Guide to
Electoral Dispute Resolution

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THE
CARTER CENTER

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Summary

Electoral rights are based on fundamental human rights, namely the civil and political freedoms of opinion, expression, association, and peaceful assembly that are solidly established on a global and regional basis under numerous international conventions. The right to enjoy free and fair elections also derives from the right to participate in governance, both directly and through representatives, which is also established through these instruments. Finally, the treaties also require protection of electoral as well as other human rights through an effective system of appeal.

The importance of electoral dispute resolution is often underappreciated, since the electoral complaint and appeal process is governed by technical, legal rules. The applicable rules are specific to each state, and there are no agreed models for electoral dispute resolution on the international level. Due to the variety of comparative experience in this area, even proposed standards and best practices are somewhat general in nature.

Failure to create and implement effective mechanisms to resolve electoral appeals can seriously undermine the legitimacy of an entire electoral process. At the same time, there are often numerous impediments to effective dispute resolution, including incomplete, vague, inconsistent, duplicative, or overly complex rules and procedures; weak or insufficiently autonomous electoral and judicial institutions; lack of training; and political or other interference.

International participation in electoral dispute resolution is significant, but mainly indirect. The international community provides technical advice, assistance, and support to countries in designing, establishing, and implementing systems for handling election complaints and appeals. International election observers assess the adequacy of dispute resolution, follow the handling of particular cases, and publish findings and recommendations. Sometimes, when serious electoral issues remain, international organizations and other institutions undertake missions – including those for fact-finding, conciliation, and mediation – to monitor or assist in dispute resolution or make recommendations for further international action.

The Carter Center has extensive experience in electoral observation and technical assistance. With respect to technical assistance, the Center is currently working with other election observation organizations on a democratic election standards project to identify specific comprehensive obligations for democratic elections based on international law, including but not limited to electoral dispute resolution.

In a separate but parallel effort, The Carter Center has also initiated a project on electoral dispute resolution, in order to collect information on the resolution of such disputes, identify the key issues, and identify approaches to disputes that arise in connection with elections. The current report is based on a background paper that contains analysis of related international law, standards, and practices; description of the ways electoral disputes arise and how they are handled at each stage of the election process; identification of approaches that can be made by practitioners in response to these issues; and a collection of relevant documents and sources.

The Carter Center Work in Democracy and Elections

Now more than ever, citizens around the world participate in elections to hold their governments accountable, and more governments than ever recognize democratic elections as essential to establishing their legitimate authority. Yet one democratic election does not change the political culture of a society overnight. Long-term efforts are necessary to build an inclusive democratic society that respects human rights and laws, administers justice fairly, and encourages full citizen participation in government.

Observing Elections

The assessments of organizations that monitor elections in emerging democracies are central to determining whether an election is considered genuinely democratic. The Center has been a pioneer of election observation, monitoring more than 70 elections in Africa, Latin America, and Asia since 1989, and forging many of the techniques now common to the field. Most recently, the Center has observed elections in Indonesia, Lebanon, Nepal, and Sudan.

The Center must be invited by a country's election authorities and welcomed by the major political parties to ensure it can play a meaningful, nonpartisan role. Long before election day, observers analyze election laws, assess voter education and registration, and evaluate fairness in campaigns. When votes are cast, the presence of impartial observers deters interference or fraud and reassures voters that they can safely and secretly cast their ballots. Before, during, and after an election, the Center's findings are shared in-country and reported to the international community through public statements.

Developing Standards for Democratic Elections

The Center, together with the U.N. Electoral Assistance Division and the National Democratic Institute, played a key role in producing the Declaration of Principles for International Observation, which established professional standards for election observers. Launched in 2005, the declaration has been endorsed by more than 30 observer organizations. Now the Center is spearheading efforts to identify and foster consensus on common international standards for what constitutes a genuinely democratic election. A related project is creating a method for observing electronic voting.

Although the declaration establishes general principles for professional observation, it does not attempt to define what is meant by "genuine democratic elections." The international community does not have a single common set of internationally accepted standards for democratic elections or criteria for assessing elections. As a result, there is an urgent need for election observation organizations to work together to build consensus on detailed criteria for assessing elections.

In 2005, The Carter Center launched a multiyear collaborative project, carried out by the Democracy Program, aimed at developing and building consensus around a single set of criteria for assessing democratic elections. The initiative recognizes that election observation should be

understood in the context of, and closely linked to, broader efforts to promote democracy, with elections as unique opportunities to assess how well a country's political institutions serve its citizens.

Project goals include an innovative approach to developing criteria for assessing elections based on obligations in public international law. The Carter Center is working closely with a number of other organizations to develop this methodology and to promote broad international consensus about the key criteria for democratic elections through formal and informal dialogue processes.

The Carter Center Work in Conflict Resolution

Wars produce the worst violations of human rights worldwide and are the greatest impediment to human development. Most of the more than 50 major armed conflicts since the Cold War have been internal clashes over religion, national or ethnic identity, or access to natural resources or wealth. The Conflict Resolution Program works to resolve such conflicts and build sustainable peace.

The Carter Center has become a trusted broker for peace, serving as an alternative channel for dialogue and negotiation until official diplomacy can take place. As a nonpartisan, nongovernmental organization with access to world leaders and expertise in mediation, negotiation, and peace building, the Center helps warring parties when traditional dispute resolution methods fail, filling the space between official diplomacy and unofficial grassroots peace efforts.

Monitoring and Mediating Conflicts

Program staff and interns monitor daily many of the world's armed conflicts to better understand their histories, the underlying causes, the primary actors involved, the disputed issues, and the efforts being made to resolve them. The Center will intervene if no current avenues for mediation exist or are working effectively. To mediate, the Center must be invited by all of the major adversaries and see evidence that they are truly interested in resolving the conflict. Conflict Resolution Program staff pave the way through ground-level contacts, and President Carter may travel to the region and remain in close touch with key leaders.

Implementing Peace Agreements and Building Peace

An end to fighting does not always mean a conflict has been completely resolved. The often-protracted process that leads to a peace agreement represents the beginning of an even longer process of peace implementation and post-conflict reconciliation. All parties must be held accountable for implementing agreements in good faith. Beyond the implementation of a peace agreement, root causes of a conflict may linger and continue to fester to the point of reigniting the conflict. Bringing former combatants together to forge a shared future demands patient, persistent effort. Steps may be taken to ease ethnic tensions, identify and build consensus around shared social goals, strengthen the rule of law, and bring justice to victims.

Preventing Conflict

While direct negotiation to resolve armed conflict is the program's major focus, there is also an emphasis on preventing conflict. A series of minor crises can signal or contribute to deteriorating societal and political stability. In such situations, parties in dispute may approach the Center as a neutral third party to facilitate dialogue that can keep tensions from erupting into violent conflict.

Electoral Conflict Resolution

Electoral interests are important civil and political rights, among the core human rights for which effective protection must be provided through official appeal and adjudication channels. Increasingly, effective resolution of disputes is considered essential to successful conclusion of the election process and acceptance of its results.

Resolution of election complaints and appeals is often impeded by complex administrative, legal, procedural, and other factors. Failure to address legislative and other legal ambiguities often results in substantial appeals being rejected on technicalities, especially when the relevant institutions are weak or unduly subject to influence by government or other political interests.

Phase I of The Carter Center's election dispute resolution (EDR) project is aimed at assembling a dispute resolution guidebook for election practitioners, including administrators, parliamentarians, political-party representatives, civil society, and observers. The guidebook demonstrates that electoral rights are among the human rights subject to protection through the complaint and appeal process, identifies the major issues (including legislative, administrative, other legal, procedural, and political) impeding effective electoral dispute resolution, and distills the major issues into a manual for practitioners.[1]

The guidebook also contains appendices referencing the main global and regional legal texts supporting the protection of electoral rights through the election complaints/appeal process. As part of a second phase (not reflected in this document), the guide could also be supplemented by special regional studies, including those for Africa and the Middle East, and could be validated by use in connection with upcoming elections in these regions.

It is anticipated that the manual for practitioners and associated materials in the guidebook would also be employed by The Carter Center in its ongoing programs in Africa, including with respect to technical cooperation with the African Union. In particular, the contents could assist participants and observers during upcoming elections both there and in the Middle East.

The outline for the guidebook follows:

Section 1: Electoral Rights as Human Rights: The resolution of electoral disputes, particularly postelection appeals, may constitute the most sensitive phase of an election, but its importance is often underappreciated and sometimes largely overlooked. Yet the credibility of an entire election may depend on open and effective dispute resolution, carried out without governmental manipulation or political interference, to prevent public suspicion or even unrest.

The introductory section will elaborate on the importance of dispute resolution in the election process, and contain an overall description of the legal and other authorities that require electoral rights to be protected through effective complaint/appeal proceedings. The discussion will reflect and synthesize the primary legal and related sources cited in the appendix, including the main global and also selected regional documentation.

[1] This guidebook was drafted by Dr. Daniel Finn.

Section 2: Issues, Standards, and Best Practices for EDR: This section presents the major issues impeding electoral dispute resolution. Among the issues that should be addressed by election administrators, election stakeholders, and complaint/appeal bodies are the following:

- Are the relevant legislative provisions clear and unambiguous, including with respect to the proper forum for complaint/appeal resolution, form of action (e.g., administrative, civil, or criminal) and available remedies, and the specific information (including forms) and evidence to be submitted?
- Have conflicts between electoral law and procedural codes been reconciled, or is there a clear way to resolve them through statutory interpretation and principles?
- Are the procedures and standards applied by dispute resolution bodies (election administration or the courts) clearly set forth in the law or adequately described in applicable rules of procedure and/or regulations?
- Do the rules concerning disputes give sufficient notice of the obligation of complainants to appeal, and if necessary initiate litigation on, alleged violations and their effects on an ongoing basis during the electoral process?
- Are effective remedies available at each stage of the process, and is the scope of a potential postelection remedy sufficient to address the issues in a comprehensive way?
- Does the postelection appeal process permit issues that have not previously been resolved to be considered in a way that enables the following: factual claims and legal issues to be reviewed, proposals for alternate remedies to be considered, and a timely result achieved that could receive widespread political acquiescence and public support?

Specific examples of the various issues are discussed, and suggestions about how to address them are presented.

Section 3: EDR Matrix/Manual for Practitioners: Based on the background and analysis, the manual contains a matrix of chief problems, considerations, and solutions to assist election practitioners (see above) to work for specific improvements in the resolution of electoral disputes.

Section 4: Appendices, references, and excerpts from international treaties; international declarations and resolutions; and proposed international guidelines, standards, and practices related to EDR**.**

Section 1
ELECTORAL RIGHTS AS HUMAN RIGHTS

Electoral rights are founded on fundamental human, civil, and political rights. Electoral rights are explicitly protected under the leading international principles and treaties establishing and protecting human rights.[2]

Universal Declaration of Human Rights

The inclusion of electoral rights within the human rights subject to international protection was explicitly made through the 1948 Universal Declaration of Human Rights, Article 21, which states:

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 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 Universal Declaration also recognized a number of other rights connected with elections, including the rights to nondiscrimination (Article 2), equality and equal protection (Article 7), freedom of expression and information (Article 19), and freedom of peaceful assembly and association (Article 20). It also makes clear, in Article 8, that human rights should be enforceable through national channels: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

International Covenant on Civil and Political Rights

The protections for human rights recognized under the Universal Declaration were defined and extended through the International Covenant on Civil and Political Rights (Covenant, or ICCPR), a binding treaty adopted under United Nations auspices. The ICCPR also guarantees various civil and political rights associated with elections, including the freedoms of opinion and expression (Article 19), peaceful assembly (Article 21), and association (Article 22). The Covenant also clarifies the extent and under what circumstances restrictions can be placed on their exercise (Articles 19.3 and 21) – viz., if the restrictions are based in law and are socially necessary.

Protection of Civil and Political Rights

The ICCPR also contains provisions concerning the implementation of human rights guarantees by state parties. First, states undertake, "in accordance with [their] constitutional processes and with the provisions of the … Covenant" to "take the necessary steps … to adopt such legislative

[2] NB – Major documents and works cited in the text are described in the References (Annex A); citations to other works are contained in footnotes.

or other measures as may be necessary to give effect to the rights recognized" in it (Article 2.2). Second, the parties also undertake to provide effective administrative, judicial, and other remedies for the protection of these rights (Article 2.3).
The ICCPR, in Article 25, lays out in greater detail the rights to participate in democratic governance, including through elections:

> Every citizen shall have the right and the opportunity, without any … distinctions … 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.

The ICCPR also provides for states to submit periodic reports on human rights in their territory (Article 40) and established a United Nations Human Rights Committee (UNHRC) to assist in monitoring implementation of the Covenant and its protocols by state parties (Article 28). The UNHRC, which consists of experts in the field of human rights, meets several times a year, and submits an annual report to the General Assembly. States that have agreed to reciprocal application of the procedure by other states may refer issues related to implementation of the Covenant to the UNHRC (Article 40), which may appoint an ad hoc Conciliation Commission to pursue the matter (Article 42). With respect to elections, the UNHRC has issued General Comment 25 on the interpretation and application of ICCPR Article 25; and, for states that have agreed to the First Optional Protocol of the Covenant, also considers matters brought before it by individuals. In addition, the UNHRC has published General Comments (Nos. 31 and 32) on the right to an effective remedy (ICCPR Article 2) and standards for adjudicative proceedings (Article 14.1). General Comment No. 25 and selected determinations of the UNHRC under Article 25 will be discussed below, as will the General Comments (Nos. 31 and 32) related to the right to an effective remedy through appeal and adjudication.

Complaints and Appeals

The ICCPR extended the principle of effective remedies for human rights violations by requiring states to implement appropriate procedures to consider complaints, and take steps to enforce the remedy granted. Under Article 2.3, each state party to the Covenant undertakes:

> a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the States, and to develop the possibilities of judicial remedy;
> c. To ensure that the competent authorities shall enforce such remedies when granted.

Arguably, the obligation to provide effective channels of resolution for alleged violations of civil and political rights applies fully to electoral rights. The wide variation in electoral practices and the lack of agreed standards for elections at the global level make it difficult, however, to determine whether a violation of fundamental rights has occurred in connection with particular

election operations or procedures. But this has not prevented international reaction in cases in which human rights have clearly been violated during an election.

The ICCPR, in Article 14.1, also addresses the general standards for adjudicative proceedings, which would apply to complaints and appeals seeking a remedy for a violation of electoral as well as other civil and political rights:

> All persons shall be equal before the courts and tribunals. In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order *(ordre public)* or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a … suit at law shall be made public except where [protection of certain areas of personal privacy] otherwise requires ….

Global Framework for Electoral Rights Protection

At the global level, there is considerable support for electoral rights, as well as the need for effective electoral dispute resolution through resolutions and decisions of international bodies, including the United Nations and regional international organizations, and for interpretations, standards, and guidelines adopted by international organizations and leading nongovernmental organizations (NGOs).[3] This includes portions of a number of U.N. General Assembly resolutions and is reflected in decisions of the Security Council (which authorizes peacekeeping and other special-assistance missions including an electoral component). But there is no universal, legally binding instrument setting forth international standards for elections, including regarding electoral complaints and appeals.

Numerous efforts have been made to identify general principles for the conduct of democratic elections, both by U.N. bodies and other entities. The former U.N. Commission on Human Rights (UNCHR) declared in 1989 that, "There is a particular need for independent supervision, appropriate voter registration, reliable balloting procedures and methods for preventing electoral fraud and resolving disputes."[4] In connection with their ongoing support for elections in many countries, U.N. bodies have identified numerous principles to guide their programs and identify priorities for technical assistance and support.[5]

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[3] See, e.g., Inter-Parliamentary Council, 1994, Paragraph 9: "States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the Courts."

[4] UNCHR, 1989.

[5] See, e.g., U.N. Center for Human Rights, 1994, pp. 4-17. With respect to electoral complaints/appeals in particular, the Center provided the following comments:

> The right to challenge election results and for aggrieved parties to seek redress should be provided by law. The petition process should set out the scope of available review, procedures for its initiation and the powers of the independent judicial body charged with such review. Multiple levels of review, where appropriate, should be described as well.
>
> The effect of irregularities on the outcome of elections must be established by law. Anyone alleging a denial of their individual voting or other political rights must have access to independent review and redress. Id., p. 16

U.N. agencies conduct a wide variety of electoral programming, ranging from actually conducting elections (usually in connection with large-scale peacekeeping operations), supervising them (similarly, or as part of other major political and assistance missions), or verifying their conduct by national authorities ("verification missions"). In addition, the United Nations – largely through the Department of Political Affairs (DPA), Election Assistance Division (EAD) – provides a variety of technical assistance and advice to national authorities or other national entities (including domestic observers) directly or through U.N. specialized agencies (particularly the U.N. Development Program) and ad hoc missions.[6]

UNHRC General Comment No. 25

Perhaps the most significant delineation of electoral principles at the global level is General Comment 25, in which the UNHRC, established under the ICCPR, published its views concerning the application of ICCPR Article 25 on citizen rights to participate in governance. Following are some of the key parts related to election law and complaints/appeals:

> The Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.[7]
>
> States must take effective measures to ensure that all persons entitled to vote are able to exercise that right.[8] … State reports should also describe factors which impede citizens from exercising the right to vote and the positive measures which have been adopted to overcome these factors.[9]
>
> States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.[10]
>
> The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.[11] … The legal grounds and procedures for the removal of elected office holders should be described.[12]
>
> [E]lections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights.[13]
>
> There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.[14]

In the same publication, the Center also described standards for an independent and impartial judiciary (id., pp. 6 & 8) and for criminal sanctions against corrupt practices that could influence an election process (id., p. 16). More generally, it also addressed the need to have basic legal provisions related to elections enacted "in the highest law of the land [in] clear, concise and adequately specific" terms to prevent "abuse of discretion, discriminatory application, or impingement upon the rights of free expression or full participation." (Id., p. 17.)

[6] Id., pp. 2-3.

[7] UNHRC General Comment No. 25, paragraph 5.

[8] Id., paragraph 11.

[9] Id., paragraph 13.

[10] Id., paragraph 15.

[11] Id., paragraph 16.

[12] Id., paragraph 18.

[13] Id., paragraph 19.

> State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. … Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.[15]

As can be seen, however, the relevant principles indicated by the UNHRC cannot be taken as a systematic or complete guide to a democratic electoral process, including with respect to effective resolution of election disputes.

UNHRC General Comment No. 31

An important contribution to the understanding of the scope of the right under ICCPR Article 2 – to have the civil and political interests of individuals protected by the state, including through effective official remedies – has been made by the UNHRC in its Comment 31 on this subject. While of more general applicability, the interpretations contained in the comment clarify, and in effect enlarge, the understanding of the scope of state responsibilities to avoid, prevent, redress, and respond to violations of civil and political rights.

