forming* process did not fully conform to the standards of good deliberation, this certainly casts a shadow on the election, especially if the outcome is close. Yet it might not cause all legitimacy of the government elected to vanish at once. If, however, there was foreign interference in the opinion-*collecting* process, the situation looks different. When voters are prevented from voting or having their votes accurately captured, counted, and communicated, it becomes highly questionable whether such an election can successfully bestow any governmental legitimacy.

This in turn translates to the international level as well, at least if one relies on the concept of a chain of democratic legitimation¹¹³¹ that starts within the

1126 See for this definition of legitimacy Wolfrum 2011, para 1.

1127 Wolfrum 2011, paras 9–14. For a related discussion of why foreign electoral interference ‘poses a problem for liberal theory’ see Fidler 2021, 300: ‘[i]t challenges the proposition that nonstate actors drive the formation of political preferences because a foreign government manipulated domestic political processes in order to produce what it preferred.’

1128 See d’Aspremont 2006, 913: ‘[a]n illiberal democracy is a democratically elected government exercising its power in violation of the substantive elements of democracy.’ Fareed Zakaria is usually credited with coining this term, including by d’Aspremont (ibid, 879, fn 5): Fareed Zakaria, *The Rise of Illiberal Democracies* (Foreign Affairs, November/December 1997).

1129 See d’Aspremont 2006, 888, mentioning the People’s Republic of China as the most obvious example (fn 47).

1130 Bodansky 1999, 599. See also d’Aspremont 2006, 888. Both employ slightly weaker formulations than I do here.

1131 The ‘chain of legitimation’ – or, ‘Legitimationskette’ – is a well-established concept in German constitutional thought. See for example Böckenförde 2005, 38: ‘Als demokratische Organe müssen sich die Leitungsorgane durch eine ununterbrochene Legitimationskette auf das Volk zurückführen lassen: Erforderlich ist also, daß sie unmittelbar oder mittelbar vom Volk berufen werden und grundsätzlich auch abberufbar

domestic context and reaches into the sphere of international relations.¹¹³² Problems of legitimacy within *intra*-state electoral processes could then also lead to a legitimacy deficit of governments' *inter*-state conduct. This concerns not only the sources of international law¹¹³³ but also intergovernmental institutions and their executive, legislative, and judicial organs.¹¹³⁴ Any claims¹¹³⁵ to legitimate governance and decision-making that international organizations might raise are potentially affected by legitimacy deficits in national elections as well – at least to the extent that their bodies are appointed by the member states' governments rather than directly elected by a transnational electorate like the European Parliament.¹¹³⁶ In short, if the legitimacy chain breaks at the national level, it cannot reach to the international level either. Therefore, foreign electoral interference has the potential to create a deficit of legitimacy that concerns not only the government of the target state but the international order as well.

15. Moving forward: what to do about foreign electoral interference

If the previous observations were correct, foreign electoral interference can be divided into several subsets. Many examples – albeit not all – raise problems from the perspective of democratic theory. Of these problematic cases, only some are impermissible under international law. An even smaller subset

sind [...]'. For an English formulation see von Bogdandy 2004, 902 (also referring to Böckenförde in fn 84): '[a]ll public acts achieve a democratic quality only when they are either enacted (exceptionally) by the citizenry as such (through referenda) or can be traced back to the decisions of elected bodies ("chain of democratic legitimation").' A related concept is the 'chain of political representation': Rohrschneider/Thomassen 2020, 2-3; Crisp/Olivella/Rosas 2020.

1132 For publications that mention the chain of democratic legitimation in a transnational context see Habermas 2008, esp 451-454; von Bogdandy 2004, 902; Nullmeier/Pritzlaff 2010.

1133 On the legitimacy of both international treaties and customary international law depending on the legitimacy chain at the national level see Wolfrum 2011, paras 9-14.

1134 On the legitimacy of international institutions, their legislative and executive actions, and decisions by international courts and tribunals specifically see the respective contributions in Wolfrum/Röben 2008; D'Amato 2008; Pellet 2008; Treves 2008; Müllerson 2008.

1135 On the possibility of legitimate international governance in general see Bodansky 1999; Buchanan/Keohane 2006.

1136 On the European Parliament in general see Raunio 2012. On representation-related aspects see Hobolt 2020.

is also likely to become the subject of international legal accountability mechanisms. This raises the question of whether new legal avenues might have to be created or whether there are promising non-legal responses available. After all, Stephen Tierney might be right when writing that ‘there is only so much that legal regulation can do to facilitate deliberation’ and that ‘[m]uch must ultimately depend upon the quality of debate within civil society and the engagement of the private media’.¹¹³⁷ The following sections offer some reflections on what can – and perhaps should – be done about foreign electoral interference beyond the pursuit of existing legal avenues.

15.1. On the possibility of amending international law

The binding requirements concerning elections stipulated in today’s international legal order arguably represent a very minimalist understanding of electoral integrity. However, this state of legal affairs is not set in stone. One possibility of dealing with the phenomenon of foreign electoral interference is to amend international law. Notwithstanding the fact that this might not be politically realistic, several options are conceivable.

As far as the form of new legal rules is concerned, one could either draft a new international convention or amend existing ones.¹¹³⁸ For example, the ICCPR could in theory be amended by an additional optional protocol containing more comprehensive guardrails for elections. As regards the substance of such amendments, there are different avenues available as well. They can be illustrated on the basis of some existing soft law documents and domestic legal approaches. To begin with, the path chosen by Canada is an interesting example. Its Elections Act contains a prohibition of certain foreign broadcasting, with the key criterion being the ‘intent to influence’:¹¹³⁹

No person shall, with intent to influence persons to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at an election, use a broadcasting station outside Canada, or aid, abet, counsel or procure the use of a broadcasting station outside Canada, during an election period, for the broadcasting of any matter having reference to an election.

1137 Tierney made this statement in the context of referendums rather than elections: Tierney 2018, 206.

1138 On ‘establishing a United Nations convention to stop foreign election interference’ see Carney 2021 (capitalization removed).

1139 Canada Elections Act, Section 330(1). See also the other subsections: ‘(1.1) Subsection (1) does not apply in respect of any matter that is broadcast if the broadcasting signals originated in Canada. [...] (2) During an election period, no person shall broadcast, outside Canada, election advertising with respect to an election.’

Interestingly, a 2018 amendment¹¹⁴⁰ repealed a further-reaching prohibition¹¹⁴¹ of undue influence by foreigners and replaced it with a more nuanced one.¹¹⁴² While the exact formulation of such prohibitions requires careful consideration, one might in principle also build one into international law. Relying on intentions is often tricky in international law due to the fictitious personality of states. However, sometimes the intentions of governments may very well be stated or otherwise evident, in which case they can also be taken into account.¹¹⁴³

Another notable example is the Venice Commission's Code of Good Practice in Electoral Matters.¹¹⁴⁴ The code comes in the form of soft law¹¹⁴⁵ and, on

1140 See the Elections Modernization Act. For some background on Canada's approach see Judge/Korhani 2020; Dawood 2021. See also Aaron Wherry, *Barack Obama tweets endorsement of Justin Trudeau* (CBC, 16 October 2019, last updated 17 October 2019).

1141 Canada Elections Act, Section 331. Repealed by the Elections Modernization Act, Section 213.

1142 Canada Elections Act, Section 282.4: '[Undue influence by foreigners] 282.4(1) No person or entity referred to in any of paragraphs (a) to (e) shall, during an election period, unduly influence an elector to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at the election: (a) an individual who is not a Canadian citizen or a permanent resident as defined in subsection 2(1) of the Immigration and Refugee Protection Act and who does not reside in Canada; (b) a corporation or entity incorporated, formed or otherwise organized outside Canada that does not carry on business in Canada or whose primary purpose in Canada during an election period is to influence electors during that period to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at the election; (c) a trade union that does not hold bargaining rights for employees in Canada; (d) a foreign political party; or (e) a foreign government or an agent or mandatary of a foreign government. [Meaning of unduly influencing] (2) For the purposes of subsection (1), a person or entity unduly influences an elector to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at an election if (a) they knowingly incur any expense to directly promote or oppose a candidate in that election, a registered party that has endorsed a candidate in that election or the leader of such a registered party; (b) one of the things done by them to influence the elector is an offence under an Act of Parliament or a regulation made under any such Act, or under an Act of the legislature of a province or a regulation made under any such Act. [Exceptions] (3) For greater certainty, subsection (1) does not apply if the only thing done by the person or entity to influence the elector to vote or refrain from voting, or to vote or refrain from voting for the particular candidate or registered party, consists of (a) an expression of their opinion about the outcome or desired outcome of the election; (b) a statement by them that encourages the elector to vote or refrain from voting for any candidate or registered party in the election; or (c) the transmission to the public through broadcasting, or through electronic or print media, of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news, regardless of the expense incurred in doing so, if no contravention of subsection 330(1) or (2) is involved in the transmission. [...].'

1143 See already footnote 152 above.

1144 European Commission for Democracy Through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd Session (Venice, 18-19 October 2002), Opinion no 190/2002, CDL-AD(2002)023rev2-cor.

