

**FOREIGN INTERFERENCE IN A STATE'S ELECTORAL PROCESS: A THREAT TO
DEMOCRACY AND SOVEREIGNTY OF STATES, RESPONSES UNDER INTERNATIONAL
LAW**

(Presented by Dr. Alix Richard)

The member states of the Organization of American States (OAS) chose to enshrine into the Charter of the Organization several fundamental principles, among them: respect for the personality, sovereignty, and independence of states^{1/} and non-interference in the affairs of other states.^{2/} They also stated their preference for and commitment to representative democracy by signing the Inter-American Democratic Charter.

The holding of free, democratic, and periodic elections is one of the pillars of the democratic system, as defined in the Democratic Charter.^{3/} This is an exercise that by definition is reserved for sovereign people belonging to the same national entity. The free participation of citizens in choosing their leaders, without foreign interference and without any outside pressure or influence whatsoever is a fundamental right that must be preserved. Accordingly, any foreign intervention in the electoral process of another state calls into question the aforementioned principles and is even a threat to peaceful international relations, to the extent that it can lead to tensions and an escalation in measures that a victim state may be tempted to take.

It may be tempting to believe, at first glance, that foreign interference in the electoral process of another state may be characterized as a violation of international law that can be condemned under existing legal instruments. But on close scrutiny, one quickly realizes that it is a much more complex issue on which international jurists are divided. The existing rules appear not to be clear-cut in how they address all cases of foreign interference in the elections of a state.

The question therefore arises as to what additional measures are needed under international law, to protect states against any form of interference in their electoral systems and to provide victims with an effective international legal tool for them to hold the offending foreign entity internationally liable and to get a conviction, without having to resort to coercive measures.

This paper is intended to demonstrate to the Inter-American Juridical Committee that there is interest and a need to address the thorny issue of foreign interference in elections of states. First of all, it

^{1.} Charter of the Organization of American States, article 3.b

^{2.} Idem, article 3.c

^{3.} Democratic Charter: Article 3 “*Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.*” (Adopted at the twenty-eighth special session of the General Assembly of the Organization, held in Lima, Republic of Peru, on September 11, 2001).

must be emphasized that this practice is nothing new and that certain powers have been using it for ages; and it could take a variety of the latest and most sophisticated forms (I). Secondly, a summary review of the available legal arsenal in international law to address that practice will be presented, underlining its limitations and inadequacy with respect to the latest digital technologies being used (II). Finally, given the complex nature of the techniques used, what approach under international law might be most effective in order to properly address a problem that is likely to increase in the years ahead and likely to become a real threat to peace in international relations (III)?

I. Foreign interference in elections

Accusations about Russian government interference in the 2016 US presidential election raised awareness worldwide as to the growing phenomenon, which poses a real threat to democracy and to sovereignty of states.

As long as such operations were orchestrated by great powers against weaker states, the question seemed not to have bothered too many people. But because communication and information technologies have made these powers themselves vulnerable and subject to attacks on their electoral systems, the phenomenon has taken on another dimension. Thus, no state is immune and can, at any moment, find the very foundation of its sovereignty targeted.

a) A longstanding practice

Interference in another country's elections did not start in 2016 with Russian meddling in the US presidential elections. It has been a widespread practice, which countries with the means and interest in doing so have widely used for a long time. The operations of erstwhile powerful colonial mercenaries in their former possessions in Africa to oust presidents or impose others, are well-known and documented. Dov H. Levin recently published a very detailed study that identifies a number of instances of interference by both the United States of America and the [former] Soviet Union in [other] nations' elections between 1946 and 2000.⁴

b) Various forms of interference

Interference in states' domestic politics and in the choice of their leaders has taken various – and sometimes brutal – forms that are often more discreet but no less effective.

There are several documented cases of powerful states stepping in to overthrow presidents who were democratically-elected but not to their liking, or who wanted to pursue measures to benefit their people but which measures ran against the interests of certain multinational corporations. Interference could be motivated by ideology as well – for example, during the Cold War, when vicious dictatorships were being supported and elected governments were destabilized under the pretext that the people had made the wrong choice: that is, they had not voted the way the interfering power had wanted.

Interference can be in the form of direct financing, involving bags of money to cover campaign expenses of a preferred candidate, pay for advertising campaigns, bribe influential media and skew direct their reporting to favor a particular candidate, or to launch smear campaigns.

Pressure on voters can also result in blackmail and financial support withdrawn if the candidate elected is not the one desired.

⁴ Dov H. Levin, *Partisan Electoral Interventions by the Great Powers: Introducing the PEIG Dataset*,

Several OAS member states have been targeted by this kind of interference, which has declined considerably since the Cold War ended and with participatory democracy advancing in the Americas.