Applying these principles to electoral rights established under the ICCPR, the UNHRC comments lead to several conclusions relevant to the electoral dispute resolution process:

- State responsibility to prevent and respond to electoral violations is unitary; that is, the executive branch does not avoid international responsibility for violations that are committed or permitted by other branches of government such as administrative, legislative, and judicial, or other levels of government such as municipal or local.
- States are required to adopt "legislative, judicial, administrative, educative and other appropriate measures" to address electoral violations; these should include training of public officials and education of the population at large. Violations that occur despite the existence of a remedy are presumed to have occurred due to the failure of the remedy to function effectively in practice.
- States are required to prevent acts committed by private persons (e.g., voter fraud, voter intimidation or inducement, or interference or unfair actions directed at campaigns) that violate electoral rights, and are responsible for "permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."
- The primary civil and political rights established under the ICCPR also apply to groups, since these rights are enjoyed by individuals "in community with others." Thus individual rights of opinion, expression, association, peaceful assembly, and participation in governance are protected when they are exercised through such organizations as political parties and nongovernmental organizations.
- National law must be formulated and applied in a way consistent with obligations under the ICCPR, including with respect to the establishment and operation of "accessible and effective" mechanisms of appeals of an administrative and judicial nature. Failure to

[14] Id., paragraph 20.
[15] Id., paragraph 22.

comply cannot be justified upon social or economic circumstances or made subject to conditions inconsistent with the ICCPR.[16]

- Redress for violations of rights must involve "reparation," which "can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of … violations." It is easy to see how this principle could be applied to electoral violations.
- States have an integral obligation to prevent recurrence of a violation. In addition, they are obliged to bring violators to justice; failure to do so could constitute a separate violation.
- States are also obliged to take provisional or interim measures in response to a violation, and to mitigate the harm caused by a violation at the earliest opportunity.

The full text of General Comment No. 31 is reproduced in Appendix C. Some of the key portions of the comment with potential application to violations of electoral rights read as follows:

> Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction[.][17]
>
> The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally … may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility.[18]
>
> … Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2 …would be incompatible with the Covenant when considered in the light of its objects and purposes.[19] Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.[20]
>
> … [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the

[16] It should be noted that, while General Comment No. 31 argues that placing conditions on the applicability of ICCPR Article 2 would be incompatible with the purposes of the ICCPR, Article 2 is not listed among those articles against which derogation is prohibited; ICCPR, Article 4.2. (In this connection, derogation refers to suspension of obligations under certain circumstances as permitted by a convention, such as through Article 4 of the ICCPR.).
[17] Id., paragraph 3.
[18] Id., paragraph 4.
[19] Id., paragraph 5.
[20] Id., paragraph 7.

enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.[21]

The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others.[22]

Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees.[23]

The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.[24]

Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person … The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.[25]

Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. … The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[26]

In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant.[27]

Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.[28]

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[21] Id., paragraph 8.
[22] Id., paragraph 9.
[23] Id., paragraph 13.
[24] Id., paragraph 14.
[25] Id., paragraph 15.
[26] Id., paragraph 16.
[27] Id., paragraph 17.
[28] Id., paragraph 18.

> The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.[29]
>
> Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice.[30]

UNHRC General Comment No. 32

ICCPR Article 14, which addresses equality and due process in judicial and other adjudicatory proceedings—particularly criminal trials—is the subject of another UNHRC General Comment, No. 32. Although only the first section of ICCPR Article 14 (see text in Appendix B) addresses noncriminal proceedings, the UNHRC has issued extensive and detailed guidance on its application to civil and administrative proceedings. Since electoral rights are within the human rights protected under the ICCPR, these comments should be carefully considered for application to all sorts of election-related complaint and appeal processes.

Some of the key elements of the UNHRC commentary on Article 14 include:

- The basic principle of equality applies to all adjudicatory proceedings, including those of a civil or administrative nature. Equality requires access to fair and public hearings; a competent, independent and impartial tribunal; and decisions that are made objectively based on the law and evidence.
- Fair adjudication of disputes also requires "equality of arms" (equal ability of the sides to present their cases in full) and nondiscrimination between the parties in their access to the tribunal or ability to pursue their cases.
- The right to appeal a violation should not be infringed through undue delays or by unreasonable costs, or frustrated by a pattern of nonreceptiveness by the authorities.
- Courts and other adjudicatory tribunals must be competent, independent, and neutral; the presiding official must conduct the hearings with impartiality and objectivity; and the proceedings must give the appearance of fairness to a reasonable observer. Parties to such proceedings must also be protected from threats or pressure.
- Appellate proceedings in the limited sense are not subject to Article 14 standards, but any proceeding (including an appeal proceeding) that has full adjudicative power should be conducted according to such standards.
- First-instance (trial) proceedings must include oral argumentation as well as evidentiary examination, while appellate rulings may be decided based on submission of written briefs

[29] Id., paragraph 19.
[30] Id., paragraph 20.

alone. In all cases, however, the judgment (including essential findings, evidence, and legal reasoning) must be published.

The relevant portions of General Comment 32 are reproduced in Appendix C. The following selections contain some of the most interesting material:

> The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.[31]
>
> Article 14[,] … paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The … same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if … their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the … paragraph.[32]
>
> Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law.[33] While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.[34] While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 …, [t]he guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. … Deviating from fundamental principles of fair trial … is prohibited at all times.[35]
>
> The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals [specifically] addressed …, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.[36] The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in … Article 14, … those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.[37]
>
> Article 14 encompasses the right of access to the courts in cases of determination of … rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. … A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. …[38]

[31] UNHCR, General Comment 32, paragraph 2.
[32] Id., paragraph 3.
[33] Id., paragraph 4.
[34] Id., paragraph 5.
[35] Id., paragraph 6.
[36] Id., paragraph 7.
[37] Id., paragraph 8.
[38] Id., paragraph 9.

[T]he imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1. In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant … .[39]

The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.[40] … The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. …[41]

The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of … [individuals'] rights and obligations in a suit at law. …[42]

The concept of determination of rights and obligations "in a suit at law" (*de caractère civil*) … encompasses (a) judicial procedures aimed at determining rights and obligations * * * * * in the area of private law, as well as (b) equivalent notions in the area of administrative law … In addition, it may (c) cover other procedures ….[43]

The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. … [W]henever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. …[44]

The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. …[45] The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. …[46]

The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. …[47] An important aspect of the fairness of a hearing is its expeditiousness. …[48]

All trials … related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information

[39] Id., paragraph 11.
[40] Id., paragraph 12.
[41] Id., paragraph 13.
[42] Id., paragraph 15.
[43] Id., paragraph 16.
[44] Id., paragraph 18.
[45] Id., paragraph 19.
[46] Id., paragraph 21.
[47] Id., paragraph 25.
[48] Id., paragraph 27.

> regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing. The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities.[49]
>
> Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except [in certain special cases].[50]

UNHRC Opinions

In terms of considering particular cases concerning electoral rights, the UNHRC has also examined a range of election-related cases in response to submissions by affected individuals. Since petitioners to the UNHRC are required to exhaust their remedies at the national level,[51] many cases require consideration of the dispute resolution procedures that were applied. The following cases,[52] however, also directly involved whether an adequate ability to appeal infringements of electoral rights had been provided:

In Sinistsin v. Belarus (2007), the applicant's right to be elected was found to be violated after the authorities struck off signatures supporting his presidential candidacy petition and invalidated his application, without the opportunity for an appeal to the electoral authorities or for review of their action by an independent and impartial body.

In Paraga v. Croatia (2001), delays in pending criminal proceeding against the applicant prevented him from being a candidate in a parliamentary election, and the authorities were found to have not provided an effective remedy to protect his right to be elected.

In Ignatane v. Latvia (1999), the applicant was rejected as a candidate in a local council election due to lack of proficiency in the state language, and the absence of a possibility for appeal from the determination of the authorities contributed to a violation of the right to be elected.

Regional Frameworks for Electoral Rights Protection

The codification of international standards for democratic elections, as well as creation of mechanisms to review and safeguard electoral rights, is considerably more advanced at the regional versus global level. Particularly noteworthy are the arrangements established by

[49] Id., paragraph 28.
[50] Id., paragraph 29.
[51] ICCPR, Optional Protocol, Article 2.
[52] These case descriptions are derived from NDI, 2008; Appendix IV of that document contains additional information and case notes.

participating states of the Organization for Security and Cooperation in Europe (OSCE), with participants spanning Europe, Eurasia, and North America, as well as by the Council of Europe (CoE), with broad membership in Europe and Eurasia.

There are also important arrangements in other regions, particularly in Africa (under the African Union [AU], the Economic Community of West African States [ECOWAS], and the Southern African Development Community [SADC]) and in Latin America under the Inter-American System. In addition, activities of a regional or other subglobal nature have been taken by the Commonwealth of Nations (the Commonwealth) and by the Commonwealth of Independent States (CIS). The discussion here will address the key elements, related to electoral dispute resolution, of the regional systems in Europe and Eurasia and in Africa and Latin America.

Organization for Security and Cooperation in Europe (OSCE)

The foundational document for OSCE involvement in human rights matters is the 1990 Copenhagen Document of the Conference on Security and Cooperation in Europe (CSCE, the OSCE's predecessor), which set forth an extensive body of principles regarding human rights and related matters that participating states committed themselves to respect. Since they are framed as political commitments rather than legal obligations, the Copenhagen principles are subject to a process of international consultation rather than legal disputation. In addition, such commitments – unlike similar legal obligations – are not subject to "derogation clauses" commonly found in treaties, under which certain obligations can be suspended under special circumstances.

The various OSCE commitments related to elections are substantial yet incomplete. In addition, their drafting often makes them difficult to apply. A number of the commitments that relate to electoral complaints, appeals of an administrative and judicial nature, and other aspects of human rights protection through administrative and judicial means will be briefly presented in this section.

The OSCE monitoring and technical consultative role for elections is organized by the Office for Democratic Institutions and Human Rights (ODIHR). Its reports on the conduct of elections in the OSCE area are an important source of information and analysis on this subject, but also highlight the difficulties applying the Copenhagen principles to the details of election administration. In recent years, ODIHR's work on election observation has been complicated by East-West disagreement concerning the role and methodology of election observation, and the conclusions reached by international observers.

The Copenhagen commitments related to election disputes in particular can be summarized in the following manner:[53]

> OSCE participating states "solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: … everyone will have an effective means of

[53] OSCE/ODIHR, 2003, Part One, paragraphs 10.1-2 (references omitted). The first paragraph synthesizes material from Copenhagen commitments number 5, 5.10, 5.11, and 5.12; the second includes material from commitment number 12.

> redress against administrative decisions, so as to guarantee respect for fundamental human rights and ensure legal integrity; administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available; [and] the independence of judges and the impartial operation of the public judicial service will be ensured.
>
> "The participating States, wishing to ensure greater transparency in the implementation of the commitments undertaken in the Vienna Concluding Document … decide to accept as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at proceedings before courts as provided for in national legislation and international law; it is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments."

An earlier OSCE document, the Concluding Document of Vienna,[54] had set forth appeal rights for those whose human rights have been violated, by committing participating states to:

> [E]nsure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia,* effectively apply the following remedies:
>
> - the right of the individual to appeal to executive, legislative, judicial or administrative organs;
> - the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
> - the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

In addition, the CSCE Charter of Paris for a New Europe (1990) provides:

> We [OSCE participating states] will ensure that everyone will enjoy recourse to effective remedies, national or international, against any violation of his rights.

Council of Europe

In 1950, the CoE adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms (also called the European Convention on Human Rights, or ECHR), which came into effect in 1953. The European Convention provides for the protection of civil and political rights, including rights related to the political process involving free opinion,

[54] OSCE, 1989; see paragraph 13.9.

expression, association, and assembly.[55] Protocol No. 1, Article 3 to the ECHR extends the human rights protections of the convention to electoral matters.[56]

European Court of Human Rights

The convention also established the European Court of Human Rights (ECHR)[57] to consider cases brought by state parties against other parties[58] or by individuals against a state party.[59] The court also has jurisdiction to give advisory opinions at the request of the CoE Council of Ministers.[60]

A number of election-related cases have been decided by the European Court of Human Rights. Similarly, as with respect to submissions of individual cases to the UNHRC under the ICCPR, the European Convention requires that the submitter have exhausted legal remedies at the national level;[61] so the fairness and adequacy of appeals at that level often figure in the court's reasoning. The following cases, however, also focused directly (at least in part) on the adequacy of the national electoral appeal process itself:[62]

Georgia Labor Party v. Georgia (2008): In a case involving parliamentary elections in 2003-04, a political party (as well as voters) was found to have an enforceable right to a free election. Election commissions may not have been sufficiently independent, but there was no evidence of abuse of the right to nominate candidates for election. But the decision of the Central Election Commission (CEC) to annul the results in two districts had been made nontransparently and without justification, resulting in a violation of the party's right to contest the elections as well as the voters' rights there.

Russian Conservative Party of Entrepreneurs and Others v. Russia (2007): The denial of registration of a candidate list based on certain nominees' submission of incorrect information and their involuntary withdrawal, followed by the reversal of a lower court order to reinstate the list based on "supervisory" proceedings by a higher court, deviated from legal predictability and resulted in a disproportionate action taken against the party.

Hirst v. United Kingdom (2005): The general, automatic, and indiscriminate removal of the voting rights of convicts, applicable to a wide range of offenses and sentences, was found disproportionate and in violation of their rights.

Zdonoka v. Latvia (2004): A permanent ban on candidacy for elective office based on prior activity with the Communist Party was disproportionate to the objective of the "lustration" (cleansing) process during political transition.

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[55] European Convention on Human Rights (CoE, 1950), Articles 9-11.
[56] "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 people in the choice of the legislature."
[57] Id., Section II (Articles 19-51).
[58] Id., Article 33.
[59] Id., Article 34.
[60] Id., Articles 47-49.
[61] European Convention, Article 35.1.
[62] These case notes are derived from NDI, 2008.

Podkolzina v. Latvia (2002): Denial of registration as a parliamentary candidate was unfair and unwarranted since the individual had received a valid linguistic proficiency certificate but was subjected to further examination, then denied approval based on the nonappealable decision of a single official.

Gaulieder v. Slovak Republic (1999): The barring from office of an elected member who resigned from a political party violated his right to discharge his duties for the period of his term.

Pierre-Bloch v. France (1997): In a controversial decision, the court addressed a situation in which a successful candidate for the National Assembly who was administratively determined to have overspent the applicable ceiling on campaign spending was subject to penalties including reimbursement of the amount of funds overspent, forfeiture of his parliamentary mandate, and disqualification from seeking parliamentary office for one year. The court concluded, by seven judges to two, that the applicant could not assert violation of his "civil" rights despite his inability to mount an effective contestation on appeal, since the penalties in question were of a "political" character, and as such a matter of public not private law, nor were the penalties explicitly criminal in nature. (The dissenting judges found the matters at issue to be civil and/or criminal in nature, and should have been subject to an effective possibility of appeal in compliance with the European Convention.)[63]

Other CoE-Affiliated Bodies

Other bodies affiliated with the CoE have developed standards and guidelines for implementation of the ECHR, including Protocol No. 1. Perhaps the foremost of these is the European Commission for Democracy Through Law, or "Venice Commission" (CoE/VC). In addition to providing commentary and other assistance on the development and implementation of electoral legislation, the CoE/VC has developed guidelines and standards on matters of electoral law and its implementation.[64]

Like the OSCE commitments referred to previously, CoE/VC guidelines are neither complete nor entirely systematic. Instead, the relevant VC guidelines and related explanatory comments on electoral appeals lay out a number of desiderata aimed at achieving "an effective system of appeal" – viz., that election complaints are resolved fairly, expeditiously, and effectively by impartial administrative and judicial bodies.[65]

[63] The original administrative determination on the overspending was made by the National Commission on Election Campaign Accounts and Political Funding, based solely on an audit and without an investigatory hearing. The determination was upheld by a high-level body, the Constitutional Council, which also imposed the penalties. (While the Council is not a court per se, it exercises a variety of quasi-judicial functions, such as review of proposed legislative enactments with respect to their constitutionality.) The applicant could have made a submission to the latter body, but was not invited to attend a hearing on the matter. It could be argued that the ECHR should have resolved the matter by narrowly upholding the limited, administrative-type review of the matter by the Council, rather than ruling broadly that the substantial penalties in question were not "civil" or "criminal" in nature. See discussion of UNHRC General Comment No. 32, above.

[64] See Venice Commission, 2002.

[65] See id., Guideline 3.3 and Explanatory Report paragraph 3.3 (reprinted in Annex B).

Organization of American States (OAS)

Inter-American Treaty System

The American Convention on Human Rights (ACHR), which entered into force in 1978, established a similar institutional framework for the protection of human rights as the European Convention previously discussed. Political rights such as the rights to free thought and expression, association, and assembly are recognized,[66] as is the right to participate in government (Article 23):

> 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.

In addition, the ACHR (Article 25) provides that judicial remedies should be available for violations of political and other rights guaranteed by the treaty:

> Right to Judicial Protection
>
> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
>
> 2. The States Parties undertake:
>   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
>   b. to develop the possibilities of judicial remedy; and
>   c. to ensure that the competent authorities shall enforce such remedies when granted.

While certain rights (including opinion and expression, association and assembly) protected under the ACHR can be derogated in case of public emergency, the right to participate in government and to an effective judicial remedy for the preserved rights are not subject to derogation (Article 27).

[66] ACHR, Articles 13, 15 & 16.

Enforcement of the human rights protections under the ACHR is accomplished through establishment of the Inter-American Human Rights Commission (IHRC) and Inter-American Court of Human Rights (ICHR):[67]

Inter-American Human Rights Commission

Legally recognized private organizations in the member states can submit a complaint to the commission concerning an alleged violation by any state party,[68] and member states must initiate their complaints to the court by fulfilling the investigatory and reporting procedures of the commission.[69] Such a complaint may only be accepted by the commission, however, if the complainant and respondent states have both made declarations that they agree to such complaints being made by another state.[70]

Whether the commission would take up cases in the electoral area, despite traditional hemispheric concerns about internal sovereignty, was mooted until the court began to assert its competence, notably in a series of complaints against the Mexican authorities. Following are descriptions of some election-related cases that have been considered by the ICHR:[71]

Walter Humberto Vásquez v. Peru (2000): Removal of judges and magistrates during "national emergency of corruption" violated several articles of the ACHR, including Article 23 on political rights, Article 24 on equality before the law, and Article 25 on the right of judicial protection.

Andreas Aylwin Azocar et al. v. Chile (1999): The creation of the position "senator for life" violated popular sovereignty and ACHR Articles 23 and 24 (see above).

Clemente Ayala Torres et al. v. Mexico (1999): Kidnappings and murders of members of a political party during a state election and the inadequate response of the state government violated the rights to judicial guarantees and judicial protection.