1145 See footnote 725 above and the accompanying text.

its face, reiterates familiar voting principles: universal, equal, free, secret, and direct suffrage at regular elections.¹¹⁴⁶ However, its understanding of electoral integrity is significantly more detailed and comprehensive than the one expressed in Article 25 of the ICCPR. Perhaps most notably, the Venice Commission also regards ‘equality of opportunity’ as a component of equal suffrage. This requirement, a familiar one,¹¹⁴⁷ is explicated by the code as follows:¹¹⁴⁸

- a. Equality of opportunity must be guaranteed for parties and candidates alike. This implies a neutral attitude by state authorities, in particular with regard to:
 - i. the election campaign;
 - ii. coverage by the media, in particular by the publicly owned media;
 - iii. public funding of parties and campaigns.
- b. Depending on the subject matter, equality may be strict or proportional. If it is strict, political parties are treated on an equal footing irrespective of their current parliamentary strength or support among the electorate. If it is proportional, political parties must be treated according to the results achieved in the elections. Equality of opportunity applies in particular to radio and television air-time, public funds and other forms of backing.
- c. In conformity with freedom of expression, legal provision should be made to ensure that there is a minimum access to privately owned audiovisual media, with regard to the election campaign and to advertising, for all participants in elections.
- d. Political party, candidates and election campaign funding must be transparent.
- e. The principle of equality of opportunity can, in certain cases, lead to a limitation of political party spending, especially on advertising.

The code goes further than current international law in other areas, too.¹¹⁴⁹ Building such a more comprehensive vision of electoral integrity into binding international human rights law could be a viable path for the future. Turning

1146 See European Commission for Democracy Through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd Session (Venice, 18-19 October 2002), Opinion no 190/2002, CDL-AD(2002)023rev2-cor, paras I.1.-I.6.

1147 On *equal opportunity of access to political influence* as a standard of good deliberation see section 14.1.3.3 above.

1148 European Commission for Democracy Through Law (Venice Commission), Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, Adopted by the Venice Commission at its 52nd Session (Venice, 18-19 October 2002), Opinion no 190/2002, CDL-AD(2002)023rev2-cor, para I.2.3.

1149 See paras I.1.-I.6. and compare them with the requirements of Article 25 of the ICCPR as portrayed in section 10.3.2 above. In addition, the code also mentions conditions for implementing its principles. See paras II.1.-II.4.

at least some of the code's requirements into hard law could help strengthen electoral processes and improve the protection of electoral rights against foreign interference.

Finally, another document is worth mentioning. The 'International code of conduct for information security'¹¹⁵⁰ is an initiative by China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan, and Uzbekistan which aims at establishing an 'information environment that is peaceful, secure, open and founded on cooperation'.¹¹⁵¹ It contains the following paragraph:¹¹⁵²

Each State voluntarily subscribing to this Code of Conduct pledges: [...]

(3) Not to use information and communications technologies and information and communications networks to interfere in the internal affairs of other States or with the aim of undermining their political, economic and social stability;

While Canada's Elections Act focuses on the 'intent to influence' and the Code of Good Practice on Electoral Matters focuses on the yardsticks of electoral integrity, this last example focuses on the 'aim of undermining'. Taken together, these texts indicate what could be feasible avenues for conceptualizing new international rules concerning foreign electoral interference. Whereas giving up the threshold for impermissible political influence completely would produce undesirable consequences,¹¹⁵³ lowering it from 'coercion' to the aim or intent to self-interestedly influence the outcome of foreign elections is worth considering. In addition, one could of course focus on specific means of interference and prohibit certain forms of funding, certain forms of communication, or certain technical operations.¹¹⁵⁴ In any case, there is no lack of possibilities, should there be sufficient political will to amend international law.

15.2. Other avenues to counter foreign electoral interference

The following sections discuss avenues for states, international organizations, civil society, businesses, and other actors to counter different forms of foreign

1150 UNGA, Letter dated 9 January 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General (2015) UN Doc A/69/723, Annex.

1151 *ibid*, para 1.

1152 *ibid*, para 2(3). For a similar initiative see the Paris Call: For trust and security in cyberspace (11 December 2018), especially principle 3: '[d]efend electoral processes: Strengthen our capacity to prevent malign interference by foreign actors aimed at undermining electoral processes through malicious cyber activities.' See on this initiative Hollis/Neutze 2021, 344-347.

1153 See footnote 295 above and the accompanying text.

1154 On specific responses to economic, informational, and technical means of interference, respectively, see section 15.2.

electoral interference. The role of journalistic media and the individual responsibility of voters are treated separately thereafter. Importantly, the measures discussed should be seen as complementing each other rather than as alternatives. While this is not the place to exhaustively cover all conceivable measures,¹¹⁵⁵ it is appropriate to at least address some possible responses that follow from the insights so far.

15.2.1. Strengthening the will formation process: electoral laws, resilience, and transparency

There are roughly three main categories into which measures can be grouped: setting out a clear framework of *domestic electoral laws*, increasing the *resilience* of democratic processes, and ensuring as much *transparency* as possible about political influence.¹¹⁵⁶ Enacting electoral laws and thereby defining clear requirements for the integrity of electoral processes is an expression of peoples' right to self-determination. If the observations in the legal assessment are correct, such laws also expand the set of rules that foreign states have to abide by, at least if the laws in question are in compliance with international human rights law.¹¹⁵⁷ In addition, a more resilient political process could lower the risk of foreign electoral interference becoming disproportionately intense.¹¹⁵⁸ Furthermore, transparency is a fundamental desideratum for good deliberation – and arguably in light of any democratic theory that relies on information-

1155 To illustrate the volume of available recommendations see the following publications and the steps they discuss: Tenove/Bufie/McKay/Moscrop 2018, 36-49; Doublet 2019, 37-38; Sebastian Bay & Guna Šnore, *Protecting Elections: A Strategic Communications Approach* (NATO Strategic Communications Centre of Excellence, 2019), 20-21; Erik Brattberg & Tim Maurer, *Russian Election Interference: Europe's Counter to Fake News and Cyber Attacks* (Carnegie Endowment for International Peace, 2018), 28-32; Brennan Center for Justice, *Defending America's Election Infrastructure* (2019). For an overview of some responses discussed to date see also the following publication: European Parliament, 'Foreign interference in democracies: Understanding the threat, and evolving responses' (2020) PE 652.082. On a 'potpourri' of available responses to foreign electoral interference see Lin 2021, 370 (capitalization removed).

1156 The importance of transparency has also been emphasized by Ohlin 2018, 15-23. See also Ohlin 2020, 118-146; Ohlin 2021a, 251-259. The concept of resilience is also discussed by Fjällhed/Pamment/Bay 2021, 145-146. For a view that comparative approaches to foreign election interference are converging and 'have worked their way toward a common set of solutions' see Ringhand 2021, 2: '[t]hese efforts have varied in their details [...] but they have consolidated around the same general set of ideas: better educating citizens about the perils of cyber speech, increasing transparency about who is promoting online communications, building better barriers to exclude foreign funding of electoral communications, and trying to remove the most egregiously false statements from political discourse.' See also the following publications in the same issue: Dawood 2021; Eisler 2021; Irwin/van Holsteyn 2021; Orr/Geddis 2021; Couzigou 2021.

1157 See section 13.2.1 above.

1158 See section 13.2.2 above.

based will formation to some extent.¹¹⁵⁹ If there is transparency regarding the nature and origin of foreign influence on the opinion-forming process, these factors can at least be taken into account by voters. The fact that there is foreign interference in the interest of a certain campaign might itself become a relevant factor in public discourse. By contrast, if the interference remains covert, there cannot be (good) deliberation about it. The following sections will discuss specific measures that could strengthen the opinion-forming process in light of economic and informational means of interference, respectively.

15.2.1.1. Possible responses to economic means of interference

One of the most obvious responses to economic means of interference – in the form of financial support for political actors – is to regulate political funding.¹¹⁶⁰ Already in 2003, the Council of Europe’s Committee of Ministers included the following article in its Recommendation to member states on common rules against corruption in the funding of political parties and electoral campaigns: ‘States should specifically limit, prohibit or otherwise regulate donations from foreign donors.’¹¹⁶¹ In a 2006 opinion, the Venice Commission elaborated further on this.¹¹⁶² In an interconnected world with institutional and political structures transcending borders, as for example in the case of the European Parliament,¹¹⁶³ there may of course be reasons against a blanket ban on international financial cooperation between political actors. Beyond such situations, however, there can nonetheless be good reasons for banning or at least limiting certain forms of political funding from abroad. The Venice Commission gave the following examples in which a prohibition of funding from foreign sources ‘may be considered necessary in a democratic society’:¹¹⁶⁴

1159 See footnotes 1026–1027 above and the accompanying text.

1160 On campaign finance reform as a response to foreign electoral interference see also Vandewalker/Norden 2021.

1161 Council of Europe, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers’ Deputies), Article 7. For a recent reiteration in the specific context of disinformation see Doublet 2019, 38: ‘[m]ember states of the Council of Europe should, within a given time frame, adopt an overall strategy on social media and electoral campaigns, which would be a combination of statutory measures and self-regulation. They should: [...] ban funding of digital electoral expenditure by a foreign physical or legal person [...]’

1162 European Commission for Democracy through Law (Venice Commission), Opinion on the Prohibition of Financial Contributions to Political Parties from Foreign Sources, Adopted by the Venice Commission at its 66th Plenary Session (Venice, 17–18 March 2006), Opinion no 366/2006, CDL-AD(2006)014.

1163 See for this point *ibid.*, para 32.

1164 *ibid.*, para 33.

- if the funding ‘is used to pursue aims not compatible with the Constitution and the laws of the country (for example, the foreign political party advocates discrimination and violations of human rights)’
- if it ‘undermines the fairness or integrity of political competition or leads to distortions of the electoral process or poses a threat to national territorial integrity’
- if it ‘is part of international obligations of the State’
- if it ‘inhibits responsive democratic development’.