It must be emphasized, however, that it is not easy for a clear dividing line to be drawn between international solidarity among sister parties in different countries, between propaganda and public relations or influence operations and proven attempts to manipulate voters one way or another. An excellent article by our colleague Duncan B. Hollis sets out in plain terms the various aspects of the problem of distinguishing between operations that are within the ambit of accepted diplomatic practice and those that go far enough to be considered unacceptable interference.^{5/}

International action to promote democracy and human rights has led to significant involvement by states and international organizations intervening - directly or through non-governmental organizations that they fund - in electoral processes in states transitioning to democracy.

Some missions providing technical assistance for electoral processes are so strongly involved in even the holding of elections that it begs the question as to the level of possible interference. For some countries, election financing gets its main support from certain donor countries which, naturally, tend to think that they have oversight or veto rights over the process and even over the results. Certain electoral observation missions are sometimes powerful enough to get a disputed result validated or changed, or an election canceled where the results are not to the liking of a particular power.

Interference is, in other words, not the exclusive preserve of states. International organizations can also be influenced or manipulated by powerful states. No study on foreign interference in a state's elections should ignore this element.

c) Interference in today's digital world

With the advent of information and communication technologies in elections, the work of international lawyers has become considerably more complex. The technologies are engaged and widely used at all levels – from the operation and organizing of political parties and candidates, to the organization of the election machinery (voters lists, where voters are located, their personal data, the organization of the vote at polling stations, the vote count, and transmission of data and results) – not to mention in disseminating truthful and especially false information, or the use of social networks.

Recent instances of cyber interference in elections in the United States, France, Germany, Ukraine, and Russia demonstrate that this is a real and growing problem.

Not even the most powerful states are immune to hostile attacks on their electoral processes with all the consequences that it entails. It has become quite clear that states must take this problem into consideration if they are to preserve the integrity of their electoral and political systems. Not so long ago, the methods used for interference in our hemisphere were more direct and less sophisticated. Given the power imbalance, not much effort has been made to challenge these traditional practices based on international law. The OAS cannot remain indifferent to this new trend developing in relations between states.

II. International law and meddling in elections

^{5.} Duncan Hollis, *The Influence of War; The War For Influence*, Temple University Beasley School of Law(2017)

The question the Inter-American Juridical Committee must ask is what is of concern to the world of international jurists. Are the current tools available under international law sufficient to legally protect a victim state and to respond effectively to this new form of technological foreign interference in a state's electoral process? Does it violate such fundamental principles of international law as sovereignty, non-interference, human rights, the right to self-determination? Opinions vary. This will entail exploring the issue and evaluating work already done and positions taken by the many jurists who have already studied the issue. There is general agreement that aforementioned principles do not cover all aspects of the issue. CJI could help the OAS make a contribution to the development of international law in an area that is beginning to garner interest worldwide.

The latest edition of the Tallinn Manual 2.0 provides a comprehensive analysis of how international law applies to cyber operations in general.⁶ International legal experts and information technology experts are engaged in brainstorming on the subject, through the North Atlantic Treaty Organization (NATO) with support from the United States of America and some twenty European countries.

III. What effective response is there?

The response to the threat to peace stemming from interference in any state's electoral process lies primarily with that state's jurisdiction. Each state must protect its electoral system against outside attacks.

Just like they spend considerable amounts of money to protect their land, air, and maritime territory, they have to be equally concerned with protecting their cyberspace.

In fact, any state with the means to influence another country's choice of leaders favorable to itself will not hesitate to use those means. New technologies place the means of interference at the disposal of all states.

A state whose electoral system comes under attack will tend to react in equal proportion against the aggressor state, with the risk of escalation and threat to peace.

This is not to focus the analysis solely on interference carried out through technological means, even if it must be acknowledged that they occupy an important place in the debate today.

It would be useful for the member states to be sent a questionnaire to weigh their interest in the issue and to examine the technical and legal steps already taken or being planned for defending their electoral system against external attacks, as well as their willingness to support adoption of an international legal instrument to govern activities that may constitute interference in their electoral system.

Mindful of how complex the subject is and how potentially difficult it would be to find sufficient consensus to develop new rules, CJI could at least come up with recommendations for strengthening the domestic legal arsenal and best practices to be applied for states to deal with this problem.

This paper has only scratched the surface of the issue and has merely outlined the problem of foreign interference in elections of states. If, as I hope, the CJI agrees to place the issue on its agenda, I would be pleased to work on the issue, with collaboration from our esteemed colleague Duncan Hollis.

⁶ *Tallinn Manual 2.0, on the International Law Applicable to Cyber Operations*. Cambridge University Press, 2017. Cambridge UK