Efraín Rios Montt v. Guatemala (1993): Preventing candidacy by the leader of a coup d'etat, armed revolution, or other movement that changes the constitutional order, and other individuals who became head of government as a result of such actions, does not violate political rights.

Luis Felipe Bravo Mena v. Mexico (1993): Electoral irregularities are not solely within national jurisdiction, but can be reviewed under the ACHR if protected rights are infringed.

National Action Party v. Mexico (1991): Electoral statute that left functions of the election authority in the hands of the ruling party violated the rights of political participation (ACHR

[67] In this respect, the ACHR also followed the European Convention in its original form; but the European Commission on Human Rights has been discontinued and its role in considering disputes has been transferred to the ECHR.
[68] ACHR, Article 44.
[69] Id., Articles 48, 50 & 61.2.
[70] Id., Article 45.
[71] These descriptions are derived from NDI, 2004, pp. 128-129.

Article 23), effective recourse (Article 25), and access to an independent tribunal (Article 8), and government was obliged to correct the situation through law.

Mexico Election Decision (1990): Commission is competent to consider elections within ACHR member states, and Mexico must correct its domestic law to permit the exercise of the rights enumerated in the convention.

Nicola Estiverne v. Haiti (1988): Declaring a citizen persona non grata and barring his candidacy in an election violated several rights established in the ACHR, including political participation (Article 23) and judicial protection (Article 25).

Inter-American Court of Human Rights

OAS member states may also make optional declarations that they accept mandatory jurisdiction of the ICHR, without special agreement, but they may limit or make subject to reciprocity their obligation in this regard.[72] The remedies available to the court are essentially declaratory in nature, but the court may also order preliminary relief in case irrevocable injury to a person could occur otherwise.[73]
Following are some of its relevant election-related decisions.[74] These rulings make clear that it recognizes its jurisdiction to protect electoral as well as other human rights:
Castaneda Gutman v. Mexico (2008): Denial of independent candidacies was not a violation of candidacy rights, except if political parties were noninclusive in nominating candidates.
Yatama v. Nicaragua (2005): Denial of registration to candidates of an indigenous political party was discriminatory and violated due process.
Ricardo Canese v. Paraguay (2004): State was required to take special efforts to protect free expression during the pre-election campaign period.

Inter-American Democratic Charter

In 2001, the OAS Council adopted the Inter-American Democratic Charter, which reaffirmed the importance of democracy as a foundation for development and rule of law in the Americas.[75] The charter also recognized the singular role of free and fair elections and other key elements of representative democracy in ensuring democratic governance and respect for human rights (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.

[72] Id., Article 62.
[73] Id., Article 63.
[74] These descriptions are derived from NDI, 2004, pp. 130-132.
[75] OAS Council, 2001, Articles 1 & 2. See generally E. Lagos & T. Rudy, 2004.

The charter also stresses the unique capacity of democratic institutions for preserving the human rights guaranteed in international and regional treaties (Article 7):

> Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.

To that end, the charter encourages claims of violation of human rights to be referred to the Inter-American System, and indicates that the system should be strengthened in its role of protecting democratic rights (Article 8):

> Any person or group of persons who consider that their human rights have been violated may present claims or petitions to the inter-American system for the promotion and protection of human rights in accordance with its established procedures.
>
> Member states reaffirm their intention to strengthen the inter-American system for the protection of human rights for the consolidation of democracy in the Hemisphere.

Accordingly, the charter calls for member states who have concerns about their internal democracy to request assistance from the Inter-American System,[76] and for other member states or the secretary-general to bring to the attention of the Permanent Council any extra-constitutional alteration of the internal democratic systems of member states.[77] The council could then initiate an investigation and recommend actions to the OAS General Assembly, up to and including suspension of the state from participation in OAS organs.[78]

The charter also makes clear, in Article 23, that, "Member states are responsible for organizing, conducting, and ensuring free and fair electoral processes." To that end, members are encouraged to seek assistance in this regard, and the charter provides that they may request OAS election observation missions (EOMs) to be dispatched. The charter also encourages greater support for promotion of democratic culture in the Americas,[79] including "programs and activities … to promote good governance, sound administration, democratic values, and the strengthening of political institutions and civil society organizations."

Africa

The establishment of a regional treaty regime and institutional framework for the protection of human rights in sub-Saharan Africa has followed a similar legal and institutional form to regional developments elsewhere. African governments, however – often referring to the legacy of colonialism – are highly sensitive to issues of sovereignty and therefore are often unwilling to overtly attempt to influence or intervene in the internal affairs of other states.

As a result, compliance with human rights obligations and securing cooperation and participation within the regional framework for the protection of human rights in Africa has been uneven.

[76] Id., Articles 17-18.
[77] Id., Articles 19-20.
[78] Id., Articles 20-22.
[79] Id., Articles 26-28.

Recent events – particularly with respect to the failed presidential elections in Kenya and Zimbabwe – have demonstrated the limitations of regional and subregional democracy and election-related initiatives by the African Union, Economic Community of West African States, and the Southern African Development Community.

The African Union

BANJUL CHARTER

The member states of the former Organization for African Unity (OAU) adopted the African Charter on Human and Peoples' Rights (ACHPR, or Banjul Charter) in 1982, and it came into effect a few years later. The treaty expressly recognizes various civil and political rights, including the freedoms of conscience (Article 8), information (Article 9), lawful association (Article 10), and assembly (Article 11). The right to participate in government (Article 13) is expressed in terms very similar to the corresponding provisions in the global and other regional treaties.

The Banjul Charter contains a strong provision concerning judicial protection of individual rights (Article 7.1):

> Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force. …

And the parties are obliged to develop and provide impartial judicial and other bodies to protect human rights (Article 26):

> States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

OAU/AU DECLARATION ON THE PRINCIPLES GOVERNING DEMOCRATIC ELECTIONS

In 2002, the OAU adopted the Declaration on the Principles Governing Democratic Elections in Africa (AU Declaration). The AU Declaration sets forth general principles for democratic elections,[80] and the rights and obligations of citizens with respect to elections.[81] The declaration also contains a number of political commitments by the member states to establish internal institutional structures in support of regular democratic elections.[82] In the declaration, African leaders also requested the then OAU "to be fully engaged in the strengthening of the democratization process, particularly by observing and monitoring elections in our Member States,"[83] and requested the secretary-general to take measures to support these functions,

[80] AU Declaration, Part II.
[81] Id., Part IV.
[82] Id., Part III.
[83] Id., Part V.

including by mobilizing resources and making the necessary financial and administrative arrangements.[84]

AFRICAN CHARTER ON DEMOCRACY, ELECTIONS, AND GOVERNANCE

This instrument was adopted by the AU Assembly in 2007, and is not yet in force. The charter contains additional commitments on democracy, rule of law and human rights, and constitutional rule and transfer of power.[85] It also lays out a number of standards for democratic elections[86] and democratic governance,[87] and provides for potential sanctions in case the results of an election are not respected or there is an unconstitutional change of government by other means.[88] Also, with respect to elections, the charter continues the mechanism under the previous OAU/AU declaration for technical assistance and support as well as observation by AU structures.[89]

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

The Banjul Charter created the African Commission on Human and Peoples' Rights. State parties may refer matters in other state parties for consideration by the commission, with information to the other states and to the OAU secretary-general. The commission is to conduct an inquiry, attempt to achieve an amicable agreement ,and, if not, reach conclusions for transmission to the parties and the OAU Assembly of Heads of State and Government. The steps in this process are all to be kept confidential, and there is no particular time period for its ultimate completion.[90]

The ACHPR also accepts submissions from non-state actors, subject to certain limitations. To be considered by the commission, a majority of its members must support doing so. Prior to actually considering such a submission, however, the commission must report it to the state involved. If a communication involves a "series of serious or massive violations of human and peoples' [sic] rights," the commission should report that to the Chairman of the Assembly.[91]

As for submissions by state parties, the receipt of communications from non-state actors and action thereupon by the commission remains confidential until the assembly decides otherwise, and reports of the commission on its activities are subject to the same proviso.[92]

One ACHPR decision is relevant to elections and electoral dispute resolution. In Modise v. Botswana (2000), the commission found that the government had violated the ACHR Article 13 (political participation) rights of an individual to whom it denied citizenship, despite his ancestry in the country, after he had founded an opposition political party and had been subjected to a pattern of official actions intended to hamper his political activities.[93]

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[84] Id., Part VI.
[85] AU, 2007, Articles 4-5.
[86] Id., Article 17.
[87] Id., Article 32.
[88] Id., Article 23.
[89] Id., Articles 18-19.
[90] ACHPR, Articles 47-54.
[91] *Id.,* Articles 55-58.
[92] *Id.,* Article 59.
[93] This description is derived from NDI, 2004, p. 123.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The African Court on Human and Peoples' Rights was created under a protocol to the ACHPR that entered into force in 2004. The ACHPR Court has the power to hear cases under the convention brought by state parties, the ACHPR Commission, and African intergovernmental organizations, as well as to entertain requests for advisory opinions. The court was created in 2006, but its establishment has been complicated by a resolution of the African Union under which it would be merged with the African Court of Justice, the charter of which has not yet entered into force.

Economic Community of West African States

At the end of 2001, the member States of the Economic Community of West African States adopted a protocol on Democracy and Good Governance, which is supplementary to an earlier protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (1999). The 2001 protocol declares that the human rights set forth in the ACHPR and other international instruments apply in the political realm, including with respect to the activities of political parties and freedom of association and assembly.[94] With respect to elections in particular, the protocol lays down a number of principles and standards.[95]

The 2001 protocol also creates a basis for regional cooperation on election matters through ECOWAS election monitoring and assistance programs.[96] Finally, building on the basis of the 1999 protocol, the 2001 protocol establishes a basis for coordinated implementation and even sanctions in the event "democracy is abruptly brought to an end by any means or … there is a massive violation of human rights in a member state." In this case, the privileges of that state within ECOWAS can be suspended and further action could also be taken under the earlier protocol.[97]

Southern African Development Community

The SADC Principles and Guidelines Governing Democratic Elections were adopted at a summit meeting in 2004. Like the AU Declaration, the SADC document sets forth principles for the conduct of democratic elections,[98] and the responsibilities of member states with regard to elections.[99] The main organizational provisions of the document focus on the mandate, guidelines, and operating conditions for SADC election observation missions (SEOMs).[100]

[94] ECOWAS Protocol, 2001, Article 1.
[95] Id., Articles 2-10.
[96] Id., Articles 12-18.
[97] Id., Article 45.
[98] SADC Principles and Guidelines, Section 2.
[99] Id., Section 7.
[100] Id., Sections 3, 4 & 7.

Section 2
ELECTORAL DISPUTE RESOLUTION: ISSUES, STANDARDS, AND BEST PRACTICES

Principles

In elections practice, generally a "complaint" refers to the original submission of an application for relief from a violation of electoral law or regulations. Complaints may be filed at any level of electoral administration – viz., to the body directly responsible for taking (or not taking) a required action. An "appeal" refers to a demand submitted to a body (administrative or judicial) with the responsibility to review actions (including in response to complaints) by the bodies with direct responsibility for them.

Under ICCPR Article 2.3, persons whose civil or political rights have been violated are entitled to an effective remedy. In its General Comment No. 31, the UNHRC has interpreted this article to require states to make available judicial and administrative and other means to remedy violations. As noted previously, these means are to be "accessible" by individuals and groups and capable of applying effective remedies such as "reparation, which can involve restitution, rehabilitation and measures of satisfaction," "guarantees of non-repetition," and "bringing to justice the perpetrators." According to the UNHRC, states must respond to violations even if they are committed by other branches or levels of government, or by third parties.

ICCPR Article 14.1 deals with the actual proceedings that are held to resolve complaints. The basic principles are that such proceedings must be fairly conducted and public in nature (except that states may exclude the public or press from attending in certain circumstances, if that is "strictly necessary"). In General Comment No. 32, the UNHRC has provided extensive commentary on what rules generally apply to the resolution of complaints, which are very relevant to the standards for the resolution of electoral complaints.

As discussed previously, General Comment No. 32 contains principles and standards for the conduct of a "suit at law" under Article 14.1. The comment takes such suits to include any official proceedings for the determination of legal rights – i.e., in the nature of an "adjudication." It is sometimes difficult to interpret precisely how the UNHRC comments should be applied to electoral dispute resolution, but it is possible to sketch out a consistent application for them in this connection.

Resolution of complaints must first and foremost involve a "fair and public hearing by a competent, independent and impartial tribunal."[101] An election management body (EMB) could, it seems, serve in this capacity,[102] – assuming it is nominally independent, professional, or balanced in composition, capable of operating in a quasi-judicial manner, and is not involved in the dispute at issue. If an EMB is technically qualified to function in such a capacity, however, it

[101] UNCHR General Comment No. 32, Part III.

[102] See Id., paragraph 18: "The notion of a tribunal in [ICCPR] Article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature."

would have to satisfy the other requirements identified by the UNHRC – primarily the guarantee of a fair and public hearing.[103]

Often election bodies, in considering complaints and appeals, do not provide sufficient notice or conduct full public adjudicatory proceedings at which a party can present his/her case. If the relevant law or practice does not ensure that such bodies operate in a proper adjudicatory manner, then "this must be done at least at one stage of the proceedings by an [appropriate] tribunal. …"[104] Typically in the election area, this standard is met by providing for an appropriate channel of appeal. For most types of electoral appeals, at least one opportunity for judicial involvement is provided for.

The UNHRC indicates that ICCPR Article 14.1 does not require the availability of a judicial appeal in noncriminal cases.[105] But electoral legislation often makes judicial appeals available to those whose complaints have been rejected by electoral or other administrative bodies. Often the relevant procedures are determined through administrative law, applicable to appeals from administrative agencies, rather than general civil procedures – a practice that is recognized by the UNHRC.[106]

Often judicial proceedings in administrative cases (such as appeals from electoral bodies) are subject to more limited provisions for transparency than for regular civil appeals, as is reflected in the UNHRC's conclusion that, "The requirement of a public hearing does not necessarily apply to all appellate proceedings[,] which may take place on the basis of written presentations. …"[107] But to the extent that such proceedings are adjudicatory in nature – i.e., reaching conclusions on the application of the law to established facts, and not just addressing questions of law – they would nevertheless be subject to the fair hearing requirements laid out in the comment.

In any event, UNHRC insists that, "Even in cases in which the public is excluded from the trial, the judgement, including the essential findings, evidence and legal reasoning must be made public" (except in certain very limited circumstances). Note that in certain countries (e.g., Armenia and Macedonia)[108], any information relating to an administrative appeal is normally communicated only to the parties to the case.

Practices

As will be seen below, the overall approach to electoral appeals differs among jurisdictions, largely based on whether they adhere to the Common Law (and particularly Commonwealth) or Civil Law models:

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[103] Id., paragraphs 25 & 28.
[104] Id., paragraph 18.
[105] Id., paragraphs 12 & 46.
[106] Id., paragraph 16 (excerpt): "The concept [of a 'suit at law'] encompasses (a) judicial procedures aimed at determining rights and obligations … in the area of private law, as well as (b) equivalent notions in the area of administrative law."
[107] Id., paragraph 28.
[108] After the most recent Macedonian parliamentary elections, the Supreme Court – which no longer actually had direct administrative jurisdiction – nevertheless released copies of its decisions on electoral appeals. See OSCE/ODIHR Final Report, 2008.

- The Commonwealth approach, based on the U.K. model, limits challenges to the actual conduct of elections except as part of a postelection contest, which is typically submitted to a electoral tribunal – which is either a specially constituted court or a regular court sitting as a special tribunal;
- The Common Law approach more generally permits lawsuits to be initiated throughout the election process, especially in situations in which failure to resolve issues through litigation could result in damage to the electoral process as a whole rather than the result of a single election – such as with respect to voter registration, constituency delimitation, and candidate registration. (In traditionally oriented jurisdictions, the relevant form of action would be referred to as a "writ.")
- The Civil Law approach generally permits appeals to be filed with respect to any aspect of the electoral process as it unfolds, subject to strict time limits for submission and decision, which enable a resolution to be achieved without delaying later phases.

It might be said that the Civil Law approach most closely matches international recommendations with respect to the availability of an effective remedy at each stage of an election. The general Common Law approach can also yield similar benefits, except that the legal proceedings are often more protracted and sometimes cannot be completed without adversely affecting the administration of elections.

The Commonwealth approach permits orderly administration of elections, subject to a risk of invalidation of specific election races in the event a postelection contestation is successful. This risk is mitigated by the fact that elections in these jurisdictions are generally held on a majoritarian basis, so that elections are invalidated only in relatively small single-mandate districts (SMDs), in which a repeat election can be organized if necessary. (In the United Kingdom itself, the risk of invalidating an election is further reduced by the unusual practice of numbered ballots, so that wrongly cast votes can be eliminated by the court from the total, and new results determined.)

Whatever approach is taken, it is important to delineate clearly when judicial appeals may be filed, and concerning which aspects of an election. This is illustrated by the situation that developed in Liberia in the run-up to the historic, post-conflict national elections there in 2005,[109] which led to the election of a president, Senate, and House of Representatives to replace the institutions of the National Transitional Government of Liberia (NTGL) created through the Accra Comprehensive Peace Agreement (ACPA) that ended the civil war. How this complex common-law drama played out is described in the separate box, below:

Complaint Procedures and Judicial Review in Postconflict Liberia, 2005
The constitution of the Republic of Liberia gives parties or candidates the right to file a complaint "about the manner in which the elections have been conducted or … the results

[109] The information here on electoral appeals in Liberia was obtained by the author while serving as Elections Advisor to the U.S. Embassy, Monrovia, April – December 2005.

thereof" to the National Election Commission (NEC), within seven days of its announcement of the results.[110] The NEC is required to make a decision on such a complaint within 30 days, and thereafter, if the Supreme Court orders an election nullified, the NEC must conduct a new election.

These constitutional provisions are reflected in the New Elections Law (1986), Chapter 6, concerning "Contested Election." This chapter also implemented the timelines for complaints and appeals reflected in the constitution, and provides additional detail[111] that appears designed, in part, to make the postelection appeal a flexible and tailored – but also carefully limited – remedy against electoral errors or malfeasance.

Another significant element of the statutory provisions is that they required that, "During the process of an election, any irregularity observed, shall be noted and filed with" the NEC. Such filing must occur no later than five days after the date of the election, and the notice – or Bill of Exception – must also be filed with the Supreme Court and served on the winning candidate. Neither the constitution nor the election laws specify other avenues of appeal for election participants from the electoral process, except possibly with respect to voter registration.

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[110] The Liberian Constitution, Article 83 (c,) reads in part: "Any party or candidate who complains about the manner in which the elections were conducted or who challenges the results thereof shall have the right to file a complaint with the Elections Commission. Such complaint must be filed not later than seven days after the announcement of the results of the elections."