In fact, many states have enacted laws that limit foreign contributions to political campaigns in one way or another.¹¹⁶⁵ Of course, any electoral law will have to be in line with international human rights standards if it is supposed to increase electoral integrity.¹¹⁶⁶ In 2007, the European Court of Human Rights had the opportunity to discuss a specific prohibition for political parties to accept funding from foreign states. While the court regarded the ban in question as interfering with the applicant party’s freedom of association,¹¹⁶⁷ it had ‘no difficulty in accepting that the prohibition on the funding of political parties by foreign States is necessary for the preservation of national sovereignty’.¹¹⁶⁸

Aside from complete bans and upper limits for funding, another important avenue is to ensure transparency of financial contributions and their origin. This, too, has been recommended by the Council of Europe’s Committee of Ministers: ‘[m]easures taken by states governing donations to political parties should provide specific rules to [...] ensure transparency of donations and

1165 For a recent analysis of such laws see European Parliament, ‘Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States’ (2019) PE 608.864, Annex 3: Legislative provisions of national electoral acts on campaign financing and countering disinformation and propaganda (in certain Member States), 196-198. For less recent but more comprehensive compilations of pertinent legal standards see the following publications: European Parliament, ‘Party Financing and Referendum Campaigns in EU Member States’ (2015) PE 519.217; Magnus Ohman, *Political Finance Regulations Around the World: An Overview of the International IDEA Database* (International Institute for Democracy and Electoral Assistance (IDEA), 2012). See also Wiltse/La Raja/Apollonio 2019, esp 252.

1166 For publications that suggest a reliance on international human rights law – among other yardsticks – when assessing electoral integrity see Davis-Roberts/Carroll 2010; Norris 2013; Hardman/Dickson 2017. For a collection of discussions on the theoretical relationship between democracy and human rights in general see the following contributions in Gosepath/Lohmann 1998: Böckenförde 1998; Alexy 1998; Wellmer 1998; Dworkin 1998. See also Gosepath 1998. See also Besson 2011; Besson 2011a.

1167 *Parti nationaliste basque – Organisation régionale d’Iparralde v France* App no 71251/01 ECHR 2007-II 385, para 38.

1168 *ibid*, para 47. See also the court’s considerations on funding by foreign *political parties* *ibid*.

avoid secret donations'.¹¹⁶⁹ If political parties or candidates are supported by foreign governments, having this information in the public domain at least allows voters to take the respective links into account when they form their opinion. While such recommendations concerning transparency are not new, they are certainly not yet fully implemented.¹¹⁷⁰

In addition to enacting domestic electoral laws, states could increase the resilience of their electoral process by setting up a system of public political finance, guaranteeing the availability of minimal resources necessary for election campaigns. Ideally, such systems help achieve equal opportunity of access to political influence. If electoral contestants have a minimum amount of funding at their disposal, this may mitigate not only the effects of foreign financial support *for* electoral campaigns but also those of targeted economic measures *against* electoral campaigns. All of this is of course not to say that it is never legitimate to target certain electoral contestants with sanctions,¹¹⁷¹ to exclude certain political actors from access to public funding,¹¹⁷² or to ban certain parties altogether.¹¹⁷³ However, when it comes to protecting legitimate electoral

1169 Council of Europe, Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns (Adopted by the Committee of Ministers on 8 April 2003 at the 835th meeting of the Ministers' Deputies), Article 3(a). The recommendation goes on to add the following in Article 3(b): '[s]tates should: i. provide that donations to political parties are made public, in particular, donations exceeding a fixed ceiling; ii. consider the possibility of introducing rules limiting the value of donations to political parties; iii. adopt measures to prevent established ceilings from being circumvented.' For a recent reiteration in the specific context of disinformation see Doublet 2019, 38: '[m]ember states of the Council of Europe should, within a given time frame, adopt an overall strategy on social media and electoral campaigns, which would be a combination of statutory measures and self-regulation. They should: [...] obtain disclosure for spending on digital electoral campaign activity by online platforms [...]'].

1170 See for example GRECO's criticism of Switzerland for not yet having fully implemented previous recommendations concerning the transparency of political party funding: Group of States against Corruption (GRECO), Sixth Interim Compliance Report on Switzerland "Transparency of Party Funding", Adopted by GRECO at its 83rd Plenary Meeting (Strasbourg, 17-21 June 2019), GrecoRC3(2019)5, esp para 49. Switzerland enacted new transparency rules in 2022. Time will tell if they suffice.

1171 On human rights abuses being a comparatively good reason to target someone with sanctions – even if that person happens to be a candidate in an election – see footnote 381 above.

1172 See the following example of a clearly well-justified exclusion from public funding: BBC, Greece cuts state funds for far-right Golden Dawn party (22 October 2013). For background information see Daniel Trilling, Golden Dawn: the rise and fall of Greece's neo-Nazis (The Guardian, 3 March 2020). See also Helena Smith, Neo-Nazi leaders of Greece's Golden Dawn sentenced to 13 years (The Guardian, 14 October 2020).

1173 For the case of a party – the 'National Democratic Party of Germany (NPD)' – that met all requirements for being banned, with the sole exception that '(currently) there is a

campaigns against unjustified foreign interference, the measures discussed could help prevent inequalities between campaigns from being created or exacerbated.

Lastly, with a view to biased economic policies as a means of interference, it might be advisable for states not to be too dependent economically on a single foreign state. The more economic leverage one state has over another, the larger the potential impact if that leverage is used politically in the context of an election. That said, international economic cooperation and political finance are vast topics, to which these considerations cannot do justice. Nevertheless, it should have become clear that there exist avenues to counter foreign electoral interference by economic means beyond relying on or modifying international law.

Needless to say, the best way to strengthen the opinion-forming process in light of economic means of interference is one that takes into account specific local and political circumstances and involves a mix of measures rather than just one. The more measures a state anticipates, the more robustly its electoral process can be designed. And the smaller the role money is allowed to play in politics, the less potent foreign electoral interference by economic means will be.

15.2.1.2. Possible responses to informational means of interference

As with economic means of interference, electoral laws can also be helpful in addressing foreign interference in the opinion-forming process by informational means. An interesting domestic legal approach that prohibits ‘undue influence by foreigners’ has already been discussed above: Canada’s Elections Act.¹¹⁷⁴ A further – significantly older – approach to regulating public discourse has also been touched upon before: the 1881 French law that made it ‘illegal to disturb public peace through the publication, dissemination, or reproduction of fake news in bad faith’.¹¹⁷⁵ Banning certain publications at least at certain times is of course one of the options states can resort to when it comes to regulating the opinion-forming process. However, it should be

lack of specific and weighty indications suggesting that [the party in achieving its anti-constitutional aims] will be successful’, see a recent decision by the German Federal Constitutional Court: BVerfGE 144, 20. For the English text quoted see the [press release](#) of 17 January 2017. For another example of the right to freedom of association being abused for anti-democratic aims, see *Ayoub and Others v France* App nos 77400/14, 34532/15 & 34550/15 (ECtHR, 8 October 2020). For the ECtHR’s leading case on the matter see *Refah Partisi (the Welfare Party) and Others v Turkey* [GC] App nos 41340/98, 41342/98, 41343/98 & 41344/98 ECHR 2003-II 267.

1174 See footnotes 1139–1142 above and the accompanying text.

1175 See footnote 407 above and the accompanying text.

emphasized again that any such rules are in the interest of electoral integrity only if they themselves comply with international human rights law.¹¹⁷⁶ Bans on certain forms of speech are a particularly sensitive issue and raise serious concerns with respect to the freedom of expression and the requirements for restrictions thereof.¹¹⁷⁷ Excessive or vague legal rules on speech can have a chilling effect and thereby jeopardize the exchange of political views that is vital to democracy.¹¹⁷⁸ Restrictions on the freedom of speech should thus always be approached with the greatest caution.

That said, there seems to be a crystallization of certain legislative paths to strengthen the opinion-forming process without limiting the freedom of speech in undemocratic ways. The European legal framework for media coverage of elections was analysed in a 2017 publication by the European Audiovisual Observatory.¹¹⁷⁹ Recurring issues include the following: ‘political advertising’, ‘silence periods’, ‘opinion polls and exit polls’, ‘political communication and data protection’, and ‘false information’.¹¹⁸⁰ Legislation on these matters, if done right, can help shape public discourse. While more information is generally in the interest of democratic deliberation, this may in some instances come into conflict with the undesirability of last-minute disruption, a lack of transparency, unequal opportunity, substantively unbalanced discussions, or falsehoods.¹¹⁸¹

The regulation of truth is of course a particularly delicate matter and there are limits to what the law can be expected to achieve in this regard. However, when it comes to scientifically confirmed findings, historically proven facts,

1176 See footnote 1166 above and the accompanying text.

1177 See generally McGoldrick 2022, 218-226.

1178 On the chilling effect and freedom of expression see Townend 2017.

1179 European Audiovisual Observatory, *Media coverage of elections: the legal framework in Europe*, IRIS Special (2017).

1180 See *ibid.*, 107-116. Paid political advertising, if not banned altogether or at least for certain periods, is sometimes subject to rules on price, non-discrimination, and equal opportunity as well as rules on identification and separation from other content (*ibid.*, 110, 112-113, 115). Silence periods – during which reflection is not supposed to be interrupted by new electoral messaging (see *ibid.*, 4, 23) – are imposed by various European states and usually include either just election day or, in addition, the day before (in-person) voting starts (*ibid.*, 110, 112, 114). Similarly, some countries prohibit the publication of polls for certain periods before (and including) election day or at least subject them to certain quality standards (*ibid.*, 110-111, 112, 114). A number of states also prohibit the automated distribution of online political communication to recipients without their consent (*ibid.*, 115). Finally, there are usually defamation laws that prohibit the publication of false information damaging a person’s reputation (*ibid.*, 113, 115-116). As regards more comprehensive bans on the dissemination of false information in the context of elections, discussions were still ongoing when the report was written (see *ibid.*, 115-116).

1181 On the standards of good deliberation see section 14.1.3 above.

or otherwise verifiably true information, prohibiting the dissemination of certain falsehoods that contradict such information can not only be in the interest of democracy,¹¹⁸² it is also legally possible.¹¹⁸³ While a robust democracy will be able to endure the circulation of certain lies and while it should not be necessary to ban all false information, the situation is different when it comes to the dissemination of certain particularly harmful examples of falsehoods – such as false instructions about the process of voting itself,¹¹⁸⁴ the incitement of violence based on false information,¹¹⁸⁵ or falsehoods that amount to hate speech.¹¹⁸⁶

Particularly difficult questions are raised by the (undelayed)¹¹⁸⁷ disclosure of accurate private information that is damaging to an electoral campaign. If the obtainment of such information was unauthorized but its release – possibly by journalistic organizations the information was later passed on to – is in the public interest, the case for a ban on such publications might be rather

1182 It goes without saying that legitimate reasons to prohibit the dissemination of certain falsehoods must never become a pretext for illegitimate restrictions on the freedom of expression. Such concerns rose in the context of the COVID-19 pandemic, when various states started restricting media freedom, including by ‘fake news regulations’: International Press Institute (IPI), *Tracker on Press Freedom Violations Linked to COVID-19 Coverage*. See also Annie Kelly & Pete Pattison, ‘A pandemic of abuses’: human rights under attack during Covid, says UN head (The Guardian, 22 February 2021). See also Office of the United Nations High Commissioner for Human Rights, *COVID-19: States should not abuse emergency measures to suppress human rights – UN experts* (16 March 2020).

1183 In 2019, the European Court of Human Rights confirmed that Holocaust denial is not protected by the European Convention of Human Rights – see *Pastörs v Germany* App no 55225/14 (ECtHR, 3 October 2019), esp para 47: ‘[w]hile interferences with the right to freedom of expression call for the closest scrutiny when they concern statements made by elected representatives in Parliament, utterances in such scenarios deserve little, if any, protection if their content is at odds with the democratic values of the Convention system.’ On ‘countering Holocaust denial in the twenty-first century’ see also Whine 2020 (capitalization removed). See also International Holocaust Remembrance Alliance, *Memory Laws Project Preliminary Recommendations* (December 2019). On ‘law and memory’ in general see Belavusau/Gliszczyńska-Grabias 2017 (capitalization removed).

1184 On disinformation about voting see Judge/Korhani 2020, 251. On false “‘participation’ information” versus false ‘political “viewpoint” information’ see also Horder 2021, esp 16.

1185 Events in 2021 have vividly shown that sometimes all efforts of contextualization, correction, and counterspeech are not enough. In such cases and as a last resort, it may be necessary to remove particularly harmful content from public discourse. See Julia Carrie Wong & Kari Paul, *Twitter permanently suspends Trump’s account to prevent ‘further incitement of violence’* (The Guardian, 9 January 2021).

1186 On hate speech, legal approaches to its regulation, and its relationship with the freedom of speech and human dignity see Rosenfeld 2003.

1187 On the need to reveal information fully, accurately, and without delay see section 14.1.3.4 above.

weak.¹¹⁸⁸ While a variety of factors may play a role in practice,¹¹⁸⁹ the unauthorized release of information about unethical conduct by a person of public interest might itself have to be deemed ethical more often than not.¹¹⁹⁰

In addition to enacting electoral laws, there are further levers to pull. These include increasing media and information literacy, providing reliable sources of information, and improving the quality of discourse on social media.¹¹⁹¹ To begin with, the fact that foreign electoral interference has received

1188 On the epistemic goals of deliberation see section 14.1.3.4 above. On hacking and leaking in the public interest see footnote 433 above and the accompanying text.

1189 Internal guidance at The New York Times on how to cover hacked material includes an illustrative five-step process called the ‘EMAIL Method’: ‘EVIDENCE: Reporters and editors should independently verify the authenticity of hacked/leaked material. [...] MOTIVE: Reporters and editors should try to determine who obtained the material, how they did so, and why it is being leaked, and contextualize the hack-and-leak operation as fully as possible for readers. [...] ACTIVITY: Reporters and editors should try to trace the origins of the hacked/leaked material, and note how (and by whom) the material is being promoted online. [...] INTENT: Reporters and editors should be aware that they are often key targets of disinformation campaigns, and that those waging such campaigns often explicitly seek to bait journalists into covering them at face value. [...] LABELS: Reporters and editors should clearly identify all reporting that stems from hacked/leaked material.’ – Lauren Jackson & Desiree Ibekwe, *Covering Political Hacks and Leaks Ahead of the Election* (The New York Times, 23 October 2020, updated 25 October 2020).

1190 It is interesting to note that recent years have seen various initiatives to better protect whistleblowers, that is, persons ‘working for an organization who [disclose] information that they believe shows evidence that may be illegal, unethical, or could cause harm to others.’ For this definition and the juxtaposition of leaking and whistleblowing as two forms of unauthorized disclosure of information see Open Society Foundations, *Why We Need Whistleblower Protections* (last updated: December 2019). See also the work done by the Council of Europe, the EU, and the OECD: Council of Europe, Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers (Adopted by the Committee of Ministers on 30 April 2014, at the 1198th meeting of the Ministers’ Deputies); Council of the European Union, *Better protection of whistle-blowers: new EU-wide rules to kick in in 2021* (7 October 2019); OECD, *Committing to Effective Whistleblower Protection* (2016).

1191 The complementarity of different approaches is also emphasized by the following publication: European Commission, ‘Tackling online disinformation: a European Approach’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2018) 236 final, 6: ‘[i]n the Commission’s view, the following overarching principles and objectives should guide action to tackle disinformation: [...] First, to improve transparency regarding the origin of information and the way it is produced, sponsored, disseminated and targeted in order to enable citizens to assess the content they access online and to reveal possible attempts to manipulate opinion. [...] Second, to promote diversity of information, in order to enable citizens to make informed decisions based on critical thinking, through support to high quality journalism, media literacy, and the rebalancing of the relation between information creators and distributors. [...] Third, to foster credibility of information by providing an indication of its trustworthiness, notably with the help of trusted flaggers, and by improving traceability of

a lot of public attention in recent years is itself an important development.¹¹⁹² Raising awareness about the possibility of systematic dissemination of false information by foreign actors can help increase voters' preparedness and, accordingly, the electorate's resilience to such influence. Promoting 'media and information literacy' is one of five pillars within a multi-dimensional approach advanced by the 'High Level Expert Group on Fake News and Online Disinformation' in its 2018 report to the European Commission.¹¹⁹³ Media and information literacy is understood as follows: 'the capacity to exert critical thinking as to the productions, representations, languages (visuals, texts, sounds), audiences and communities characteristic of mainstream and social media'.¹¹⁹⁴ The use of analytical thinking has been shown to lower the 'susceptibility to partisan fake news'.¹¹⁹⁵ Increased media and information literacy could thus reduce the effectiveness of false information as an example of foreign electoral interference.

Furthermore, the availability of reliable sources of truthful information is of course paramount, be it through independent journalistic media, state broadcasters, or fact-checking initiatives. Voters' ability to spot potentially false information is of limited use if there is no possibility of resorting to trusted sources for verification. A prominent example of a multi-dimensional initiative against disinformation is EUvsDisinfo, a project by the European External Action Service designed to 'better forecast, address, and respond to the Russian Federation's ongoing disinformation campaigns affecting the European

information and authentication of influential information providers. [...] Fourth, to fashion inclusive solutions. Effective long-term solutions require awareness-raising, more media literacy, broad stakeholder involvement and the cooperation of public authorities, online platforms, advertisers, trusted flaggers, journalists and media groups.'

1192 It is illustrative that the 2016 US presidential election and interference therein was voted the year's top news story by US news directors and editors: David Crary, AP Poll: US election voted top news story of 2016 (AP News, 21 December 2016). It has also been named one of the year's most significant events worldwide: James M. Lindsay, *The 10 Most Significant World Events in 2016* (The Atlantic, 28 December 2016).

1193 For all five pillars see European Commission, *A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation* (2018), 5-6: '1. enhance transparency of online news, involving an adequate and privacy-compliant sharing of data about the systems that enable their circulation online; 2. promote media and information literacy to counter disinformation and help users navigate the digital media environment; 3. develop tools for empowering users and journalists to tackle disinformation and foster a positive engagement with fast-evolving information technologies; 4. safeguard the diversity and sustainability of the European news media ecosystem, and 5. promote continued research on the impact of disinformation in Europe to evaluate the measures taken by different actors and constantly adjust the necessary responses.'

1194 *ibid.*, 25 (fn 40).

1195 Pennycook/Rand 2019. See also Pennycook/Rand 2020 on 'who falls for fake news'.

Union, its Member States, and countries in the shared neighbourhood.¹¹⁹⁶ By establishing a database of disinformation cases and their disproofs, analysing current developments, and publishing their findings, EUvsDisinfo not only corrects false information, it also contributes to more transparency about its spread. Such efforts do not necessarily have to come from states or international organizations. They can be – and are being – led by media¹¹⁹⁷ and civil society¹¹⁹⁸ as well, with fact-checking projects on the rise worldwide.¹¹⁹⁹ Provided that the corrected information finds its way to voters, such initiatives can help curb the spread of false information and its impact on the opinion-forming process preceding elections.