[111] Among these are the effect of a successful complaint or appeal to nullify an election, the winner of which has already been installed in office; the necessity of showing that certain actions affected the result of an election and were not harmless errors; nullification of an election due to bribery or undue influence by a candidate, and not based on election offenses by a person other than the candidate, without his/her knowledge or consent, or for an offense other than bribery or corruption; and the potential to pursue criminal remedies for offenses that are not sufficient to lead to nullification of an election. New Elections Law, Sec. 6.2.

[112] Id., Secs. 3.15 (objection by voter to continuance of a name on the roll) & 3.16 (objection by voter or other person to addition of a name on the roll).

[113] Id., Sec. 3.19: "No Registration Roll may be altered within the thirty (30) days period immediately prior to an election, including Election Day, except upon order of the Honourable Supreme Court of Liberia on the determination of a manifest error."

[114] Constitution, Art. 26: "Where any person or any association alleges that any of the rights granted under this Constitution or any legislation or directives are constitutionally contravened, that person or association may invoke the privilege and benefit of court direction, order or writ, including a judgment of unconstitutionality; and anyone injured by an act of the Government or any person acting under its authority, whether in property, contract, tort or otherwise, shall have the right to bring suit for appropriate redress. All such suits brought against the Government shall originate in a Claims Court; appeals from judgment of the Claims Court shall lie directly to the Supreme Court."

[115] Page & Bryant v. NEC, Petition for Writ of Mandamus, May 17, 2005.

[116] Electoral Reform Law, Sec. 1.3: "Elections for the office of Senator of the Republic of Liberia shall be based on a simple majoritarian system. The two candidates who obtain the highest and second highest numbers of valid votes cast in the county shall be elected. The senator with the highest number of valid votes cast shall be senator of the first category [9-year term], and the senator with the second highest number of valid votes cast shall be a senator of the second category [6-year term]. Each voter shall have one vote."

[117] For the language of the ACPA, see below (discussion of international mediation in election disputes). Illustrating the tension between the Court and the NEC as institutions of the transitional government, the opinion of the Court threatened to hold attorneys working at the NEC in contempt and initiate disciplinary proceedings against them for preparing to refer cases to international mediation rather than direct appeal to the Court.

Voters or other persons may object to the competent Magistrate of Elections concerning names appearing on the voter role, and the decision of the magistrate on such objections is to be reviewed by the NEC.[112] There was no explicit right of appeal to the Supreme Court, but the possibility of appeal on voter registration could be inferred from a provision under which the court is permitted to alter the roll under certain circumstances, even during the 30-day period prior to an election, during which such modifications would otherwise be prohibited.[113]

The specific mention in the constitution of postelection judicial appeal, and the absence of other explicit avenues of judicial appeal in election disputes, could be interpreted to mean that the postelection contestation was intended to be the primary or even exclusive method of challenging actions by election administration. Nevertheless, the constitution does not expressly rule out other types of judicial appeal, and contains a general provision concerning the availability of judicial redress for violations of rights resulting from government action.[114]

The result of this ambiguity was to create considerable concern about the role of the Supreme Court during the elections, and ultimately led to confusion and uncertainty before election day.

Earlier, during the voter registration period, the court took up a writ of mandamus (requesting that a governmental entity be compelled to take an action) filed by private plaintiffs seeking modification and lengthening of the voter registration process,[115] but their request was denied by the justice who was handling motions. Two appeals by rejected legislative candidates were decided on technical grounds. The most troublesome cases came later, and were not decided by the Supreme Court until just prior to the elections.

The most significant case was a challenge by an electoral coalition against the NEC's application of the Electoral Reform Law (2004) with respect to voting in Senate elections. In line with a provision of the law as commonly understood,[116] the instructions on the ballot papers being printed under NEC instructions indicated that each voter could cast only a single vote in senatorial elections. The court held, however, that each voter was entitled to a single vote for *each position* being elected, a conclusion that the legal department of the UN Mission in Liberia (UNMIL) found to be "without legal merit." In the remaining time before election day, UNMIL produced stickers containing new instructions for the ballot papers, but these could not be affixed in time and near-chaos occurred at the opening of the polls as workers attempted to attach the stickers while long queues formed outside.

The other case was an appeal by a prominent Liberian attorney, whose application for registration as an independent presidential candidate was rejected for technical reasons by the NEC. The chief issue in this case was that the applicant, who submitted his nomination petition shortly before the close of the period, and prior to the adoption by NEC of complaint regulations, had not been provided an opportunity to correct deficiencies in the materials (as provided for by the law). This decision did not threaten the elections, however, after the candidate was persuaded to step aside after international mediation.

The case about voting in the Senate elections, on the other hand, arose from a complaint to NEC submitted after its complaint regulations had come into effect. For unknown reasons, the NEC

did not conduct an appeal proceeding as provided in the regulations despite a request by the complainant; so the court had a procedural reason to rule against the NEC even though its opinion also agreed with the complainant on the substantive issues.

These developments also illustrate the importance of carefully drafted and scrupulously observed complaint regulations, especially in common-law jurisdictions. In the case of the NEC Complaint Regulations, had they been properly applied they could have:

- Imposed procedural requirements which would have enabled the NEC to be informed of objections on an ongoing basis and if necessary take remedial action, receive and at the appropriate point give formal consideration to complaints, and prior to any appeal to the court make a final administrative determination as provided for by the Liberian constitution;

- Defined and limited the types of electoral actions and decisions that could be the subject of complaints submitted during the electoral process, as opposed to being considered as part of a postelection contestation initiated after the determination of results; and

- Provided the NEC an opportunity, if necessary during the consideration of electoral complaints and appeals, to invoke mediation by the International Community with respect to conflicts among the powers of the institutions of the NTGL, including the Supreme Court, as envisioned in the ACPA.[117]

Right to Petition for Redress

In terms of the protection of human rights, the key element of the ability to appeal from a violation is that it should be *effective.* In the circumstances of an election, the power to appeal from actions (including inaction) of election administration or other authorities can only be effectively exercised if there is reasonable access to such proceedings for those with a direct interest in the matter, appeals can lead to appropriate and complete redress, and the proceedings on appeal can be brought to a conclusion in a timely way – ideally, if at all possible, within the electoral period.

The materials explicated in this report and quoted in the appendices approach the issues concerning effective appeals from a number of different overall perspectives, viz.:

- the *individuals or organizations* (such as citizens, voters, political parties, or other organizations nominating candidates for election, and other organizations such as national NGO observers) with right to appeal;
- the *various phases of election preparation and administration* (e.g., voter registration, establishment of election districts [constituencies], candidate registration, conduct of the voting and counting, consolidation [tabulation] of the count, and determination of the results) from which interested persons may appeal, and during what time period;
- the *other aspects* of the electoral process, including actions by other authorities and their ability and willingness to prevent or respond to abuses during the campaign period by election participants (including political parties, candidates, and their agents and

supporters), state or local administration officials or bodies, or other organizations (including the media);
- the *tribunals,* or appeal bodies – judicial and/or administrative – to which appeals can be directed, and their composition, impartiality, professionalism, and autonomy or independence;
- the *remedies* that are available upon appeal, and the extent to which they provide adequate redress for electoral irregularities or violations at each stage;
- the *time frame* for submission and resolution of appeals at each stage; and
- the *evidentiary and other procedural rules* applicable to appeals.

Viewing the exercise of the right to appeal in connection with an election process from these different overall perspectives makes it very difficult to formulate a set of standards applicable at each stage. So the analysis here will instead be presented in a quasi-narrative form, proceeding from one phase or component of the elections process to the next. Along the way, points will be made, examples given, and suggestions advanced relevant to how the appeals mechanism should be approached with respect to each component. The analysis will focus on the quality of the relevant electoral dispute mechanisms themselves, as well as on issues which, based on past experience, constitute the basis of complaints and appeals at various stages in the electoral process.

Before proceeding, however, it is necessary to address the issue of "standing" *(locus standii)*, the power to initiate an administrative or legal process, such as an electoral complaint/appeal. On this issue, many proposed complaint/appeal standards and guidelines do not make clear whether and to what extent voters and others (including other citizens and NGOs) – other than the political parties and candidates contesting an election – should be permitted to initiate or participate in electoral dispute resolution procedures.[118]

On the question of electoral complaints and appeals by voters, it is axiomatic that citizens should have the right to complain about their voter registration, or otherwise being denied their individual right to vote, and to pursue an appeal at the administrative level – as well, as a best practice, have the opportunity for at least a single judicial appeal. But to what extent should voters[119] or civil society also have the right to submit complaints and appeals about election developments that do not affect their personal franchise?

A variety of approaches have been proposed concerning this question, including permitting individual voters and/or groups of voters to have the ability to challenge any election activity or decision. Allowing voter-initiated appeals about matters not directly affecting voter franchise can be administratively burdensome, however, since it can lead to a large number of (sometimes frivolous or exaggerated) complaints and appeals at every stage. Even limiting voter appeals to those with sufficient public support could create the spectacle of large-scale signature petitions

[118] See generally CoE/Venice Commission, 2002, paragraph and note 3.3; NDI, 2008, "Complaint Mechanisms" section; OSCE/ODIHR, 2003, Part One, section 10; and OSCE/ODIHR, 2000, "Generic Guidelines." The relevant portions of these texts are reproduced in Appendix D, Guidelines.

[119] Most election systems that permit appeals to be initiated by private individuals or groups limit this right to voters, although it would be more consistent with the international human rights norms concerning participation in political affairs discussed in a previous section to accord such a right to citizens more generally.

being circulated during the electoral process, potentially undermining the legitimacy of an election even while it is underway.

For practical reasons, voters or their voluntary associations are not generally granted full rights to appeal against aspects of the electoral process that do not affect their suffrage directly – i.e., in line with general principles of legal standing, actions with respect to which they do not have an interest that is unique or differentiable from that of others.[120] An alternative approach to permitting broad voter appeals is to grant NGOs that are accredited as national observer organizations for elections full appeal rights, similar to those of election contestants,[121] but this approach is also not generally taken since it may result in a proliferation of complaints, some of which may reflect particular civil or political agendas.

Aspects of the Pre-election and Electoral Period

Political and Human Rights Environment

As the earlier discussion of international human rights law shows, electoral rights are built upon a foundation of other fundamental civil and political rights, including the basic rights to free opinion, expression, association and peaceful assembly, and participation in governance. Electoral rights cannot be fully exercised unless those other rights are also recognized and protected.

In many countries, overall limits on basic civil and political rights do not permit a fully free and fair electoral process to occur. In such countries, the constitution and/or election laws on their face often guarantee full rights to conduct a pre-election campaign freely, but freedom of expression, association, and assembly are seriously restricted by laws and regulations in the non-electoral period, particularly outside the limited period of the actual pre-election campaign.[122]

While it is welcome that even some authoritarian countries open up the political space to a degree during elections, the limitations on political rights at other times severely disadvantage

[120] This principle is especially important in common-law jurisdictions, in which the decisions in law cases have explicit precedential value. It is applied to ensure that the parties bringing a matter to the court for adjudication have an adequate interest in it to ensure that they pursue it carefully and bring the best arguments forward. But the principle in fact applies more broadly in public law litigation, including in civil law proceedings.

[121] This practice is followed in the Republic of Georgia, where the NGOs filed over a thousand separate postelection complaints and appeals during each of the two elections (extraordinary presidential and early parliamentary) in 2008; most sought annulment of the results of the election at polling stations where national observers were located and had reported irregularities. See Finn, 2009.

[122] E.g., the Cambodian Constitution (Articles 35 & 42) protects the rights of speech and association, and the Cambodian Law on Election of Members of the National Assembly (LEMNA) permits free speech and assembly during a 30-day period prior to a parliamentary election, subject to certain limitations (Articles 71-72). But regulations of the National Election Committee (NEC) expand the scope of the limitations and define campaigning very broadly so that other political activities prior to the campaign period are not explicitly permitted (NEC Regulations, Chapter 7). In other countries – e.g., in the CIS region, such as Armenia – the authorities implicitly lift generally [is this word supposed to be “general” instead of “generally”? because this section of the sentence doesn’t seem to make sense as is] restrictions to a certain degree during the electoral period in order to create a somewhat freer political environment, but leave unclear whether certain political activities can be conducted outside the brief official campaign period. See OSCE/ODIHR, Final Report, Armenian Parliamentary Elections 2007, p. 10.

the public, as well as nongoverning political parties, in terms of their ability to participate in a fair election. In addition, the recognition that the relative freedom during an electoral period is extraordinary may cause voters, opposition parties, and civil society to moderate their behavior – not exercising their full political freedoms – so as not to incur the wrath of the authorities after the election is over.

The right to effective redress for violations of human (including civil and political) rights is well-established in global and regional legal instruments. But in fact in many countries there is an overall lack of effective complaint and appeal mechanisms for violations by the authorities. Some of the factors behind this gap are insufficient respect for the rule of law, corruption, and the absence of strong, impartial, and independent judicial institutions. If effective remedies for violations of general civil and political rights are not available, then the credibility of the dispute resolution process during elections will also be affected. In this situation, the political opposition, civil society, and voters will not be motivated to make use of existing appeal mechanisms.

International attention has focused recently on the important role of "human rights defenders," who pursue implementation and enforcement of human rights by national or subnational authorities by engaging in individual, organizational, and other advocacy activities, including recourse to administrative tribunals or the courts. Such activities were the subject of a U.N. General Assembly Resolution declaring the right and responsibility of individuals to engage in such activities, and calling for their role to be recognized and protected by government.[123]

It could also be said that providing effective redress against human rights violations is part of the concept of the "responsibility to protect" (R2P) human rights, which has been promoted in international NGO circles and reflected in actions by United Nations bodies. Up to now, however, the direct application of this concept has mainly been limited to massive violations of human rights, such as war crimes, crimes against humanity, or genocide.[124]

[123] U.N. General Assembly, 1999.

[124] See, e.g., United Nations, World Summit Outcome Document (September 2005):

> 138. Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.
>
> 139. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. * * * * * [delete asterisks?]

Legislative Framework for Elections

In General

The scaffolding of laws and sub-laws under which an election will be carried out must be as complete as possible, and the key elements should be set forth in higher-order legal instruments, including the constitution and organic legislation.[125] Election laws should also be in place a considerable period of time prior to the announcement and conduct of the election. It is often said that election laws must not be amended during the year prior to an anticipated election,[126] although in cases in which significant defects are discovered in the legislative framework during that period, it could be permissible to correct them assuming that the consent of the major political formations and public support can be obtained.

Electoral Appeal Mechanisms

RELATION TO OTHER PROCEDURES

Although election laws often contain specific complaint-and-appeal provisions, including with respect to appeals to the courts, civil and administrative law and procedure codes are also usually applicable to such appeals. Unfortunately, not infrequently the procedures specified in the latter codes and other basic instruments (including the statutes and related rules of the courts themselves) are inconsistent with those in the election laws – in which case judges may tend to follow the general rules.

Actual or potential conflicts between electoral dispute resolution procedures and those applicable under general law, while a very technical subject, are extremely important to address since failure to address such conflicts legislatively can lead to an infringement on the right of appeal. Inconsistent provisions can lead appellants astray in directing their appeals to the correct tribunal, create multiple and overlapping channels of appeal, and/or lead to other jurisdictional or other procedural surprises that cause appeals to be rejected for technical reasons.[127] Thus, failure to address inconsistencies among legal codes can prevent election participants from obtaining effective relief from irregular actions by election administration.

Conflicts of Law and Procedure in FYR Macedonia, 2008
An egregious situation arose during the 2008 Macedonian parliamentary elections, which were held early due to political factors. A judicial transition was underway under new judicial and procedural codes that shifted jurisdiction of election cases to a new Administrative Court, which

[125] See, e.g., CoE/VC, 2002, Guideline II.2.b.

[126] See, e.g., Id. Some constitutions contain a similar principle, such as the Constitution of Afghanistan (2004), which prevents amendments to election law in the last year of the legislative session (Article 109). A Croatian Constitutional Law on Implementing the Constitution, 2001 (Article 4) also prevents electoral legislation from being enacted during the year prior to an election; but during parliamentary elections in 2007, a challenge to the elections based on an apparent violation of this provision was found by the Constitutional Court not to constitute an "election dispute" but could be considered later as a regular constitutional appeal. See OSCE/ODIHR Limited Election Observation Mission Report, 2007, p. 5.

[127] On the latter point, see discussion of the Georgian 2008 extraordinary presidential election below, under Election Organization, Voter Education and Training of Election Officials. See also D. Finn, 2009.

was still in process of consolidation, and away from the Supreme Court, but no action was taken by Parliament to address the situation before it dissolved. In the event, the Supreme Court asserted continued jurisdiction, but then took a very limited approach that prevented election participants from contesting key elements of the election process, such as registration of the candidate lists of political parties.

Specifically, the court limited its consideration to appeals that were specifically described in the electoral code, and rejected other cases suitable for a wider, "administrative"-type review of the actions of election administration (which would be available in an action before the new Administrative Court, and had been available previously through administrative proceedings in the Supreme Court). In the event, the Supreme Court denied an appeal by the main opposition party against registration by the Central Election Commission of candidates of a bogus party – which masqueraded as the main opposition party in an attempt to confuse voters and lessen the votes received by the opposition – on the grounds that the Election Code only explicitly mentioned appeals from denial, not approval, of candidate list registration.[128]

OTHER TECHNICAL AND DOCTRINAL ISSUES

Mention should also be made of a variety of other technical and doctrinal issues that create undue obstacles to successful appeals and thereby infringe on the rights of appellants. Sometimes these factors are applied in such a convoluted and even inconsistent way that it creates the impression that judges are unwilling to discharge their responsibilities to resolve electoral appeals under the law or are influenced by personal interests or political factors. In other cases, it is the specified procedure itself that places limitations on the ability to obtain justice on appeal.

OVERLAPPING/CONFLICTING CHANNELS

In some countries, the electoral and other laws create overlapping or potentially conflicting channels of appeal. Suggested best practice in this area emphasizes a unitary appeal channel that avoids any overlaps and conflicts,[129] but there is no absolute reason not to make a second channel available provided that it does not conflict with the first. (For example, appellants could proceed either to an electoral body or to court, but having exercised their choice would not have the opportunity to launch a parallel appeal in the other channel.)[130] Still, appellants would have the ability to go "forum shopping," and appeals directed to different channels could result in inconsistent results.

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[128] See OSCE/ODIHR, Final Report, 2008 FYROM Early Parliamentary Elections, p. 15.

[129] See CoE/VC, 2002, Guideline 3.3.c.

[130] In Georgia during the 2008 presidential election, the relevant election code provision at the time (Article 77) appeared to create a dual channel of appeal, to the next-higher election commission or to the primary courts. For a variety of reasons – including relative formality of procedures, costs, and trust and confidence in the decision-makers – most appellants preferred to direct their appeals to the election commission. Unfortunately, many appeals were later rejected for technical reasons under a doctrine created by Supreme Court judges that required submitters of most postelection appeals from the results adopted by polling committees to go only to court, not the CEC, after a first appeal to the next-higher (district) election commission. See Finn, 2009, and separate discussion below.