Finally, one of the primary ways to spread false information is of course via social media platforms, which are administered by private companies.¹²⁰⁰ While various social media companies have – under considerable public pressure – made changes to the rules guiding discourse on their platforms in the run-up to the 2020 US presidential election,¹²⁰¹ there is more that can be done. In an effort to bring about changes in the industry and to set self-regulatory standards, the EU developed the Code of Practice on Disinformation in 2018.¹²⁰² The code’s purpose ‘is to identify the actions that Signatories could put in place in order to address the challenges related to “Disinformation”’¹²⁰³. Importantly, regulating discourse does not necessarily mean regulating speech,¹²⁰⁴ as becomes obvious from the commitments made in the code. Possible steps include limiting, labelling, and fact-checking paid content,¹²⁰⁵

1196 See the self-description of the project online.

1197 On the role of journalistic media in particular see section 15.3 below.

1198 See the example of a civil society organization called Win Black / Pa'lante: Progressive Group Combats Disinformation Campaigns Aimed At Latino Voters (NPR, 18 October 2020).

1199 See Mark Stencel, Erica Ryan & Joel Luther, Fact-checkers extend their global reach with 391 outlets, but growth has slowed (Duke Reporters’ Lab, 17 June 2022).

1200 For the ‘mechanics of the proliferation of disinformation’ online – ‘algorithm-based’, ‘advertising-driven’, and ‘technology-enabled’ – see European Commission, ‘Tackling online disinformation: a European Approach’ (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions) COM(2018) 236 final, 5.

1201 See Vera Bergengruen, ‘The Devil Will Be in the Details.’ How Social Media Platforms Are Bracing For Election Chaos (Time, 23 September 2020).

1202 European Union, Code of Practice on Disinformation (2018).

1203 *ibid.*, I. For the underlying definition of disinformation see footnotes 178–179 above and the accompanying text.

1204 A similar statement was made in the following podcast episode: Missing America, Episode 4 – Disinformation (Crooked Media, 1 September 2020), at 27:14.

1205 See European Union, Code of Practice on Disinformation (2018), II.A. and II.B.

promoting the visibility of authoritative information, the representation of diverse perspectives, and media literacy,¹²⁰⁶ as well as regulating the use of automated bots¹²⁰⁷ and micro-targeting¹²⁰⁸. A 2022 update, the Strengthened Code of Practice on Disinformation, takes the previous commitments a step further.¹²⁰⁹ The impact of such commitments may of course be limited as long as they remain voluntary and self-regulatory.¹²¹⁰ However, such efforts at least demonstrate avenues for what social media companies can and should do to contribute to strengthening the opinion-forming process in light of informational means of foreign electoral interference.

Democratic will formation is complex, and these considerations have touched upon vast topics that others will cover in more detail. What is clear, however, is that the rationale behind any response to interference by informational means should be to provide the electorate with a basis for decision-making that is as well-informed as possible. The means of foreign interference in the opinion-forming process will continue to evolve; the responses to strengthen that process will have to do so as well. The more accurate and complete the picture is that voters have, the better. This includes knowledge about where political influence comes from, who its authors are, and what their motives are.

15.2.2. Protecting voting procedures: possible responses to technical means of interference

A 2017 publication pointedly summarized the premise of protecting the voting process: ‘[w]hen we flip a switch, we expect the lights to come on. When we pull

1206 See *ibid.*, II.D.

1207 See *ibid.*, II.C.

1208 Micro-targeting of political advertising, while not addressed by the code itself, is discussed in the code’s first assessment: European Commission, ‘Assessment of the Code of Practice on Disinformation – Achievements and areas for further improvement’ (Commission Staff Working Document) SWD(2020) 180 final, para 3.2.3(b).

1209 European Union, *Strengthened Code of Practice on Disinformation* (2022). Interestingly, the 2022 edition describes a ‘common understanding of impermissible manipulative behaviour’. See *ibid.*, 15–16 (capitalization removed): ‘the creation and use of fake accounts, account takeovers and bot-driven amplification; hack-and-leak operations; impersonation; malicious deep fakes; the purchase of fake engagements; non-transparent paid messages or promotion by influencers; the creation and use of accounts that participate in coordinated inauthentic behaviour; user conduct aimed at artificially amplifying the reach or perceived public support for disinformation.’

1210 On ‘limitations inherent to the self-regulatory nature of the code’ see *ibid.*, para 3.2.4 (capitalization removed). For social media companies that have subscribed to the code – including Facebook, Twitter, and Google – see *ibid.*, para 1. See also Douek 2021, 287: ‘[p]latforms alone should not be able to set the terms of debate for what constitutes important election interference or manipulation.’

a lever, or touch a screen, we expect our vote to be recorded accurately.¹²¹¹ There are various ways to vote and not all of them involve digital aspects.¹²¹² As soon as digital infrastructure is involved, however, it is conceivable that votes, electoral registers, or other data are manipulated by technical means. In order to prevent this and to protect the integrity of the voting process, states have several complementary measures at their disposal.

Firstly, as mentioned before, it is important to raise awareness of possible attempts at foreign electoral interference.¹²¹³ Both voters and officials such as poll workers should be educated about how to spot irregularities and what to do if they occur. Secondly, experts recommend that there always be some form of paper trail, even when votes are recorded electronically.¹²¹⁴ This allows results to be verified and helps document attempts at manipulation. Thirdly, whenever digital infrastructure is used, it needs to be made as secure as possible. Particularly comprehensive guidance on how to do so is provided by the Center for Internet Security. Its Handbook for Elections Infrastructure Security contains no less than 88 recommendations on technical best practice to mitigate risks in election systems.¹²¹⁵

As always, responses to technical means of interference need to take into account the full and exact extent of the problems they are supposed to ameliorate.¹²¹⁶ Maintaining election security may require early planning and sufficient funding.¹²¹⁷ Given the real risk of voting procedures being manipulated

1211 Shackelford/Schneier/Sulmeyer/Boustead et al 2017, 667.

1212 See footnote 208 above.

1213 See section 15.2.1.2 above.

1214 Shackelford/Schneier/Sulmeyer/Boustead et al 2017, 663; Bruce Schneier, *American elections are too easy to hack. We must take action now* (The Guardian, 18 April 2018); Michael Chertoff & Grover Norquist, *We need to hack-proof our elections. An old technology can help.* (The Washington Post, 14 February 2018); Lawrence Norden & Ian Vandewalker, *Securing Elections from Foreign Interference* (Brennan Center for Justice at New York University School of Law, 29 June 2017).

1215 Center for Internet Security (CIS), *A Handbook for Elections Infrastructure Security* (Version 1.0, 2018), 36–66. The recommendations are accorded different levels of priority and concern the areas ‘device’, ‘process’, ‘software’, and ‘user’. See *ibid.*, 33 (capitalization removed).

1216 Despite its length, the authors of the handbook insist that it does not provide a ‘one-size-fits-all’ approach, nor is it of ‘all-encompassing scope’. See *ibid.*, 9.

1217 To make sure that voting systems receive the (financial) attention they deserve, experts in the US usually call for permanently designating voting machines as ‘critical infrastructure’. Election systems were designated as critical infrastructure in 2017, yet ‘this designation could be withdrawn by the executive branch at any time’: Brennan Center for Justice, *Defending America’s Election Infrastructure* (2019). See on this also Shackelford/Schneier/Sulmeyer/Boustead et al 2017, 633–641. See also Moynihan 2019, 41, 43–44.

by foreign states and the far-reaching political and legal implications, any such efforts are undoubtedly well spent. In electoral democracies, voting is the primary way to let the electorate express its will and legitimize governmental authority. There is thus no way around taking all necessary measures to guarantee that all members of the electorate can effectively exercise their right to vote and have their vote accurately captured, counted, and communicated.

15.3. The role of reliable journalistic media in particular

It can hardly be stressed enough how essential the role of generally available and editorially independent media adhering to standards of journalistic integrity¹²¹⁸ is in the context of foreign electoral interference. The general importance of the media for democracy is of course widely acknowledged and sometimes encapsulated in the term ‘fourth estate’.¹²¹⁹ With respect to foreign interference in the opinion-forming process preceding an election, the media’s responsibility is at least threefold. Firstly, media outlets can serve as a source of reliable information and therefore provide voters with an opportunity to verify or debunk information gathered elsewhere. Secondly, they can expose attempts at electoral interference by foreign states and thereby help voters get a better understanding of the political influences at play. Thirdly, they can give voice to political actors and publicize alternative views that would otherwise not receive sufficient attention.

However, not every media outlet will do. While some journalistic organizations play a vital role in responding to foreign electoral interference, other entities operating as media outlets are at the very heart of the problem. To begin with, the two media outlets RT¹²²⁰ and Sputnik were of course key components of Russia’s efforts to influence the 2016 US presidential election.¹²²¹ More recently, an ostensible ‘global news organization’ called PeaceData was exposed as fabricated by the Russian Internet Research Agency¹²²² – known

1218 There are several formulations of such standards, but their thrust is the same. See for example Society of Professional Journalists (SPJ), *SPJ Code of Ethics* (revised 6 September 2014); International Federation of Journalists (IFJ), *Global Charter of Ethics for Journalists* (adopted at the 30th IFJ World Congress in Tunis on 12 June 2019).

1219 See Hampton 2010.

1220 On the ‘organizational behavior of Russia Today (RT)’ in particular see Elswah/Howard 2020.

1221 See Office of the Director of National Intelligence (US), *Intelligence Community Assessment: Assessing Russian Activities and Intentions in Recent US Elections* (6 January 2017), 3–4.

1222 On the Internet Research Agency see Renee DiResta, Kris Shaffer, Becky Ruppel, David Sullivan, Robert Matney, Ryan Fox, Jonathan Albright & Ben Johnson, *The Tactics & Tropes of the Internet Research Agency* (New Knowledge, 2019).

for its efforts in 2016 as well.¹²²³ While PeaceData’s editors were fictitious, it recruited real freelance reporters in order to more credibly spread political content in the run-up to the 2020 US presidential election.¹²²⁴ Accounts and content linked to the operation were eventually removed by the social networks the organization was using.¹²²⁵ However, this example shows particularly well that not every media outlet is a reliable source of information.¹²²⁶

To be sure, bad information does not necessarily have to come from abroad. False or misleading information can be disseminated by domestic actors as well,¹²²⁷ including by media outlets that spread partisan propaganda instead of adhering to rules of journalistic integrity. While such negative examples represent one end of the spectrum, the other end is represented by organizations – operating locally, nationally, or internationally – that are editorially independent, follow journalistic ethics,¹²²⁸ and, ideally, are freely accessible or at least affordable to the wider public. Typically, many public broadcasters will fulfil these requirements.¹²²⁹ As regards private media, the Guardian is an illustrative example. Firstly, because of its special ownership structure that allows for financial and editorial independence.¹²³⁰ Secondly, because access to almost all of its content is free, as opposed to being restricted by a paywall.¹²³¹ Thirdly, because its reporting has in fact contributed to exposing examples of foreign electoral interference.¹²³² That is of course not to say that the Guardian is always right or that its publications should be exempt from

1223 See the detailed analysis by Graphika: Ben Nimmo, Camille François, C. Shawn Eib & Léa Ronzaud, IRA Again: Unlucky Thirteen: Facebook Takes Down Small, Recently Created Network Linked to Internet Research Agency (Graphika, September 2020).

1224 *ibid.* See also the story of one of those freelance writers: Jack Delaney, I’m a freelance writer. A Russian media operation targeted and used me (The Guardian, 4 September 2020).

1225 Julia Carrie Wong, Russian agency created fake leftwing news outlet with fictional editors, Facebook says (The Guardian, 2 September 2020).

1226 For a tool that rates the trustworthiness – that is, the credibility and transparency – of news sources online, see NewsGuard.

1227 See footnote 180 above.

1228 See footnote 1218 above.

1229 On the BBC providing a ‘common informational experience’ in Britain see William Davies, Why can’t we agree on what’s true any more? (The Guardian, 19 September 2019).

1230 On the Scott Trust and the Guardian’s ownership, values, and funding see About Guardian Media Group (The Guardian, 24 July 2018).

1231 Financial contributions by readers are encouraged but nonetheless voluntary. According to the editor-in-chief, the strategy employed is successful: Katharine Viner: ‘The Guardian’s reader funding model is working. It’s inspiring’ (The Guardian, 12 November 2018).

1232 See for example Carole Cadwalladr & Lee Glendonning, Exposing Cambridge Analytica: ‘It’s been exhausting, exhilarating, and slightly terrifying’ (The Guardian, 29 September 2018).

criticism. Yet, such conditions are certainly more conducive to genuinely informing public discourse and strengthening democratic opinion-forming than is the case with media enterprises that put profit before truth.

The criteria mentioned can – and ideally should – be met by a plurality of media outlets with different focuses, approaches, and leanings. What is decisive is that their work contributes to good deliberation rather than to chaos, obfuscation, non-substantive shouting matches, or the circulation of irrelevant noise or false information – be it of domestic or foreign origin. Not surprisingly, the principles of ethical journalism and the standards of good deliberation share many ideals, most notably the epistemic goal of finding truth but also notions of respect, transparency, accountability, balance, and sincerity.¹²³³

The general availability of independent media committed to such ideals will not only increase the probability for attempts at foreign electoral interference to be uncovered and thereby inform the choices of voters. Access to reliable sources of relevant information might also lower the risk of discourse being taken over by false information, the financially most potent campaign, or last-minute leaks. At the same time, it raises the chances for a shared informational experience¹²³⁴ – or a ‘common baseline of facts’¹²³⁵ –, based on which deliberation can take place. Yet, that is only the case if voters make use of the possibility of accessing those reliable sources of information.¹²³⁶ Their responsibility to do so will be discussed next.

15.4. The individual responsibility of voters

There is one more group of actors whose role has not been discussed so far: voters themselves. Previous sections have touched upon measures to build resilience by, for example, increasing media literacy and promoting critical thinking, by providing reliable sources of information, and by shielding voters from certain forms of speech such as particularly harmful lies. Such efforts are of little use if voters do not assume their own responsibility. Voters who obtain information only from their social media bubbles before an election arguably do not take their responsibility seriously enough. Neither do those who assume

1233 For formulations of the standards of journalistic integrity see footnote 1218 above. For the standards of good deliberation see section 14.1.3.1 above.

1234 See footnote 1229 above and the accompanying text.

1235 Barack Obama, Transcript: NPR’s Full Interview With Former President Barack Obama (NPR, 16 November 2020).

1236 For discussions and empirical evidence on how much can be expected from voters in a democracy and on the likeliness of this study’s view being classified as an ‘optimistic’ one, see footnote 933 above and the accompanying text.

every information circulating on social media – and elsewhere – to be true, who never question the validity of the sources they consult, and who never critically reflect on whether their position is rationally defensible against other arguments. Democracy does not just require democratic institutions and democratic rules, it also depends on a democratic culture among its citizens.¹²³⁷

Making informed choices in a world as complex as today's is a demanding endeavour and involves a certain effort. To say it in the words of John Rawls: '[r]ational deliberation is itself an activity like any other, and the extent to which one should engage in it is subject to rational decision.'¹²³⁸ With respect to foreign electoral interference, this may mean that one should flag false information when spotted on social media, report bot accounts, refrain from forwarding unverified rumours, or help raise awareness about the need to critically reflect on political influences by talking to fellow citizens.¹²³⁹ Most importantly, however, it means that voters should themselves consult reliable sources of information to form their opinion and, at the same time, remain open to changing their mind if the arguments of others are more convincing.¹²⁴⁰

The right to vote is something generations have fought for, with many losing their lives on the way and many still struggling for participation in free and fair elections. Those fortunate enough to have the opportunity to vote in genuine elections should do so responsibly.¹²⁴¹ The more voters take their democratic responsibility seriously, the closer an election might come to actually producing the rationally best solution for society. The ultimate responsibility to achieve this, however, lies with voters. The law cannot guarantee, let alone replace, sincere deliberation.

15.5. A last word on internationalism

This study has to a large extent relied on a dichotomy between the notions of 'foreign' and 'domestic'. However, it should have become apparent by now that there are limitations to this dichotomy. More often than not, the nature

1237 Mahlmann 2021, 124, para 250.

1238 Rawls 1999, 367.

1239 To quote a European Parliament publication, voters should go 'from amplifiers to filters': European Parliament, 'Automated tackling of disinformation: Major challenges ahead' (2019) PE 624.278, 52.

1240 On the latter aspect see Ian Leslie, *How to have better arguments online* (The Guardian, 16 February 2021).

1241 To put it in the words of John Lewis: '[t]he vote is the most powerful nonviolent change agent you have in a democratic society. You must use it because it is not guaranteed. You can lose it.' – John Lewis, *Together, You Can Redeem the Soul of Our Nation* (The New York Times, 30 July 2020).

of political influence, rather than where it comes from, is decisive for its evaluation. Foreign electoral interference by economic means may distort democratic processes and contribute to unequal opportunities of access to political influence, but so may the activities of domestic actors. Foreign electoral interference by informational means may damage the quality of public deliberation by inserting false information or last-minute confusion, but so may the activities of domestic actors. Foreign electoral interference by technical means may impair the representativeness of election results by preventing votes from being cast or from being accurately captured, counted, and communicated, but, again, so may the activities of domestic actors.

The transboundary nature of foreign electoral interference certainly raises some additional problems, both legally and theoretically.¹²⁴² However, this is mainly due to the fact that states are the main locus of democracy and political organization today. This does not need to remain the case forever. The idea of a transnational democratic order is old,¹²⁴³ there is a variety of – sometimes very concrete – proposals on what it could look like,¹²⁴⁴ and the introduction of direct elections to the European Parliament is a notable practical step in this direction.¹²⁴⁵

The creation of more democratic structures at the international level presents another response to foreign electoral interference, and several of the foregoing observations lend support to closer international cooperation in general. Firstly, a more direct chain of legitimacy between individuals and transnational governmental structures could compensate for deficits of legitimacy caused by foreign interference in elections at the national level and remedy broken links in the longer, indirect legitimacy chains via state governments.¹²⁴⁶ Secondly, a denser and more comprehensive web of international

1242 On the possibility that some aspects of good deliberation may tend to be structurally absent in cases of foreign electoral interference see section 14.1.3.5 above. On the intricate issue of extraterritorial application of human rights treaties see section 12.1 above.

1243 Kant already contemplated the idea of a world republic in his 1795 work *Zum ewigen Frieden*. However, Kant eventually concluded that it ‘cannot be realised’ (Kant 1991, 105), which is why the essay proposes a federation of free states instead (ibid, 102–105). For Kant’s understanding of the notion of ‘republic’ – as opposed to ‘democracy’ – and the view that government must be representative, see ibid, 99–102. For the original German text see Kant 1912, 354–357 and 349–353, respectively.

1244 An interesting collection of normative and empirical perspectives on global democracy is offered by Archibugi/Koenig-Archibugi/Marchetti 2012.