RESTRICTIVE PROCEDURES

In many jurisdictions, electoral appeals are considered in an "administrative" channel created through administrative law and procedure codes. This is advantageous in some respects – e.g., by expediting procedures and determining the scope and type of review of administrative action. But sometimes administrative cases are considered by the courts under special procedural rules that do not adequately preserve the rights of appellants in electoral cases, as reflected in international commitments and standards. In Armenia and Macedonia, for example, administrative cases are often decided based on submitted papers and materials; hearings (if any) are held in camera*;* and decisions and judgments are normally not published (but only communicated directly to the parties to litigation).[131]

JURISDICTIONAL DOCTRINES

In some countries, the doctrines that determine jurisdiction over electoral appeals are unnecessarily confusing and even obscure. In Croatia, for example, under the Constitution, the Constitutional Court exercises general "supervision" of elections as well as jurisdiction over election cases.

Jurisdiction over Election Appeals in Croatia
Under the Croatian Constitutional Law on the Constitutional Court and the court's own Rules of Procedure, election cases are divided into requests for supervision and "disputes," and submissions to the court could also be treated as petitions for regular constitutional review (which are not subject to the special procedures for expedited consideration of electoral cases). Analysis of the limited number of cases decided by the court during the 2007 parliamentary elections shows that several cases were rejected as wrongly submitted, and one case (regarding the validity of recently enacted election legislation) was treated as a regular constitutional matter. In another case, the judges themselves were almost evenly divided on whether the appeal was a dispute or request for supervisory action, and their plenary session on the matter ended in disarray.[132]

Voter Registration

In General

In most countries, voter registration (VR) is a continuous process, but there are normally special opportunities to inspect and seek correction of the voter list (VL) during the period immediately preceding elections. The ongoing compilation and review of voter records has been greatly facilitated in recent years by the use of electronic data processing and access to the Internet.[133]

[131] See OSCE/ODIHR, EOM Report, Macedonian Parliamentary, 2008, p. 22.
[132] OSCE/ODIHR, LEOM Report, Croatian Parliamentary Elections, 2008, pp. 18-20; see further discussion of Croatian experience with campaign supervision bodies, below.
[133] See generally CoE/VC & OSCE/ODIHR, "Joint Opinion on the Draft Law on Voters Lists of Croatia," 2007.

During the period between elections, inspection and requests for correction of voter registration data in response to request is usually limited to submissions by voters about their own registration or those of certain other persons (see below). Normally, voters may inquire directly with the registering authority and appeal an adverse determination within that authority or to a permanent election administration body. Typically, a single judicial appeal can be brought to the relevant court of first instance.

Practice varies concerning whether other individuals or organizations may access VR information during the period between elections. This is due to concerns about misuse of this personal information for commercial, political, or other purposes, contrary to emerging data-protection standards. If a voter is concerned about the release of his/her voter information, then that person should have the right to appeal to the authorities against its release, as well as to seek a protection order from the court.[134]

If third parties are entitled to inspect the VL during the period between elections, the information made available should be a subset of the detailed voter registration information contained in the complete VL. Fuller access by third parties should generally only be permitted if there is a legitimate election-related purpose, such as for purely statistical analysis by bona fide researchers.

Voter List Inspection/Correction

After an election is announced, a special opportunity is customarily afforded for voters to inspect and request correction of the VL during a relatively short period of time before the election. Again, practice varies, but voters at least are permitted to inspect their own registration at this time; sometimes voters are also permitted to inspect the registration of family members or other individuals living at the same address or another residential location owned by the voter in question. Occasionally, other persons or organizations are permitted to inspect the VL at this stage as well.

Complaints by voters about their own registration or the registration of certain others (see previous paragraph) are customarily handled in a similar way as during the pre-election period, during which time the ongoing review of VR is occurring. Typically, voters may complain to the registering authority, and/or, in view of the short time available, directly to the election administration body, which sometimes exercises direct authority at this stage. Once again, there is usually a right to a single judicial appeal to a first-instance court.[135]

After political parties or other nominating organizations (herein collectively "political parties," or "parties") have been registered for an election, the question arises whether they should have the right to inspect the entire VL for the constituencies that they are contesting, and to receive a copy of the relevant VL database. The parties, of course, have a legitimate interest in ascertaining the accuracy of the VL, but there is a potential for abuse in that the parties can use VR information to contact voters and potentially influence them in an inappropriate manner. While some countries prohibit the parties from using a copy of the VL to keep track of whether

[134] The practices described in this sentence and the first sentence of the next paragraph are followed in the United Kingdom, for example.

[135] See, e.g., CoE/VC & OSCE/ODIHR, "Joint Opinion on the Draft Law on Voters Lists of Croatia," op. cit.; see also OSCE/ODIHR, EOM Final Report, Croatia Parliamentary Elections 2008, pp. 9-11.

voters have cast a ballot, elsewhere parties could use this information to "urge" voters who have not yet done so to go to the polls. Or the parties could attempt to induce such voters to request absentee, mobile, or proxy balloting, all of which create additional security problems.

During the election period, parties typically have an ability to complain to electoral administration at the appropriate level concerning the overall quality of, and specific errors in, the VL. If election administration is unresponsive, the parties can usually challenge its decision in court. Depending on the extent of the alleged defects, sometimes a further appeal is also permitted.

Election Administration

Most countries with regular elections have permanent electoral authorities, at least at the central level, although often their activities are greatly reduced between elections. Meanwhile, however, government programs related to elections, particularly voter registration, must operate continuously. It is axiomatic that electoral bodies must be autonomous, and carry out their activities in an objective and professional manner.[136]

The composition of electoral bodies is mainly of two types, or a combination thereof: The "neutral, professional" approach emphasizes these positive qualities, sometimes relying on appointments of regular government (or judicial) officials. The "balanced, multipartisan" approach seeks political inclusiveness while recognizing that appointees to electoral bodies should conduct themselves in an impartial and professional way.[137]

In recent years, increasing attention has been given to the appointment of the leading officials – president, vice president, and secretary – of electoral bodies at all levels, including polling committees. Called the troika in many Eurasian countries, these officials, by virtue of their positions, have key roles with respect to the agenda, decision making, and record keeping of electoral bodies. It has been noted in recent elections in the Caucasus that the ruling party generally has a disproportionate or nearly exclusive share of these positions vis-à-vis other parties.[138] (On the other hand, ruling parties in this region often argue that retaining control of these positions is necessary to avoid disruption in the event the opposition withdraws its cooperation or even boycotts electoral activities.) While the ruling party's domination of the troikas detracts from the image of the electoral bodies as nonpartisan, it may be mentioned that sometimes the influence of the government and ruling party is so pervasive that opposition designees on these bodies actually support the election of such troikas.

Similar issues arise when electoral bodies have a mixed composition. Many official appointees of all kinds (electoral body officials or other government officials) reliably support the interests of the governing party on issues before electoral bodies.[139] There is often also a perceived difference in status between the professional and partisan component of electoral bodies,

[136] See generally CoE/VC 2002, Guideline 3.1; OSCE/ODIHR 2003, Part One, Paragraph 4.2.
[137] See generally OSCE/ODIHR, id., Paragraph 4.2.
[138] See, e.g., OSCE/ODIHR EOM Final Report, Armenia Parliamentary Elections 2007, p. 6.
[139] In Georgia, for example, the electoral commissions for the separate 2008 presidential and parliamentary elections had working majorities of 7-6 in favor of the ruling party. (The commissions were composed of six professional members and seven members from the groups in parliament, one of which was the ruling party and the others opposition parties or independents.) See Finn, 2009.

especially when the latter only serve temporarily, during elections.[140] Oftentimes the political appointees to electoral bodies, especially those from the opposition side, complain that they are not fully included in the bodies' work, even when they are supposed to have full voting rights.[141]

Electoral Boundary Delimitation

Districts/Constituencies

Election districts for elections of representatives to legislative bodies are most often delineated through legislation, although election administration often has responsibility to further demarcate constituency boundaries. An appeal against the latter action would be an electoral appeal, subject to the special rules with regard to such appeals. Typically, appeals would have to be considered and resolved during a short time period, permitting the election to go forward on schedule. On the other hand, an appeal against delineation of constituencies by law would generally not be an electoral appeal and would be considered in the usual manner (through general or constitutional litigation), not subject to the time limits for electoral appeals.[142]

The design of election districts is of great interest to political parties, since that can alter their political composition and affect the election results that the parties can obtain in the various districts. The relative size (by population, or number of voters) of constituencies is also of direct interest to voters, since they are entitled to equality of voting power. International best practice suggests that the relative number of voters (or inhabitants) in constituencies in legislative elections should not deviate more than a relatively broad 10 percent from the "norm" (average), except that a 15 percent deviation would be acceptable in "special circumstances."[143] Once again, both sorts of appeals would be treated strictly as electoral appeals only to the extent that election administration plays a role in delineating constituencies.

Voting Districts/Precincts

The delineation of precincts, in each one of which a polling station will be located, is often carried out by other government authorities, but sometimes by election administration itself. Often there are statutory criteria – such as maximum and minimum number of voters, total size of the area, and geographical and logistical factors– regarding their design. Both political parties and voters have an interest in the design of voting districts and the specific locations of polling stations. The parties would like to have reasonable access to the polls for their voters, and voters

[140] This pattern is observed in many Balkan countries, in which election commissions are expanded during elections to include a political component.

[141] E.g., in Georgia 2008; see Finn, id.

[142] See, e.g., The Croatian Constitutional Court case referred to previously, in which the Court decided that an action challenging recently enacted election-related legislation (including adoption of a new Law on Voter Lists) was a regular constitutional case, not subject to expedited consideration as an election case. (Curiously, the plaintiff, Dobroslav Paraga, the leader of a nonparliamentary nationalist party, was also the plaintiff in an ECHR case that found that his electoral rights had been violated due to a protracted period during which criminal charges were against him, preventing his candidacy in the previous parliamentary election.)

[143] CoE/VC, 2004, Guideline I.2.2.iv. The "special circumstances" mentioned would include "protection of a concentrated minority" or existence of a "sparsely populated administrative entity." It has been argued that, when special circumstances are being relied upon to permit a wider-than-normal range of constituency sizes, the circumstances in question should be explicitly described and explained. See OSCE/ODIHR, EOM Final Report, Armenia Parliamentary Elections 2007, p. 28.

also desire facility of access to polling stations. To the extent precincts and polling station locations are determined or approved by election administration, that decision should be appealable to court, if necessary after a first appeal to a higher-level election body.[144]

Parties, Candidates, and Campaigns

Parties and Candidacies

To protect "passive" election rights (viz., the right to be elected), the candidate registration process should be designed (under law) and implemented (by election administration) in an open and inclusive manner. For qualified parties and candidates, the only restrictions or differentiations that can be applied among candidacies are with respect to purely administrative matters or reasonable privileges for political parties that are registered or represented in elective office (such as waiver of signature petitions or financial surety). The following paragraphs, drawn from an OSCE/ODIHR publication based on electoral commitments, standards, practices, and case law in the OSCE area, summarize the key points:[145]

> States must permit candidates to seek elective office, either independently or as representatives of political parties or other organizations, without unnecessary obstacles. Candidacies may be subject only to reasonable and equally applied registration procedures, such as a requirement to provide personal identification information, a personal statement or party endorsement, or evidence of a minimum level of public support.
>
> No additional qualification requirements, beyond those applicable to voters, may be imposed on candidates except, for certain offices, concerning age and duration of citizenship and/or residence. Some categories of public employment may be made incompatible with candidacy, if justified by the nature of the position or the potential for conflict of interest,
>
> Denial of candidacy on the grounds that the programme of a candidate or party violates the constitution or that candidacy poses an unreasonable risk of violence must be based on a justified determination, subject to judicial review, that: (a) the programme of the candidate or party is based on ethnic hatred, political violence, or war propaganda or is otherwise inconsistent with fundamental democratic values; or (b) its conduct demonstrates that it is not prepared to respect the law or to confine itself to peaceful means in order to achieve its objectives. Actions against candidacies on such grounds must be proportionate and not undertaken for political reasons.

[144] During the Croatian parliamentary elections in 2007, all the opposition political parties contesting the elections in one constituency challenged the locations of polling stations in part of that constituency, which they claimed unfairly rendered access to the polls more difficult for their supporters; but the judicial challenge was not accepted, as the court found that there was no evidence to support the claim, and the same locations had been used previously. Challenging the number and location of polling stations, including those established in neighboring countries to serve voters residing there, was made more difficult by the absence of definite statutory standards and procedures for their establishment. See OSCE/ODIHR, EOM Final Report, Croatia Parliamentary Elections 2007, pp. 5-6 & 19.

[145] OSCE/ODIHR, 2003, Part One (footnotes omitted), Paragraphs 6.2-6.5.

> No discriminatory actions may be carried out against certain candidacies, and no special advantages of an organizational or financial nature may be granted to other candidates or political parties, except with respect to the submission of signature petitions or financial surety. Any such advantages should be equally available and should reflect the parties' base of support or electoral record.

Violation of these or similar principles by election administration should be appealable administratively (within election administration) and/or judicially, ideally with right to a second judicial appeal. Not only should a political party or candidate have the right to appeal denial of candidate registration, but other parties and candidates should have the ability to appeal granting of registration in cases in which there are well-founded concerns that the procedural or substantive requirements for candidacy have not been met.[146]

The Campaign

CAMPAIGN DISPUTE RESOLUTION

Role of the Courts

One of the most difficult areas in which to obtain an effective remedy for an alleged violation of electoral laws and rules is that of behavior that occurs during the pre-election campaign. For reasons similar to those discussed with regard to media conduct (below), it is very hard for electoral authorities to assess the legality and significance of alleged campaign violations, and it is also challenging for them to devise and impose appropriate sanctions. Few campaign violations by a political candidate or party rise to the level where de-registration of candidacy could be justified, at least during the electoral period, and imposing other sanctions after the fact is unlikely to be effective either as a preventative or punishment during the election itself.

It is common for election laws to assign responsibility for enforcing election rules during the campaign to the courts.[147] Not only may the drafters of election laws be unsure of the full range of conduct that may be at issue during the campaign, but also distinctions among violations based on the nature of the violation and the status of the violator (state body or official, local government or employee, opposing political candidate or party, agents or supporters of opposing candidates or parties) may vary widely. Thus it may appear that such matters should be left to case by case determination, making them suitable for judicial consideration.

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[146] See the previous footnote discussing rejection of a judicial appeal by a party against the registration of the candidates of another party in Macedonian parliamentary elections. In Cambodia prior to the April 1, 2007, local council elections, the oppositional Sam Rainsy party appealed to NEC regarding registration of the ruling Cambodian People's Party candidate list in one locality, alleging that the application had not been submitted in a timely manner. The CPP was highly concerned to register candidates in this locality, in order to claim that they had registered candidates for all the local elections. The NEC rejected their appeal, however, claiming that the evidence submitted was conflicting and did not preclude the possibility that sufficient material had been submitted on time. The head of the NEC legal department informed the author that, since NEC regulations required the filing of an application "form," it would have been enough for the CPP representatives to have submitted a blank form on time.

[147] E.g., in Macedonia and Romania. For more information on recent Macedonian experiences, see next paragraph and footnote.

Even when responsibility for enforcement of campaign or related rules is explicitly assigned to the courts through electoral legislation, that often does not clearly address important elements needed to guide the courts in exercising their jurisdiction. For example, the nature of the legal action (e.g., administrative, civil, or criminal) is often not made clear, nor are the types of potential defendants (see previous paragraph) and/or available sanctions. In addition, the time limits applicable to electoral cases – which are often highly expedited – may conflict with the normal time periods under general procedural codes, and the judges are generally inclined to adhere to the latter, with which they are more familiar.

Role of the Courts in Addressing Campaign Violations Macedonia, 2008
In Macedonia during early parliamentary elections in 2008, for example, international observers reported that the means of legal recourse for campaign violations were limited and not fully described in law. The only relevant provision of the Election Code enabling candidates whose rights are infringed – "by violating and disturbing the opponents' campaign" – allowed them to seek redress in the relevant primary court (with right of appeal to the Court of Appeals).[148] The form of action that could be brought under this provision was undefined, as were the classes of potential defendants (including rival candidates or campaign organizers, private persons, and perhaps municipal or state officials). While the words "preventing and disturbing the … campaign" are the same as the description in the code of a misdemeanor,[149] the basic article does not indicate whether the form of action would be civil or criminal in nature, and most courts would not accept a misdemeanor action except if brought by an official body.[150] As a result, similar to previous elections, no such cases were brought to the district courts, and the courts gave different and conflicting explanations about how (if at all) they would approach any such cases.

Campaign Supervision Bodies

In some countries, supervision of campaigning is assigned to special bodies, constituted of a professional and/or politically balanced membership. (Sometimes such bodies are established pursuant to electoral codes of conduct subscribed to by the contestants in elections.) For the most part, these entities do not have direct enforcement authority, but provide a venue for consultations and/or give advice on whether campaign violations have occurred, their significance, and possibly also available remedies. Often, their procedures are relatively informal (sometimes even lacking public notice and agenda for proceedings), and full due-process protections (including the rights of persons with an interest in the matter to be notified in a

[148] Macedonian Election Code (2006), Article 73.
[149] Id., Article 181.
[150] OSCE/ODIHR, EOM Final Report, 2007. The EOM also reported that, as in the past, several Primary and Appeals Courts which were contacted took entirely different approaches toward their role in the complaints and appeals process. Some denied that they had any jurisdiction at all over election cases; others indicated that misdemeanor proceedings could be brought (resulting in fines and possibly even compensation for victims); while still others said they were open to considering civil actions seeking declaration that campaign rights had been violated. Perhaps as a result, no lawsuits at all were brought based on alleged campaign violations.

timely manner, to be joined or to intervene in the proceeding, to present evidence and make legal arguments, and to present evidence and cross-examine witnesses) may not be available.

The unclear role and status of special campaign supervision bodies sometimes cause difficulty with respect to judicial appeals, which are not usually authorized per se. This is because the rulings issued by these entities, while merely advisory in form, may lead other state bodies or private institutions and organizations involved in the electoral process to change their stance toward the issues in question – potentially having an impact on the election contest. In addition, the rules on judicial appeals may not provide an explicit channel of appeal concerning such actions.

Campaign Supervision: The Croatian Ethics Commission

In Croatia, an entity called the Ethics Commission is formed during parliamentary elections to act upon requests for advisory opinions concerning campaign matters from election contestants and others. The commission is of a mixed nature, with a professional core membership and also representatives of political parties.