1245 On the evolution of the European Parliament and the introduction of direct elections in 1979 see Raunio 2012; Hobolt 2020. On the role the European Union plays in the ‘deterritorialization of democracy’ – or ‘*demoi*-cracy’ – see Besson 2006 (italics in the original).

1246 On the deficit of legitimacy potentially caused by foreign electoral interference see 14.2.3 section above.

legal structures could close existing accountability gaps for violations of international law in instances of foreign electoral interference.¹²⁴⁷ Thirdly, more democratic international fora could strengthen a sense of global community, help to better understand different perspectives, and provide more inclusive platforms for finding solutions to policy disputes about matters of common concern. Such international democratic processes could not only lead to broader democratic accountability,¹²⁴⁸ they could ideally disincentivize the exertion of political influence via interference in the decision-making processes of other states. Put simply, if democracy is based on universal values,¹²⁴⁹ why should it stop at borders?

Sure enough, transnational conceptions of democracy come with their own practical obstacles. Any additional democratic structures at the international level would have to complement rather than replace existing – and yet-to-be-built – democratic structures at the national and sub-national level. For a start, the democratization of international organizations, including the UN, is one of the options that deserve serious consideration.¹²⁵⁰ While the example of the EU has shown how difficult this can be, it has also shown what is possible if one tries anyway.¹²⁵¹

What is more, even a federally structured global democratic system would not completely eliminate the problem of electoral interference between different organizational units. After all, electoral interference between the political sub-entities of federally organized states is an issue already

1247 On the deficit of accountability potentially caused by foreign electoral interference see section 14.2.2 above.

1248 On the lack of democratic accountability towards foreigners being an inherent flaw of (state-centred) democracy see Buchanan 2015, 256: '[i]t is a virtue of democracy that government officials are accountable to their fellow citizens. That is the good news. The bad news is that the democratic commitment to the accountability of government to citizens tends to produce not just accountability, but near exclusive accountability. Democratic electoral processes and constitutional checks and balances create formidable obstacles to government taking into due account the legitimate interests of anyone who is not a citizen. In other words, democracy has an inherent structural bias toward excessive partiality or, if you will, against cosmopolitanism. [...] This bias is most evident in the case of accountability through periodic elections: Foreigners have no votes.'

1249 See footnotes 965–971 above and the accompanying text.

1250 For an overview of contemporary discussions, including on 'reforming the central institutions of the United Nations', see López-Claros/Dahl/Groff 2020 (capitalization removed).

1251 On the importance of the example of the EU see Mahlmann 2021, 124, para 247. The basic premise remains the following (Mahlmann 2012, 393): 'if human dignity is to be taken seriously, national and international structures of governance have to give human individuals—as far as possible on this scale and as mediated as it may be unavoidable—some meaningful share in the process of political self-determination.'

today.¹²⁵² Yet, this is itself an important insight. The issue of electoral interference is not limited to the relationship between states. It can occur between any two polities, if at least one of them conducts elections. The phenomenon at hand is thus not inherently linked to states, and it is crucial that concerns about foreign electoral interference do not become a catalyst for nationalism.

Many of the examples of foreign electoral interference discussed in this study are problematic, be it from the perspective of international law, democratic theory, or both. Yet, this is mostly due to the nature of the specific examples rather than their foreign origin. Negative associations with foreign electoral interference are thus not necessarily unjustified, given that there are good reasons to criticize many of the examples seen in practice. However, there could be better examples as well.¹²⁵³ A public exchange of ideas between states and their governments in the context of an election is not inherently wrong. If transnational political influence respects not only international law but also the values underpinning democracy, it might even be seen as desirable. If it does not impede meaningful participation, accurate representation, and good deliberation, the negative associations with foreign electoral interference might eventually disappear.

From a purely practical perspective, too, it is probably sensible to get accustomed to some degree of transnational influence on political will formation. In an ever more globalized world, a confinement of democratic discourse within state borders is illusory. If people, goods, services, and capital cross borders every day, political influence will do so as well. States, the borders that divide them, and the international structures that connect them have not always existed as they do today, and there is every reason to expect – and to hope – that these arrangements will evolve further. With political structures becoming more and more internationalized, the question of what good transnational discourse ought to look like is gaining importance, too. What is clear, in any case, is that the answer to foreign electoral interference is more internationalism, not less.

1252 This is a recurring issue in Swiss public law scholarship. See Auer 1985; Hangartner 1996; Langer 2017.

1253 See footnote 38 above and the accompanying text. See also Damrosch 1989, 50: '[p]rovided always that states do not attempt to substitute their own preferences for the natural outcome of another state's internal political dynamic, their exercise of influence within legally defined limits might even be valuable.' On 'the case for accepting foreign influence and interference in democratic processes' see MacIntosh 2021 (capitalization removed).

Conclusion

Democracy is a complex issue. Many factors contribute to whether it fulfils its promises, and this study has highlighted just one of them. Even with respect to this one factor, foreign electoral interference, there would certainly be more to say. After all, the focus of this study was confined to a specifically defined object of enquiry and a particular methodology, both of which have their own limitations. However, the research design chosen has provided fruitful ground for reflection and generated insights that might be of value beyond the scenarios discussed.¹²⁵⁴ In the hope that my observations were correct, it is now time to summarize them.¹²⁵⁵

Background: the history of ideas, history, and political science

Foreign interference in elections – as well as in governmental affairs more generally – has been a concern of theorists since the eighteenth century. It has occurred since at least 1796 and, accordingly, is a practice virtually as old as modern electoral democracy itself. Furthermore, it has been proven to have significant effects, both on voting behaviour and on the democratic system as a whole. It is thus a phenomenon that warrants close attention.

Foreign electoral interference and international law: non-intervention, self-determination, and electoral rights

Foreign electoral interference is of concern in light of at least three pivotal concepts of international law: the prohibition of intervention, the right of peoples to self-determination, and citizens' electoral rights. While these norms relate to different categories of rights-holders – states, peoples, and individuals – they share a common core. When applied to elections, all three norms protect free political decision-making. Given the identical formulation of their central demand – 'free' choices as opposed to coercion – and their interrelatedness, their interpretation yields parallel results. Therefore, when it comes to the international legal protection of political autonomy in the context of elections, non-intervention, self-determination, and electoral rights can be seen as three sides of the same prism. That said, those ultimately forming and expressing a political opinion are individual persons. It is thus particularly important not to focus exclusively on inter-state relations while losing sight of how foreign electoral interference impacts the rights of every single voter.

¹²⁵⁴ Most notably, many of the considerations might be relevant to foreign interference in *referendums* as well.

¹²⁵⁵ This summary includes – sometimes verbatim – repetitions of earlier findings. For more detailed explanations, context, and references see the respective sections above.

A potential deficit of legality

Generally, a violation of international law – that is, of all three norms – arises whenever at least one of the following three criteria is met.

Firstly, foreign electoral interference is impermissible if it is in *contravention of human rights-compliant domestic electoral laws*. While domestic electoral laws represent a limit to foreign electoral interference, international human rights law represents their counter-limit. Secondly, foreign electoral interference is impermissible if it is *disproportionately intense*, considering its scope, the susceptibility of the target state, and, where relevant, the specific rationale of the interference. While electoral democracy inherently relies on voters' capability for critical opinion-forming, even for a comparatively resilient electorate a breaking point may be reached. Thirdly, foreign electoral interference is impermissible if it includes any *manipulation of voting procedures*. Interference of this sort aims at the heart of electoral democracy and constitutes nothing less than paternalism.

Whereas the first two criteria are relevant to economic and informational means of interference in the opinion-*forming* process, the third criterion concerns technical means of interference in the opinion-*collecting* process. The first two criteria are relative to the extent that they depend on conditions in the target state, whereas the third criterion is absolute and applies to every target state equally. The unlikely case of a valid justification aside, examples of foreign electoral interference that meet at least one of the three criteria described are impermissible under international law as surveyed in this study. This also means that foreign electoral interference is a human rights issue and that it can violate a norm of *erga omnes* and *ius cogens* character: the right of peoples to self-determination.

A potential deficit of accountability

If certain conduct is in violation of international law, the question of accountability is raised. However, when it comes to holding the interfering state responsible, there are several structural hurdles built into today's international legal order.

Firstly, governments elected with the help of foreign interference might have no incentive to initiate proceedings against the interfering state for a violation of the prohibition of intervention, given that they would thereby question the integrity of the process on which their own legitimacy rests. This means that the most successful examples of foreign electoral interference might be the least likely to become the subject of contentious proceedings before the ICJ. Secondly, the UN Human Rights Committee does not

consider complaints regarding violations of collective rights admissible, which effectively bars peoples from claiming a violation of their right to self-determination. Thirdly, yet-to-be-settled questions about the extraterritorial application of human rights treaties complicate the enforcement of citizens' electoral rights, even if the states involved have ratified the ICCPR and its Optional Protocol. It is unclear whether any case of foreign electoral interference can meet the 'effective control' test triggering the extraterritorial application of human rights treaties. While this does not affect the *target state's obligation to protect*, it does prevent the human rights obligations of the *interfering state* from arising.

In sum, it is far from certain that states involved in impermissible examples of foreign electoral interference can be held responsible via international legal accountability mechanisms.

Foreign electoral interference and democratic theory: participation, representation, and deliberation

In addition to these considerations on legality and accountability, democratic theory has something to say about foreign electoral interference. International law does not operate in a vacuum, nor is it set in stone. A divergence between legal and theoretical standards can serve as an argument for creating better regulation of certain behaviour or at least for working towards the mitigation of its effects through non-legislative measures. Strands of thought vary greatly, and a study like this one cannot cover the entire spectrum of democratic theories. A look through three conceptual lenses – participation, representation, and deliberation – nonetheless provides helpful insights.