During the last parliamentary elections, in 2007, the commission played a much greater role than previously, receiving a considerable number of submissions. While it was welcome that the parties and others were bringing their (mainly media-related) concerns to this body for resolution, the greater volume of cases revealed weaknesses in its rules of procedure.[151] While decisions of the commission are supposedly only morally enforceable, they did affect the rights and interests of election participants and others, but the procedure on appeal was unclear.

A jurisdictional issue arose in a case in which a political party, whose proposed advertisement was not accepted for broadcast by the state broadcaster and a private TV channel, brought the matter to the Ethics Commission, which did not find the actions of the media unethical. Upon appeal to the Constitutional Court, the judges were reportedly deeply divided on the question of whether the court should merely review the action of the Ethics Commission, or exercise full jurisdiction ("supervision") itself. By limiting its consideration to a review of the action of the Ethics Commission, the court's decision implied that the commission had more than purely advisory power.[152]

COMMON CAMPAIGN VIOLATIONS

There are a number of types of campaign violations that occur frequently around the world. While common, they are not always easy to identify or control through legal or administrative means. These include "vote buying," abuse of official position, and misuse of state resources.

[151] See, OSCE/ODIHR EOM Final Report, Croatia Parliamentary Elections, 2007, pp. 19-20 & 25.
[152] See id.

"Vote Buying"

Special mention must be made of a very common type of campaign violation, "vote buying," which in many countries has proved very difficult to prevent or penalize. The elements of this violation include:

- Promising, offering, or giving;
- Money, goods, services, and/or other inducements (such as promises of employment or special favors or treatment);
- To voters and/or others, including voters' families or communities;
- In the run-up to an election, after an election has been announced or during the campaign;
- By a political party, candidate, or others (agents) operating on their behalf;
- In a way which is intended, or reasonably could be expected, to influence how voters cast their vote, or would be likely to do so.

Vote buying, broadly defined, is quite common. It is distinct from negative inducements (e.g., pressure or threats) by authorities or political factions to prevent voters from supporting political opponents, which are also relatively common. For example, while positive vote buying has been observed in Georgia in the past, during the most recent parliamentary elections in 2008, most reported inducements by officials or others were of a negative nature.[153]

In less-developed economies, especially largely rural ones (such as Romania in the recent past), the power to influence voters through negative inducements is strong since voters needed to obtain approvals from local authorities for all sorts of essential activities, including fuel wood collection. But the elements of the violation of using negative influence on voters are more similar to other campaign malpractices (such as abuse of position) than to vote buying.

In recent years, vote buying proper has regularly become an issue in a number of regions, including in Southeast Asia (primarily Cambodia and Thailand) and Eurasia (including Armenia and Georgia). The latest Cambodian local elections, similar to previous parliamentary and local elections,[154] were reportedly characterized by widespread vote buying. The recent political turmoil in Thailand wound down only after a decision of the high court to dissolve the governing People Power Party (successor to Thaksin Shinawatra's Thai Rak Thai party, also disbanded for electoral fraud and corruption) and its coalition partners for buying votes in the last election.[155]

Vote Buying in Armenia, 2007
Experience in Armenia shows the difficulty of enforcing anti-vote-buying provisions. At the time of the spring 2007 parliamentary elections, Armenia had a very clear and progressive provision in the Electoral Code, which was unusual in that the elements of the offense of vote buying did not require intent to influence voters in how they cast their vote. The provision, which was

[153] In one celebrated case, a local official was filmed threatening local administration employees with loss of their jobs if there was not recorded a strong vote in favor of his candidacy. President Mikhail Saakashvili subsequently made a statement warning against such practices, and the local official withdrew his candidacy. See OSCE/ODIHR EOM Report, Georgia Parliamentary Elections, 2008, pp. 12-13.

[154] See EUEOM Report, 2003.

[155] See BBC, "Top Thai court ousts PM Somchai" (Dec. 2, 2008).

effective only during the election campaign, covered any promise or provision of goods or services to voters (later amended to apply more generally to citizens)[156].

Even then, however, the provision was not applied effectively by election administration or the courts, since many of the reported incidents involved gifts to "communities," not voters, and often were made prior to the election campaign or by persons who were not clearly agents of candidates or political parties. In addition, a large number of reported instances (including during the campaign, and even on election day or the day before, when campaigning was prohibited) could not be verified.

Also, electoral and other authorities continued to maintain that some element of intentionality would have to be shown for such actions to constitute vote "bribery," as the practice is called there. And finally, the authorities maintained that acts of such "bribery" would have to be shown to be effective in influencing the vote (which, of course, could not be demonstrated, due to the secrecy of balloting).[157]

Abuse of Official Position

Many electoral laws contain provisions against abuse of their position by officeholders during an election period. The concept of abuse of official position refers to the use of office and related powers and privileges to advance the electoral interests of a particular candidate or party (typically, the officeholder or his/her party), or to disadvantage opposing parties or candidates. Typically, such abuses of office involve:

- Mixing official business and electoral campaigning, including campaigning during officially funded trips or using official facilities for campaign purposes;
- Misusing other advantages of incumbency, such as official transportation and resources, for political purposes. This category overlaps with the concept of misuse of administrative resources, discussed separately below, but is of a more general nature;
- Channeling state funds to projects and programs in electoral districts before or during the election campaign, in an attempt to influence voters there;
- Engaging in campaign-style travel within the area in which an election is being conducted, showing a higher-than-usual level of "official" interest and/or commencing or commissioning new public facilities to serve voters there; and/or
- Conducting official business, including granting or denying approvals or requests, in an unbalanced and politically biased manner.

The nature of the violation of abusing political position makes it difficult to prove. Officeholders, particularly senior officials, have many powers, privileges, and resources, and considerable discretion in terms of how they apply them. Senior officials are often required by law or regulation to travel only with official transportation and security, and their high profile often brings considerable public attention, including from the media. Such officials do little to prevent

[156] In neighboring Georgia, the relevant provision applied to "citizens," but gifts to communities nonetheless continued. See OSCE/ODIHR Final Reports, Georgian Special Presidential and Parliamentary Elections, 2008.
[157] See OSCE/ODIHR, EOM Final Report, Armenia Parliamentary Elections 2008, p. 12.

confusion of their public and political roles by the press and voters. Nevertheless the concept is important to preserve, and to reflect in law, since it is at the center of the problem of campaign abuse by officials at all levels.

Abuse of Official Position Armenia Parliamentary Elections, 2007
The Armenian Electoral Code prohibited certain forms of campaigning,[158] including various activities by state officials and civil servants,[159] or utilizing state resources. Among the prohibited activities by officials were: campaigning in the course of performing official duties, or abuse of official position to gain electoral advantage; using state premises or other resources on any basis other than those generally available to candidacies, except security protection provided under law for high-level officials; and/or special media coverage except for official and certain other activities.[160] The interaction of these prohibitions made them difficult to apply in cases in which senior officials combine official and campaign activities while receiving state protection and other support. It was also difficult to prevent the press from failing to distinguish between campaigning and official functions. This was particularly true during combined official and campaign trips around the country by the prime minister (now president).[161]

Abuse of Official Position Georgia Parliamentary Elections, 2008
Under an amendment to the Unified Electoral Code (UEC), public officials were prevented from organizing their subordinates to participate in the campaign, gathering signatures or conducting campaign agitation during official trips, and campaigning during the conduct of their official duties.[162] Officials in "political" positions, however, could engage in the latter activity (and activities involving complimentary media programming) regardless.[163]

Misuse of Administrative Resources

While the violation of "abuse of office" is difficult to apply, misuse of administrative resources by state and local officials is equally hard to control through law and regulations. The general elements of this violation could be viewed to involve:

- Use of official funds, facilities, equipment, services, or supplies;
- By those who have official access to them;

[158] Armenian Electoral Code (2007), Sections 4, 7 & 8.
[159] Hereinafter collectively referred to as "officials."
[160] *Id.,* Article 22^1 (see previous footnote).
[161] OSCE/ODIHR, EOM Final Report, Armenia Parliamentary Elections, 2007.
[162] Georgian Unified Election Code (September 2008), Article 76^1 (new), section 1.
[163] Id., Section 2.

- And which are not available to others; or
- Which are not made available to other campaigns on an open and equal basis;
- For campaign purposes, or to provide support or assistance to a campaign;
- Without reimbursement of the full costs of such resources.

Misuse of Administrative Resources, Georgia Parliamentary Elections, 2008
In Georgia, for the parliamentary elections in 2008, the UEC provisions on abuse of office/misuse of administrative resources were extensively reworked. The UEC article (previous Article 76)[164] prohibiting candidates or others from abusing official positions for campaigning was eliminated – in favor of focusing on misuse of state administrative resources and activities of public officials – by adoption of two new articles.[165] There could well be benefit in changing the focus in this area from general principles to specific instances, since that may encourage more effective prevention and dispute resolution. On the other hand, limiting the scope of these provisions to more specific items would only be effective if those items are carefully defined, adequate to the task, and subject to effective enforcement. While linked with specific applications (such as use of buildings, means of communication, and transportation), the Georgian amendments concerning the use of state resources by those with access to them were founded upon the principle of equal opportunity (including equal conditions).[166] Yet, for example, civil servants who use official vehicles for campaign purposes would be required only to reimburse for fuel expenses,[167] which is inadequate to place them into the same position as those who do not have access to such vehicles. Additional details were also supplied concerning sanctions for misuse of administrative resources.[168] According to international observers, however, this reform was counterproductive, since it enabled officials to utilize office spaces, facilities, and other resources not generally available to the public, and because the scope of the permissive provision concerning "political" officials (see above) was unclear.[169]

[164] "Prohibition on Use of Official Position During Election Agitation and Campaign".
[165] Id., Articles 76, "Prohibition of usage of administrative resources during the election campaign," and 76^1, "Canceling of utilization of position or working status in pre-election agitation and campaign."
[166] Article 76.1 (as amended).
[167] *Id.,* Section 2.
[168] A new article empowered the CEC to impose administrative penalties for campaign violations concerning actions by officials. For each violation, the CEC could impose a fine as well as other penalties – including de-registration of an offending candidate or withdrawal of the candidate's right to participate in future elections (both subject to judicial approval). Id., Sec. 2. The ability to impose a lesser penalty through administrative proceedings could cause this type of action to be taken more often than the previously available but extreme measure of de-registration.
[169] See OSCE/ODIHR EOM Final Report, Georgia Parliamentary Elections, 2008, pp. 5-6.

Abuse of Official Position and Misuse of Administrative Resources
Palestinian Presidential and Legislative Elections, 2005–06

With respect to the Palestinian presidential election of January 2005, the EU Election Observation Mission (EUEOM) reached an overall positive conclusion – viz., that the "Palestinian election overcomes difficult and tense conditions but highlights challenges that lie ahead." Two of the core areas of concern were said to involve the misuse of state resources (and apparent abuse of official office)[170] on behalf of the candidate of the governing party (the Palestine Liberation Organization, or PLO), as well as the failure to address numerous complaints on this subject. The EOM summarized these points as follows:

> There was misuse of public resources in favour of one candidate, with public officials seen campaigning in his favour. The law is clear on this point and this should not be allowed, but the electoral authorities did not act against this despite numerous complaints.[171]

With respect to the Palestinian legislative elections that were held the following January, the EUEOM once again reached an overall positive conclusion: "Open and well-run parliamentary elections strengthen Palestinian commitment to democratic institutions."[172] With respect to the misuse of state resources and associated issues, the EOM found, "In comparison to the 1996 and 2005 elections, there was a notable drop in reports of the use of state resources by candidates in campaign."[173]

The main problems observed by the EOM included difficulties with Israeli administration (including regarding freedom of movement, association and assembly, and particularly accessibility of voting in East Jerusalem), coercion by (largely PLO-linked) militias and pressure on electoral administrators by senior officials, an especially high level of tension in Gaza, and further manipulation of voting rules for security personnel.[174]

Although a new election law had been enacted prior to the parliamentary elections, it did not lead to an improvement of complaint procedures and sanctions for violations:[175]

> [T]he CEC lacks any enforcement powers or sanctions where the law is violated. In practice, this meant that the CEC used informal channels to address complaints it received, regardless of the seriousness of the allegation. Moreover, there are no effective or transparent procedures for the handling of complaints and the CEC is under no requirement to publish details of the complaints it receives.[176]

[170] The EUEOM statement refers to pressure put on electoral administrators and others by officials, including security officials, and in particular manipulation of the voting rules that could permit double-voting by security personnel.

[171] EUEOM, West Bank and Gaza 2005, Preliminary Statement (Executive Summary). The EUEOM statement went on to describe more specific points which indicate the magnitude of the issues with respect to the violations and lack of response to them. Under Electoral Administration, the EUEOM commented:

> One area of concern regarding the administration is the issue of complaints and appeals. Numerous complaints were lodged with District Election Commissions and the CEC, such as on misuse of public resources, but there was a lack of any real action on these. There was also a lack of transparency, in that complaints and any decisions were not necessarily made public. …

CAMPAIGN FINANCE REGULATION

Regulation of campaign (and more general political) financing encompasses a number of different elements, such as those in the list that follows, wherein each next element is commonly added to those that precede it as the system grows in scope and complexity:

- Disclosure and reporting of financial contributions on a periodic basis, including after an election;
- Disclosure and reporting of financial contributions during the campaign and before the election;
- Publication of periodic and final financial reports;
- Disclosure and reporting of non-cash contributions – such as donations of goods and services – based on their economic value;
- Prohibitions on sources of contributions (such as from government agencies, state-owned enterprises, foreign individuals, or organizations or the like);
- Ceiling on contributions by individual persons and organizations;
- Ceiling on overall contributions and expenditures;
- Establishment of special electoral campaign fund;
- Retention of financial manager with legal responsibility for compliance with regulations and authorization of transactions;
- Submission of audited financial reports, including related records;
- Review of financial reports by electoral or other authorities.

And under Electoral Campaign, the EUEOM observed:

> A widespread problem during the campaign was the involvement of PA institutions, personnel and materials on behalf of Mahmoud Abbas. The law is clear on this point; the PA is not supposed to be involved at all in such a manner. However, observers reported on a government minister [in one city] inviting teachers to attend a Mahmoud Abbas campaign rally; banners and posters hanging on the office buildings of Governors, Security and Police forces, Local Government and public institutions in [several cities]; the active involvement of the security forces in attending campaign rallies for Mahmoud Abbas and security forces obstructing a meeting for [another candidate] in [one city]. In many of these cases a complaint was lodged with the district or central election officials but it is uncertain whether any action was taken or not.

[172] EUEOM, West Bank and Gaza 2006, Statement of Preliminary Conclusions and Findings (Jerusalem, 26 January 2006).

[173] Id., "Campaign."

[174] See generally Id.

[175] Id., "Legal Framework."

[176] Id.; the EUEOM went on to report related observations under Election Administration:

> The EU EOM is aware that a number of complaints have been made to the CEC during the campaign period. The absence of a formal, transparent mechanism for handling complaints and acting against violations of the law has meant that, in most cases, no discernible action has been taken to enforce the law, although in two relatively minor cases, complaints have been passed to the Prosecutor's Office for consideration. The most serious complaint related to a letter from the Chief of Civil Police of the West Bank, sent to all district police chiefs, [that] instructed police to vote in favour of the ruling party. This complaint was addressed only through an informal discussion between the CEC and the Office of the PA President.

It is unnecessary to explicate the reasons for the various components of campaign finance regulation, as the purpose of each is immediately evident. The basic principle underlying the disclosure, reporting, and publication of campaign finance is to enable voters to obtain information about the sources of political parties' (and/or candidates') funding in relation to the election and the relative amount of resources each party can devote to its campaign. This purpose can only be achieved if information received from the parties is published before the election as well as afterwards.

Information technology has greatly simplified the publication of political party financial reports, on the Internet, so they are accessible to the public. Even in difficult post-conflict situations it has proved possible to provide for submission of financial reports by election contestants and the publication of reports on an ongoing basis by electoral authorities.[177]

The problem with financial reporting by election contestants, of course, is with respect to its accuracy and completeness. While many systems of financial regulation are complete in themselves, they rely on the parties for information and do not provide for any external (or "forensic") auditing of the reports that are submitted. Often, to the extent that reports are audited at all, the authorities merely cross-check the records (receipts, vouchers, and the like) that they receive against entries in the account book of a special campaign fund.[178] It is difficult or impossible to determine if a party's finances exceed the reported level since relevant information (such as applicable media rates for advertising; donations of equipment, supplies, and services; or gifts by third parties to voters or their communities) cannot easily be tracked. Thus, whole realms of nonreported contributions and expenditures regularly evade inspection.

In addition, a number of legal obstacles often apply to financial reporting, restrictions, and prohibitions. Sometimes the authorities (including electoral and state registration bodies) take the position that contributions to a political party or for its campaign are not reportable unless they are made pursuant to a legal agreement between the contributor and the party. In one egregious case in Armenia, prior to the spring 2006 parliamentary elections, the third-ranked party (which was apparently bankrolled by its oligarch founder and leader) reported no contributions for the year prior to the elections, since the leader was providing the resources voluntarily and not under contract.[179]

Voter Education and Training of Election Officials

Civic education and training of election and other officials are essential parts of a fair election process, both of which require large-scale efforts. The necessity for voter education arises from the right of information that is contained in many human rights instruments either explicitly or implicitly. Training of election and other officials playing a role in the electoral process is required if election rules are to be applied equally and uniformly.

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[177] See, e.g., Republic of Liberia, National Election Commission, Campaign Finance Regulations for Political Parties and Candidates (Monrovia, May 30, 2005).

[178] E.g., in Macedonia, where financial reporting is based on establishment of a special "gyro" (i.e., current) campaign account. See OSCE/ODIHR, EOM Report, Macedonia Parliamentary Elections 2008, p. 11. Similar issues have recently been observed elsewhere in the OSCE area, for example in Armenia and Croatia.

[179] See OSCE/ODIHR, EOM Report, Armenia Parliamentary Elections 2007, pp. 10-11.

Voter education is usually provided through the media (and civic education more broadly usually in schools), while training of election officials is mainly conducted directly through classes, or a combination of courses and secondary transmission ("cascade") of the information provided. While insufficient voter education or official training is very problematic, it is difficult to appeal about directly. Related complaints and appeals would normally arise in case of voter confusion at the polls or irregular implementation of election procedures by officials.

Special care should be taken with information and training provided to judges with respect to their role in adjudicating election cases. While it is helpful if judges are already familiar with the law related to cases that come before them, their professional and institutional responsibility is to decide cases fairly based on the law, responding to the evidence and arguments submitted by the parties with respect to the subject matter in litigation, and not based on interpretations of application of the law that have been disseminated by the authorities.

A situation that arose in Georgia during the extraordinary presidential election in January 2008 (see footnote) illustrates some of the pitfalls that can occur in this regard. The Georgian experience shows clearly the necessity of preventing the development and application of internal understandings within the courts concerning the handling of election cases. It indicates strongly that classes and materials offered for training of judges on election cases should be inclusive (i.e., available to the legal profession, media, civil society, and to the extent possible, the more general public) and transparent (with training sessions and materials made publicly available).

Judicial Training Georgia Presidential Election, 2008[180]
Prior to these elections, it seems that several judges of the Supreme Court, who were especially knowledgeable about election law, developed a doctrine under which a particular type of postelection appeal (viz., challenging the protocol of results prepared by a polling committee or its adoption by that committee) would be treated differently from other, similar appeals. This interpretation was somehow communicated to officials of the Central Election Commission and was also known by parliamentary officials. This interpretation was also conveyed by the Supreme Court judges to judges of the lower courts (district and appeal) through training courses and materials, some of which had been supported by the International Community. The judges' doctrine was developed partially in response to concerns that the CEC would be inundated with postelection appeals about the validity of the protocols prepared by the polling committees, and may have been intended to cause such appeals to be distributed among the district courts around the country instead. But the doctrine was not communicated to the public, including opposition political parties, NGOs, and the legal profession. As a result, several hundred appeals of this sort (and possibly also related kinds) were rejected without consideration on the merits. Those that were submitted to the CEC were rejected for this or other technical reasons after the time limit for submission of the appeal to court had already expired. Those that were submitted to the courts, sometimes after being rejected by the CEC, were also largely dismissed for technical reasons, including lateness.

[180] See D. Finn, 2009.

Observers

National observers for elections are normally accredited by election administration, on the central and/or regional level. Especially in transitional countries, any NGO, the statute of which mentions "elections" and/or "democracy," is normally able to apply for accreditation of election observers. This has sometimes permitted bogus NGOs (which are legally registered as such but not active) or organizations with an unacknowledged political orientation to seek accreditation. In one extreme example, in Romania, "phantom" NGOs linked with the former security force *(Securitate)* or the (former Communist) Social Democratic Party repeatedly appeared during elections to take exclusive observer places at commissions, disrupting the deployment of legitimate observers.[181]

This legalistic approach continues in many countries, perhaps due to concern that enabling election administration to inquire into the bona fides of observing organizations could politicize the accreditation process. Where electoral institutions remain weak or politicized, however, it is probably good that they are not able to the capabilities of observer organizations but are limited to considering whether they are independent and nonpartisan. Over the longer term, however, it would be desirable if observer organizations were expected to demonstrate their impartiality and capability through an active role in election-related legal and administrative affairs, as well as through previous experience in observing elections, and to be certified by electoral administration through a transparent process.

In terms of appeal, it is generally possible to challenge the decision of an election commission to accredit certain national observers (including organizations and individuals) by petitioning the central election commission or court. More often, however, complaints are made at polling committees and other election commissions concerning the behavior of observers as well as others – such as party representatives, candidate agents, government officials, or security personnel – who are present in polling stations or during the operations of other election commissions.

Media

The media have several roles to play during elections, including mandatory voter information/education, usually by state-owned outlets; similar voluntary or compensated efforts by private media firms; allocating campaigners time or space, usually under highly regulated conditions intended to provide "equal" or "equitable" access; regular public affairs (news) coverage; editorial programs; and, last but not least, accepting political advertising. While such aspects are often addressed in election laws, due to the complexity of these matters the preferable practice is to implement them through a professionally-knowledgeable body such as an official media council. This is particularly true of technical matters, such as the rates offered by media organizations to carry political advertising, and the journalistic accuracy and professional integrity of reporting and editorial commentary (and applying remedies such as the right of reply).

In terms of complaints and appeals, it is often difficult to obtain a remedy for alleged violations by the media due to subjective considerations (with respect to objectivity and "fairness") and

[181] See IFES, Romania: Technical Assistance to the Central Election Bureau (1996).

lack of evidence (such as concerning prevailing advertising rates and conditions). Often election administration is not in a position to apply sanctions against even the simplest violations involving public communication, such as ignoring "blackout" or "election silence" periods. (In the latter case, a sanction usually could not be imposed until after the time it would be effective.) For these reasons, a professional body is normally in a better position to assess media violations and to develop and apply appropriate sanctions – even then, often only after an election is over.

Voting and Counting

Complaints about voting and counting at polling stations—or also counting centers, if applicable—must usually be submitted to the polling (and/or counting) board at the appropriate time. Complaints about the conduct of voting must usually be made to the polling committee president at the time a violation is observed, and in any case prior to the closing of the voting and beginning of the count. Complaints about the counting must be made in a similar manner, prior to completion of the counting and preparation of the protocol of results.

Typically, complaints about the voting and counting can be made by all persons authorized to be present during operations at polling and counting facilities, including national observers (but excluding international ones, due to their codes of conduct). But only in a relatively small number of countries can national observers actually pursue their complaints through appeals to higher election commissions and/or the courts.[182] Complaints generally must be accepted by the committee president and recorded in the official logbook.

Sometimes candidate or political party agents or representatives, or even members of the polling committee, may be subject to pressure not to submit a complaint, or the committee president may (contrary to his or her responsibility) refuse to accept it. So it is good practice to provide that in such cases the complaint may be submitted within a reasonable period of time to the next higher electoral commission instead.

Appeals from complaints about the voting and counting are often referred to as "postelection," since they are considered and resolved after election day. Often there are a great number of such appeals, which must be resolved speedily in order to permit the results of the election to be announced on time. Deficiencies in the approach by submitters as well as receiving institutions – including electoral commissions and the courts – often cause this process to be adversarial and often unproductive (in terms of ensuring that significant issues are identified and examined carefully). Some of the problems in the postelection appeal process include:[183]

- The institutions responsible for resolving complaints and appeals may be weak and unwilling to take action, which could impede the successful conclusion of the electoral process, or be viewed as opposing the interests of the government.

- Organizations and institutions may be unfamiliar with structured approaches to electoral complaints, through which the extent of consideration of a complaint and examination of

[182] See Finn, 2009, for description of experience with NGO appeals in the Georgian elections (presidential and parliamentary) during 2008.
[183] See Finn, 2008, pp. 9-10.

the evidence depends on the credibility of the claims made and the assessed effect of a violation on the legitimacy of the results.

- Statutory procedures through which the evidence contained in electoral records (such as protocols; voter list extracts; polling committee logbooks; spoiled, unused, and even voted ballots; and equipment and materials such as stamps) could be opened for examination or recount are not applied.

- The timeline for resolution of electoral complaints and appeals is necessarily very short, which puts the institutions under considerable pressure to resolve cases quickly, so that, to be considered, relevant evidence must be made available very expeditiously.

- Complainants are often unable to proffer sufficient evidence to justify their claims, yet demand a remedy (such as annulment of results in individual precincts or even a entire district) that could result in failure of an electoral process, thereby negating legitimate votes and imposing costs (economic) and risks (political) on society.

- Alternative remedies, other than annulment, are often not proposed by complainants nor pursued by the courts or electoral commissions. Such remedies could include: Ordering an examination of the election materials to assess the practical effect of the violation (see above), quarantining the results pending a determination whether they could have led to a significant effect on the tally, annulling the results at a polling station only if observed violations are found actually or probably to have had such an effect on the results, or inviting all interested parties to join the proceedings in order to seek a mutually agreeable resolution (such as excluding certain ballots, or adjusting the results in line with evidence about the nature and extent of violations).

- Election laws are often unclear regarding whether, if a substantial violation is found and the results at a precinct are declared invalid, a repeat election must be conducted there if the violation could not change the final result of the election in question.

- There are often no established means to ensure that violations of a serious nature are referred to the relevant authorities (such as prosecutors, police, or tax authorities) as well – in the case of electoral and other public officials – to civil service and election authorities, regardless of whether a violation has led to an annulment or otherwise may have had an effect on the results.

As the comments above show, there is a need for all concerned – appellants, appeal bodies, and other interested parties – to take a more balanced and realistic approach if the appeal process related to the voting and counting is to be successful. As political organizations and government and legal institutions mature, a more flexible approach could be taken toward resolving appeals about the voting and counting processes. Ideally, appellants would come to refrain from demanding annulment of results regardless of the significance of an alleged violation, and appeal bodies would utilize the evidence available to them in appropriate cases to assess the likely significance of suspected violations. From that starting point, it might be possible to approach postelection appeals in a more evidence-based and generally satisfactory way.

Tabulation

Tabulation (also called consolidation) of the counted votes is conducted by intermediate election bodies and the central election body. Tabulation itself is a relatively straightforward process, but it is particularly important that it be conducted in an entirely transparent manner, with election participants and observers able to review and compare all the original protocols of results from the polling stations, as well as any corrected documents.

Transparency is enhanced when participants and observers are able to obtain official copies of the protocols from the polling stations, and conduct their own independent tabulations. Posting of the protocols at the polling stations at the end of the counting also enables civil society and the public to confirm the accuracy of tabulation compared to published results. Copies and displays of protocols also enable participants and observers to confirm the validity of the overall tabulation by conducting parallel vote tabulation (PVT), either based on the complete results of the count or a statistically significant representative sample.

Intermediate Tabulation

Tabulation at the intermediate level is complicated by the need to validate the protocols of results received from polling committees. Often the protocols contain arithmetical or other errors that must be examined and corrected before the results can be added to the tabulation. Legally, it is usually the case that a protocol cannot be corrected unless at least the president, and sometimes other members, of the polling committee agree. The members of the receiving body must also do what is necessary to correct errors, possibly including examining the other materials (if necessary, including recounting voted and other ballots) received from the polling committee. For this reason, it is especially important that election participants and observers have full access to the sessions and operations of the intermediate commission during the tabulation phase.

Failure to conduct a transparent tabulation process at the intermediate level can seriously undermine the credibility of election results. For example, during the Romanian national elections in 2004, numerous errors found in protocols led the intermediate commissions to undertake sweeping corrections – many of which were made without obtaining approval by the polling committee presidents, or going back to confirm that the number of voters recorded as having voted was based on records and not merely recalculation. (The opposition also claimed that their representatives were excluded from this exercise.) The opposition presidential candidate initially called for the results of the first-round presidential election to be nullified based on irregularities during tabulation, but ultimately participated in and won the second round.[184]

Intermediate Tabulation Nicaraguan National Elections, 2006
Defects in the recordation of results from the polling stations and modification (or alteration) of tally sheets was a major issue in the Nicaraguan national elections in 2006. Observers from The Carter Center commented on the slow development and vagueness of the regulations of the Supreme Electoral Council (CSE) on appeals concerning the results reported from polling

[184] OSCE/ODIHR Expanded Election Assessment Mission Final Report, Romania, 2004, pp. 24-26

stations and other levels during the preparatory phase, and its later observations during the period of tabulation and determination of the results of the election confirmed that the verification of the vote count emerged as a significant area of weakness.[185]

The Center observers made extensive efforts to monitor the tabulation process at every level, but were often unable to obtain complete access. A number of challenges were made, under circumstances that suggested numerous problems in the reporting of results from the polling, municipal, and departmental levels. After publication by the CSE of preliminary results, two parties filed challenges based on numerous alleged discrepancies in reported vote counts. No recounts were conducted in response to the allegations of altered results, and the results in one area were modified. The CSE's brief decision was criticized by the observers as lacking in explanation and justification.[186]

The Center's final report on these elections stressed, as a recommendation, the need to develop clear rules for resolving challenges to vote tallies. The report also recommends recourse to vote recounts in situations in which the available documentation (primarily copies of tally sheets) is contradictory or suspect.[187] These conclusions are very supportive of the general suggestions made earlier about challenges to vote counts from polling stations and the response by superior election commissions.

The EUEOM for these elections concluded that the complaint/appeal procedures overall were "basic," and the CSE regulation on challenges did not adequately clarify the procedure to be followed in response to allegations that results forms had been damaged or altered. The EUEOM indicated that this problem was all the more serious since the CSE was constitutionally responsible for adjudicating election disputes, and there was "almost no recourse possible to the judicial system."[188]

Final Tabulation

Final tabulation by the central electoral authority, based on the protocols accepted by the intermediate bodies and their partial tabulations, is inherently a simpler process. Here, however, it is also important that transparency be maintained through permitting election participants and observers to attend all the meetings and working sessions of the central authority. In addition, information technology has made it possible to increase transparency not only for accredited organizations but the public at large. The best practice now is to publish scanned copies of the original protocols, plus any authorized corrected protocols, on the internet for public inspection.[189]

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[185] TCC, Observing the 2006 Nicaraguan Elections (May 2007), pp. 28, 30, 34-38.
[186] Id., pp. 34-38.
[187] Id., pp. 46-47.
[188] EUEOM, Nicaragua Elections 2006, Preliminary Statement, p. 4.
[189] Following the Georgian extraordinary presidential election in January 2008, in which the incumbent president narrowly won sufficient votes for a first-round victory, the CEC published only the first pages of two-page protocols. The stamp and signatures of polling committee members were placed on the second page, making it

Results

Ultimately, the aim of all post-election appeals is to change the reported results of an election, either in part or entirely. Appeals against actions of polling committees are usually directed first to the relevant intermediate electoral authority, and if unsuccessful at that stage, to the central authority or the appropriate court depending on the channel(s) of appeal established by law. Appeals against actions of intermediate electoral authorities are usually directed to the central authority, and then to court if necessary. Appeals against actions of the central authority, including adoption of the resolution containing the results of the election, are submitted to court (sometimes after being filed with the election authority itself).

Civil Law Model

Those with standing to appeal against electoral violations at any level under election law normally can pursue an action to overturn the overall result of an election as well. But in practice, they must carefully lay the groundwork for a more general appeal against the results by bringing individual appeals against all of the alleged violations that are reflected in the results. This requirement arises from other laws, including procedural codes regarding judicial appeals, which limit the scope of consideration of a matter at the appeal stage.

Usually, appellate courts will not conduct an independent examination of the evidence in a case, but confine their consideration to legal issues, including whether the evidence submitted earlier was adequate and to what extent the election body or court that considered the matter previously had given it due weight and consideration. Also, in many jurisdictions, appeals against actions of election administration are considered under special rules for the review of administrative actions. Under these rules, review by the court is limited to determining whether the administrative entity followed the correct procedures, applied the law properly, and made a reasonable decision in view of its examination of the evidence.

There is a tendency in some regions – e.g., in Eurasia – for appellants seeking to overturn the results of an entire election to combine their various complaints into a submission directly to the highest court of jurisdiction as an appeal against the results of the entire election. Many of the issues and materials combined in this manner have not first been the subject of appeals at a lower level and earlier stage in the electoral process. (The appellants often argue that they do not have trust in electoral administration or the lower courts to consider their appeals fairly.) It is not clear why these appellants believe the result would be better for them in a final appeal, or perhaps they are actually using the appellate process for a political gesture.

Final Judicial Review Armenia Parliamentary Elections, 2007
The court of final appeal cannot usually consider new factual claims, but only review whether the law was properly applied to facts established at the lower level. Yet the appellants in such actions in elections nonetheless often rely on nonadjudicated factual issues in arguing their final appeals.

impossible to determine whether the handwritten entries of the results of the count on the first pages were original and/or had been altered at some stage.

Just this situation occurred after the 2007 Armenian parliamentary elections, even though the law and rules of the Constitutional Court did not envision the court conducting an inquiry into new complaints, and the court's president had called attention to this in advance.[190] (It is noteworthy, however, that the court's organic law does permit it to refer factual issues to the appropriate bodies – including lower courts, government agencies, and even special commissions, which can include an international component – for inquiry and advice.)[191]

Common Law Models

Similar concepts operate in common law jurisdictions, but in such jurisdictions judges tend to take a more nuanced approach based on their methods of case analysis, which interweave the law and facts very closely. In some jurisdictions, appellants are required to limit the scope of their final electoral appeals to those included in a "bill of particulars," containing matters to which exception has already been taken at the national-election body level.[192] In addition to limiting the issues that may become part of a final postelection appeal, this practice alerts election administration to matters that may require correction before they become subjects of later appeals.

As mentioned earlier, in Commonwealth and other countries influenced by the electoral practices of the United Kingdom, legal appeals are strictly limited during the electoral process itself. This reflects the civil administration approach taken in the United Kingdom, where the electoral officials ("chief" and other "election," "registration," and "returning officers") at various levels are regular administrators designated to carry out election operations. This approach is founded upon the traditional reputation for competence, integrity, and impartiality of British civil servants. In the post-colonial period, most other Commonwealth countries have assigned the lead electoral role to independent commissions, with the assistance of their own staff and often a continued operational role for civil servants at the local and regional level.

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[190] See generally OSCE/ODIHR EOM Final Report, Armenia Parliamentary, 2007, pp. 26-27. See also Armenian Law on the Constitutional Court (as amended 2006), Article 74.13:

> [T]he Constitutional Court examines the circumstances of unjustified rejection of examination (review) of the electoral appeals submitted in the procedure prescribed by Law by the relevant electoral commissions as well as the circumstances of breaking of timeframes of examination (review) of such appeals and of refusal or avoidance of examination (review) of those appeals. In such cases, the Constitutional Court has the right to evaluate the evidences presented in the appeal as true and indisputable if such evaluation does not contradict other evidences acquired during the case review.

[191] See id., Article 74.8:

> [T]he Constitutional Court is authorized to assign the evidence (information related to facts) collection, necessary for holding a decision, to the state and local self-government bodies, to courts and to prosecutorial bodies, as well as to its staff members if needed. For these purpose[s] the Constitutional Court has the right to form committees involving one of the Members of the Constitutional Court (as a leader of the Committee) and the employees of the same or different bodies as well as the Deputies of the Parliament, local and international observers upon their agreement.

[192] See, e.g., National Election Commission, Republic of Liberia, Regulations on Complaints and Appeals (July 20, 2005), Sec. 7, "Contested Election."

The U.K. approach toward legal challenges against elections – that they may only be brought afterward to a special tribunal or regular court acting as electoral tribunal[193] – continues in many Commonwealth countries. For example, in Nigeria, the Electoral Act (in language precisely similar to that in U.K. law) makes this the only permissible avenue of appeal to court for electoral disputes.[194] In some such countries (e.g., Nigeria),[195] however, electoral tribunals have sometimes been exceedingly slow to complete their consideration of election cases – reflecting in part the complexity of common-law legal proceedings and the tendency of common-law judges to put thorough consideration of all aspects of a case above its speedy resolution.

Special Dispute Resolution

Some elections are held in very challenging post-conflict situations, and sometimes elections actually lead to conflict (or intensification of conflict) rather than accomplishing a peaceful transfer of political authority based on the will of the voters. In situations like these special means are necessary to ensure that the integrity of the electoral process can be preserved under great political pressure and even the threat of violence.

Transitional Dispute Resolution

In a post-conflict situation, the instruments for dispute resolution (such as the courts or traditional structures) have often been irreparably damaged or undermined, and assistance by the International Community may be sought to resolve disputes among parties. Special means must therefore often be created to provide for dispute resolution in elections that occur as part of a peacekeeping or nation-building process.