The demands of participation

Certain communitarian schools of thought may categorically reserve participation to the citizenry. Under these views, any political agency by outsiders can thus easily become problematic. An approach deemed more convincing here, however, is to regard human dignity as the principal reason why individuals should have a say in who governs them. Under such a universalist view, matters are more nuanced. The question shifts from whether outside participation is categorically illegitimate to which forms thereof are. Whether human beings effectively have a say in the determination of their political future, as they are entitled to, depends on whether the mechanisms allowing them to make their voice heard are deprived of their integrity. Such is the case if the opinion-forming process is prevented from channelling good deliberation or if the opinion-collecting process is prevented from producing accurate representation.

The demands of representation

The concept of representation lies at the heart of electoral democracy. It is also a particularly helpful tool for locating the problems with interference in the opinion-collecting process. No conventional understanding of representation leaves room for a manipulation of voting procedures. Voting is the primary link between constituents and their representatives. If voters are in any way prevented from voting or from having their votes accurately captured, counted, and communicated, this link is broken. In such cases, congruence between the elected body and the electorate is not guaranteed anymore; neither is representation. Any alteration of the election result as it corresponds to the true and final opinion of the full electorate undermines the central function of elections. Therefore, foreign interference in the opinion-collecting process cannot be in the interest of representation nor of electoral democracy in general.

The demands of deliberation

When it comes to evaluating foreign interference in the opinion-forming process, the standards of good deliberation as identified by deliberative democracy scholarship are of great value. Sharing several norms with the yardsticks used to measure perceived electoral integrity and the principles of journalistic ethics, these regulative ideals provide guidance for a particularly rational and egalitarian democratic discourse. Surveying them also unearths where some fundamental problems lie with specific forms of foreign interference in the opinion-forming process.

To be compatible with the standards of good deliberation, foreign interference in the opinion-forming process of an election would have to adhere as closely as possible to the following requirements. The interfering state's interests need to be *affected* in order to justify that state's inclusion in the deliberative process. Its conduct needs to be overt, that is, publicly visible and *transparent* with respect to the actors behind it. The pursuit of self-interest must not run counter to any defensible conception of the *common good*. It must not involve any form of *power*, be it applied force or the threat of sanctions. It must not create or exacerbate unequal *opportunities of access to political influence* between political actors in the target state. It must not lead to elected representatives being accountable to foreign actors for other than moral reasons, nor must it harm *accountability* to actual constituents by being hidden from them. It needs to contribute to a *clarification* of the interests at stake rather than promote complexity, chaos, or obfuscation. It needs to be *sincere* and thus reveal information accurately, fully, and without delay. It needs to be in line

with the *epistemic goals* of deliberation and therefore convey only facts that are not verifiably false. Finally, it needs to respect a certain *substantive balance* within deliberation and thus must not occur too late to allow for responses, nor be so all-consuming as to prevent substantive arguments on matters of importance from receiving appropriate consideration.

Good deliberation aims at achieving ‘epistemic clarity’,¹²⁵⁶ not at rewarding the voices that shout the loudest. The standards of good deliberation leave no room for secret manoeuvres, hidden agendas, and deceptive communication. This means that there is reason to criticize certain examples of foreign electoral interference that are not categorically prohibited by international law, such as covert political funding or disinformation. By contrast, ideal democratic deliberation does not exclude foreign states from participating in candid discussions about matters of common concern. It is thus of continued importance to uphold a distinction between what counts as argumentation and what can only be considered manipulation.¹²⁵⁷ The standards of good deliberation are certainly high, and some of them may be even less likely to be met by foreign actors than by domestic ones. Yet, it might be time to start holding democratic discourse to higher standards than required by today’s international legal order, and the regulative ideals of deliberative democracy provide a blueprint for a more ambitious vision of collective will formation.

A potential deficit of legitimacy

Foreign electoral interference that undermines accurate representation or good deliberation does more than interfere with the opportunity of others to enjoy meaningful political participation as they are entitled to: it also affects governmental legitimacy. The greater the adverse impact of foreign interference on the integrity of electoral processes, the less the election in question can be expected to bestow governmental legitimacy. Foreign interference in electoral processes can thus create a deficit of legitimacy, which concerns both the national and the international level. If the chain of legitimacy generated by elections is interrupted through foreign interference, the government ostensibly elected may no longer be justified in exercising public authority, neither through actions in the domestic sphere nor in the context of international relations. Since the international order is largely built on the assumption that states legitimately represent their people, any peril to the integrity of the domestic electoral mechanisms generating governmental legitimacy also

¹²⁵⁶ See footnote 1106 above.

¹²⁵⁷ See footnote 1110 above.

translates into a potential deficit of legitimacy at the international level. In short, a legitimacy chain that breaks at the national level cannot reach the international sphere. While a deficit of legitimacy is rather obvious in the case of interference in the *opinion-collecting* process – as the election outcome does not accurately represent the will of the electorate –, interference in the *opinion-forming* process, too, can cast a considerable shadow on the legitimacy of the government subsequently elected.

What to do about foreign electoral interference

In sum, foreign electoral interference is conceivable, common, and consequential. Many examples – albeit not all – raise problems from the perspective of democratic theory. Of these problematic cases, only some are impermissible under international law. An even smaller subset is likely to become the subject of international legal accountability mechanisms. There is thus ongoing reason to be concerned about foreign electoral interference. When it comes to finding appropriate responses, the onus is not just on states, and the law alone will not do. What is true so often with questions about democracy rings true here as well: ‘[t]he liberal secular state lives on premises that it cannot itself guarantee.’¹²⁵⁸

Amending international and domestic law

To be sure, it would very much be in the interest of electoral integrity to close existing accountability gaps in international law and to make sure that the norms discussed are in fact enforceable. It might also be sensible to build a more comprehensive understanding of electoral integrity into international law or to explicitly regulate the behaviour of states with the aim or intent to self-interestedly influence the outcome of foreign elections. Furthermore, domestic electoral laws can also play an important role in setting out additional guardrails for the opinion-forming process preceding an election. For example, they can prohibit financial contributions – of a certain amount, of foreign origin, or altogether – or at least require them to be transparent. In addition, domestic electoral laws could ban certain lies, at least the most harmful ones during critical phases of the electoral process. However, any such rules will have to walk a tightrope and must by no means be incompatible with the norms of international human rights law, most notably the freedom of association and the freedom of expression.

¹²⁵⁸ For the original German version of this famous dictum see Böckenförde 1976, 60. For this English translation see Moeckli 2016, 447.

Creating resilience and transparency

Of equal if not greater importance are non-legislative measures to create resilient political conditions and the highest possible transparency regarding the origin and nature of political influence. This concerns not only states but also international organizations, the private sector, and civil society. Monitoring and reporting influence campaigns, creating fair systems of political finance, promoting reliable sources of information, exposing false news, increasing media and information literacy, and improving the quality of discourse on social media are among the most important steps to counter foreign interference in the opinion-forming process. Such efforts may also entail ‘trying to remove the most egregiously false statements from political discourse.’¹²⁵⁹

The role of the media and the responsibility of voters

As regards reliable sources of information, it is of course indispensable that there be editorially independent media which adhere to standards of journalistic integrity and are available to all members of the electorate. No voter is helped by media enterprises that prioritize profit over truth. Everyone benefits from a ‘common baseline of facts’¹²⁶⁰. Yet, at the end of the day, the ultimate responsibility to make informed choices in an election lies with voters themselves. Democracy does not only require a democratic framework, it also depends on a democratic culture among its citizens.¹²⁶¹ All measures to strengthen the opinion-forming process and improve the quality of discourse are in vain if voters choose to rely on unverified utterances in obscure niches of social media instead of more trustworthy news sources. Only voters themselves can ultimately decide whether they consult reliable sources of information, engage in sincere deliberation, and cast their ballot responsibly. No law can guarantee this.

The necessity of internationalism

Crucially, one needs to be careful not to fan the flames of nationalism and denounce actions simply because of where they originate. Confrontative rhetoric and war metaphors are hardly the best we can do in response to foreign electoral interference. Instead, one should focus on the nature of the influence in question and give reasons exactly why certain conduct is not compatible with the values of democracy. The answer to concerns about foreign

1259 See footnote 1156 above.

1260 See footnote 1235 above.

1261 See footnote 1237 above.

electoral interference must be more internationalism, not less. Ideally, closer cooperation and more democratic structures at the international level could remedy deficits of legitimacy, close gaps of legal accountability, and bring about broader democratic accountability. After all, there is no *a priori* reason why democratic discourse – at least on matters of global concern – should not span the whole world. While lies, unequal economic structures, and the desire for power transcend states, so do facts, arguments, and the values on which democracy is built.

Outlook

Having one's voice replaced by someone else's is the antithesis of democracy, and some forms of foreign electoral interference can result in exactly that. In contrast, being confronted with other voices is very much inherent to democracy. Often enough, these voices are wrong, and whoever is speaking should always be critically scrutinized. No one should be followed blindly in a democracy, neither foreign nor domestic actors. Elections give voters the final say in important matters. With this also come responsibility and the risk of making mistakes.¹²⁶² A lot can and should be done to make such mistakes less frequent, given how consequential election outcomes can be. Yet, whenever possible, countering voices with better arguments is more in the spirit of democracy than shutting them out. If we strengthen the quality of discourse rather than its borders, the lessons from foreign electoral interference will eventually bring us closer together instead of driving us further apart.

¹²⁶² Mahlmann 2021, 113-114, para201.

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