SPECIAL APPEAL BODIES

When a large number of electoral disputes might be expected, and there is insufficient trust in election administration to address such disputes, an independent dispute resolution body may be created, sometimes with international participation. Depending on the scale of the problems that are anticipated, the autonomous dispute resolution function may be centralized and serve in a limited (e.g., appellate) role, or dispute resolution bodies can be decentralized and consider first-instance complaints as well as appeals.

Electoral Dispute Resolution Afghanistan Presidential Election, 2004 and Beyond
In Afghanistan during the presidential election of 2004, a special autonomous dispute resolution panel, with international participation, was established at the national level; the body also had

[193] See, e.g., Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983, Part III (Sections 120-186).

[194] Federal Republic of Nigeria, An Act to Regulate the Conduct of Federal, State and Local Government Elections and to Repeal the Electoral Act 2001; and for Connected Purposes (Electoral Act, 2002), Sec. 131 (1): "No election and no return at an election under this Act shall be questioned in any manner other than by a petition complaining of an undue election or undue return (in this Act referred to as an 'election petition') presented to competent tribunal or court in accordance with the provisions of the Constitution or of this Act …" In Nigeria, election petitions go to special tribunals which are formed for this purpose. Id., Sec. 131 (2).

[195] See, e.g., "Nigerian [Supreme] Court upholds [April 21, 2007, Presidential] Election" (AP), *New York Times,* Dec. 12, 2008.

some staff representation at the local level. While this arrangement was relatively efficient, the body proved to lack the resources to investigate disputes that arose in the field during the much more complex 2005 national assembly and provincial council elections, requiring assistance to be provided by the staff of the provincial election commissions.

Looking forward to the upcoming presidential/provincial (2009) and parliamentary (2010) elections, consideration was given to the concept of re-establishing the panel as an exclusively appellate body, with initial jurisdiction over complaints to lie with the national and provincial election commissions. Instead, the political parties in the National Assembly expressed a strong preference for a plenipotentiary dispute resolution authority to operate nationwide during upcoming elections. This would include provincial as well as national dispute resolution commissions, and staff support at both levels.[196]

Electoral Dispute Resolution
Sierra Leone National Elections, 2007

In Sierra Leone, due to lack of confidence by the public and opposition parties in the regular courts, special law courts were created prior to the 2007 presidential and parliamentary elections. The Electoral Offences Courts and Election Petition Courts were established as divisions of the High Court, with each represented in the three judicial districts.[197]

During the parliamentary and first-round presidential elections, however, 73 complaints were submitted to the National Election Commission, despite its lack of jurisdiction to take up such matters. The NEC advised submitters to turn instead to the police in the case of complaints, which could be pursued in the Electoral Offences Courts, with criminal jurisdiction, or to the Election Petition Courts. The late establishment of the electoral courts may have caused confusion concerning where to submit a "complaint" or "petition." Only one petition, challenging the electoral process in a single constituency, was actually filed.[198]

(Note that election "petitions," challenging the conduct of an election, could be brought only after the election, following the U.K./Commonwealth tradition. Also, the Sierra Leone case is included here as an example of special, transitional arrangements for electoral dispute resolution, but it should be recalled that the institution of special courts, or "tribunals," for election challenges is actually widespread in Commonwealth countries such as Nigeria, and is also sometimes used elsewhere.)

[196] See D. Finn, 2007, p. 8.
[197] EU Election Observation Mission (EOM), Republic of Sierra Leone, Presidential and Parliamentary Elections 2007, Preliminary Statement (Aug. 13, 2007), p. 4.
[198] EUEOM, Republic of Sierra Leone, Second Round of the Presidential Elections 2007, Preliminary Statement (Sept. 10, 2007), p. 5.

INTERNATIONAL MEDIATION

Mediation During the Electoral Process

In other situations, reconstituted national institutions – such as the electoral commission and courts – are relied upon for dispute resolution. It is wise in such situations, however, to establish a legal basis to prevent the authorities from exercising their powers under the law in a way that is inconsistent with the principles or purposes of the peace agreement. In addition, it is advisable to provide in for mediation (or arbitration) by a designated international representative in cases in which the institutions of the transitional national authority pursue conflicting policies.

International Mediation Liberian National Elections, 2005
In Liberia, the 2005 national (presidential, Assembly, and Senate) elections were organized by an independent National Election Commission operating under national electoral laws and receiving massive assistance and support from the U.N. Mission in Liberia (UNMIL), a U.N. peacekeeping operation. Under the ACPA signed by the warring parties, certain constitutional and legislative provisions were set aside and other laws that were inconsistent with the CPA would be suspended. The CPA also provided: "Any dispute within the NTGL, arising out of the application or interpretation of the provisions of this Agreement shall be settled through a process of mediation to be organised by ECOWAS in collaboration with the UN, the AU and the ICGL [International Contact Group on Liberia]."[199] As was mentioned earlier, at a very late stage in the election preparations, the Liberian Supreme Court handed down two decisions that threatened the elections. The first reinstated a presidential candidacy that had been denied by NEC for technical reasons; the second (requested by an electoral coalition) ordered that voters be permitted to mark two names rather than one in the Senate elections. (Two senators would be elected from each province, but language in the election law indicated that each voter would have only one vote.) These rulings, if enforced, would have necessitated all the ballot papers for the elections to be reprinted or modified. After a period of confusion and uncertainty, the ECOWAS mediator, Honorable Abdulsalami Abubakar of Nigeria, visited Monrovia and his team persuaded the aspiring presidential candidate to step aside. The ruling on voting in the Senate elections was not addressed, however, causing considerable disruption on election day since at opening time polling workers were still occupied placing stickers on the ballot papers with new instructions about voting. (Ultimately, on election day, the NEC told polling workers to leave off the stickers, and the outcome of the Senate elections did not appear to be much affected by the new rule.)

POSTELECTION INTERVENTION

A number of recent elections, most noticeably in Africa, have been followed by political crisis and civil unrest. These developments have mainly occurred after delay and suspected malfeasance during the tabulation process led to claims that an election was "stolen." In such

[199] ACPA, 2003, Articles XXXV & XXXVI.

cases, the International Community has responded mainly by authorizing limited interventions by mediators.

It is possible to distinguish such interventions as ad hoc or institutional. That is, some interventions are voluntary and involve respected individuals who are operating without a direct mandate from an international organization or other relevant body. Others involve individuals who have been assigned their mandate by a relevant international organization. (The materials on global and regional frameworks for human and electoral rights protection discussed earlier identify the organizations that are empowered to issue a mandate of this nature.) Sometimes, intervention efforts undertaken on an ad hoc basis become institutional in nature, when they are encouraged and subsequently endorsed by international organizations or other bodies.

Recent postelectoral interventions by international actors have had a mixed record of success. The intervention in Kenya by former U.N. Secretary-General Kofi Annan, endorsed by the AU, succeeded in creating a constitutional framework for some sharing of executive power by President Mwai Kibaki with his opposition rival, Raila Odinga, now prime minister. But questions about the quality of last year's election process persist[200], not to mention serious concerns about the involvement of politicians and political parties in electoral malpractice and subsequently encouraging or even organizing inter-communal violence.

Similarly, only partial success has been achieved in Zimbabwe in the postelection power-sharing talks between President Robert Mugabe and his opponent in 2009's presidential contest, Morgan Tsvangirai, despite numerous missions and other actions by the AU and SADC. (The AU delegated primary responsibility to SADC, which relied on [former] South African President Thabo Mbeki as conciliator; but Mr. Mbeki was widely seen as favoring Mugabe – or at least unwilling to put pressure on him – and therefore was viewed as unacceptable by Mr. Tsvangirai.) A mission to Harare by Kofi Annan, former U.S. President Jimmy Carter, and former South African President Nelson Mandel's wife Graça Machel on behalf of the Elders group was denied entry into the country by the Zimbabwe government.[201]

Finally, the two sides were persuaded to enter into a power-sharing arrangement. But while some progress has been made on governance issues, the new dispensation has been plagued by competition over control of key functions of government, including control of the security forces.

The recent Kenya and Zimbabwe experiences illustrate the difficulties of designing a power-sharing scheme, including sharing of executive power, as a solution to a failed election for the chief executive post. Aside from the quibbling about Cabinet positions, there seems to be little incentive for presidents returned to office by a failed election to loosen their hold on power. In the absence of effective international pressure, how can this be accomplished unless the opposition is willing to risk a bloodbath?

[200] See Republic of Kenya, Independent Review Commission (IREC), 2008.
[201] "Zimbabwe: Reaching rock bottom," *The Economist,* Dec. 6, 2008, p. 65.

Section 3
MANUAL FOR PRACTITIONERS

Electoral administration/law practitioners serve in a variety of capacities, including providing technical advice and assistance before, during, or after an election; contributing to the conduct of an election; or serving as observers for the election. Advisors are expected to assist electoral administration by identifying issues and making recommendations with respect to the conduct of the election, and often to provide conclusions (or "lessons learned") thereafter. Observers are usually prevented from providing direct advice or assistance during an election, but their activities may alert participants of subjects of interest. Observers are also expected to announce their findings with respect to the quality of the electoral process, and usually also subsequently communicate recommendations for improvement. In order to assist practitioners, this manual identifies the main issues that arise with respect to dispute resolution during each phase of the electoral process; outlines key analytical issues; and describes what findings, conclusions, and recommendations might be appropriate.

Complaint/Appeal Process

Issues	Analytical Questions	Comments and Advice	Conclusions and Recommendations
Principles	Are complaint and appeal processes "accessible" by individuals and groups and capable of applying effective remedies such as "reparation, which can involve restitution, rehabilitation and measures of satisfaction," "guarantees of non-repetition," and "bringing to justice the perpetrators"?	The availability of effective remedies is often undermined by administrative, legal, and institutional factors, including: high costs and fees, technical complexities, institutional unresponsiveness, and the inability to pursue remedies against other branches/levels of the state itself or against third parties.	ICCPR Articles 2.3, 14.1; UNHRC General Comments 31, 32
	Does the adjudication of disputes include a "fair and public hearing by a competent, independent and impartial tribunal"?	If complaints or appeals are adjudicated by electoral or other administrative bodies, those bodies should be sufficiently independent, professional, or balanced in composition to operate in an appropriate quasi-judicial manner.	UNHRC General Comment 32

Does consideration of disputes involve at least one full, fair, and public hearing? Does the hearing provide all parties an opportunity to present their arguments? Is the evidence introduced by the parties available for public inspection; is the decision of the body published; and is the decision accompanied by an opinion containing a full discussion of the relevant law and facts?	If proceedings conducted by or on behalf of electoral administration do not meet these standards, then a judicial or other appeal should be provided and the proceedings on appeal should meet the standards for an adjudicatory proceeding.	UNHRC General Comment 32
Is the appeal to court or another tribunal adjudicatory or of a limited nature?	If the appeal is non-adjudicatory, then the full standards for adjudicatory proceedings may not apply, but there must be a published decision and opinion. This is true regardless of whether the proceeding is "administrative" or civil in nature.	UNHRC General Comment 32

Practices	Are judicial appeals authorized at any stage of the electoral process (Common Law model), required to be brought at particular times and resolved under a specific timetable (Civil Law model), or restricted during the electoral process and limited to postelection contests (Commonwealth model)?	All three approaches are represented in comparative practice, although it can be said that the Civil Law approach offers the best availability of effective remedies at every stage of elections. If the Common Law approach is followed, then the laws and judicial rules should prevent disruptive judicial actions in response to lawsuits. If the Commonwealth approach is used, then interlocutory challenges should be permitted with respect to those actions of electoral administration (e.g., voter registration, election districting, and candidate registration) that cannot be overturned without requiring a broad repetition of the elections. It should also be made absolutely clear in the relevant law and judicial rules when and under what circumstances an election appeal can be pursued.	
	Does election administration have the power to promulgate complaint regulations?	The legislative framework should authorize election administration to implement necessary regulations, including for resolution of disputes.	
	Has election administration issued complaint regulations that make clear which complaints/appeals can be made at any time, alert administrators to potential issues and allow them to be addressed, and enable election administration to reach a final position before an appeal to the courts is initiated?	If authorized to do so, election administration should implement complaint regulations to achieve these and other purposes, as well as to make clear to potential complainants what they are required to do.	UNHRC General Comments 25, 31

	Does election administration rigorously follow its own regulations for the handling of complaints/appeals?	If election administration does not follow its own regulations, including on how to handle complaints, that increases the chance of complainants being successful on appeal.	
Standing ("Locus standii")	Should voters have the capacity to initiate complaints and appeals regarding all aspects of the electoral process?	Voters must have the right to seek redress for violations of their individual (active and passive) franchise rights – viz., to vote and stand as a candidate for election. Consideration could be given to authorizing civic associations (such as accredited observer organizations) to submit electoral complaints and appeals.	ICCPR Articles 2.3, 25; UNHRC General Comments 25, 31, 32
	To what extent should candidates and political parties have the capacity to submit complaints or appeals about electoral operations?	Candidates in majoritarian elections should have the ability to complain concerning any act of election administration that affects their prospects for election. In proportional elections, the capacity to submit a complaint could be limited to the nominating organization (political party, electoral alliance, or independent group).	
	Are remedies available for violations of the rights of election participants that result from the actions of third parties?	Effective remedies should exist under law against violations by other state bodies (including the government, administrative agencies, and local administrations) through the courts, election administration, or other administrative agencies or entities (such as a media council or campaign ethics commission). Such remedies must also be practically available, and the procedures (such as judicial forms of action) to obtain them should be established in law or regulation.	ICCPR Article 25; UNHRC General Comments 25, 31

Aspects of the Pre-election and Election Period

General Political and Human Rights	Are fundamental civil/political freedoms (opinion, expression, association, peaceful assembly) respected?	The absence of recognized civil and political freedom during the pre-election period makes the fairness and openness of the electoral process doubtful. Peaceful civil and political organization should be permitted outside as well as during an electoral period.	ICCPR Article 25, UNHRC General Comment 25
	Are citizens fearful of retribution by the authorities for exercising recognized civil/political rights?	Fear of retribution for exercising civil/political rights makes a free and fair electoral process problematic. Citizens should be assured that their exercise of civil/political rights both during and between elections will not lead to adverse action against them.	ICCPR Article 2.3, UNHRC General Comment 31
	Do the law and administrative practices permit civic and political organizing, such as developing and seeking support for political programs, and seeking additional members or permissible funding in the period prior to elections?	The law should clearly protect such activities, and it should be made clear that any restriction on "campaigning" outside the electoral period is not applicable to regular organizational activities by political parties or other associations. The law and regulations should also describe the activities that are considered campaigning, particularly if such activities are prohibited prior to the electoral campaign period.	ICCPR Article 25, UNHRC General Comments 25, 31
Redress for Rights Violations	Are the administrative and judicial channels for appeal by citizens concerning violations of their rights publicly viewed as accessible, professional, effective, and objective (independent)?	If the general channels of appeal are not trusted by the citizenry, then electoral appeal channels will not be effective or well-used by election participants. The effectiveness and reputation of such channels would have to be improved.	ICCPR Articles 2.3, 25; UNHRC General Comments 25, 31, 32

	Are the activities of "human rights defenders," including recourse to administrative and judicial appeal channels, promoted and protected?	Failure to promote and protect human rights defenders will make those with a grievance against election administration less likely and willing to pursue an appropriate appeal.	UNGA Res. 33/144 (Mar. 8, 1999)

Legislative Framework for Elections

Status and Stability	Is the basic electoral legislation established as high-level law and is it stable (viz., not amended in preparation for an election)?	Election laws should not be amended in the pre-election period (if possible for a year prior to the election), and if amendments must be made due to technical flaws, the amendments should have wide political support and public understanding.	
Electoral Appeal Mechanisms	Is the relationship between the procedures governing electoral appeals and those under general law (including civil, administrative, and judicial codes) clear and consistent?	Conflicts between electoral and other laws on procedures and standards applicable to appeals often prevent related electoral provisions from being properly implemented. In particular, the relevant electoral provisions should completely describe the applicable standards and procedures (including with respect to potential plaintiffs and defendants, the form of action, burden of proof, available remedies, and specific procedures including time limits).	UNHRC General Comments 31, 32
	Is there a single channel for particular election appeals under law, or if multiple channels do exist, are there rules to prevent conflicts of jurisdiction between appeal bodies or forum-shopping by appellants?	Multiple channels for appeal of the same matter are problematic, since they can lead to jurisdictional conflict or abuse.	

	Do the particular procedural provisions relevant to certain electoral appeals – such as appeals against actions of election administration – fall within special, restricted judicial procedures such as those that may be applicable to "administrative" cases?	To promote public trust in the electoral process, it is important that the specific rules and procedures applicable to electoral appeals to the courts fully respect the principle of due process for appellants – e.g., through public notice, open proceedings, oral arguments, and published decisions and written opinions.
	Is the treatment of electoral cases clearly set forth in electoral or other high-level legislation, including judicial codes, so that meritorious cases are not rejected for technical-procedural reasons?	Legislative or judicial doctrines creating special classes of cases for electoral matters, such as by differentiating review of administrative action from de novo consideration of the entire matter, should be avoided or at least very well clarified, since they cause confusion about the nature of the action complained of as well as the form and standard of review.

Voter Registration

Registration Process	Is there a continuous process of updating the voter register, including providing access by voters to check their registration, between election periods?	Improvements in information technology permit updating the voter register on a continuous basis. Posting the voter register on the Internet provides voters easy access to their registration information, in countries with good Internet infrastructure and wide access and use. But procedures should be put into place to limit access to voters' personal information by others (see below).

Inspection/ Correction	Are there adequate opportunities for voters to check and seek correction of their registration during an electoral period?	The regular means of checking the voter register should be supplemented, once an electoral period has begun, with additional opportunities, including physical access at electoral or other administrative offices. In view of the pending election, there must be expeditious procedures for voter appeals to the registration and/or electoral authorities, as well as to court.	IPC Declaration
	Are sufficient controls in place to ensure that the privacy of personal information about voters is protected?	Inspection of the VR should be limited to voters seeking information about their own registration, that of their immediate family, and others living at residences owned by them. Political parties and other organizations with a special interest in the electoral process should also be able to inspect (or even receive a copy) of the voter register, but with personal information removed. The law or regulations should limit the access to and use of such information – such as to contact voters directly or check if they voted.	

Election Administration

Election Management Bodies	Are electoral bodies at various levels sufficiently autonomous institutionally and administratively to perform effectively and independently?	It is axiomatic that electoral bodies must be autonomous, and carry out their activities in an objective and professional manner.	UNHRC General Comment 25
	Does the composition of electoral bodies at various levels reflect a "neutral, professional," "balanced, multi-partisan," or mixed approach, and does the method of appointment of the members support these objectives?	Both approaches, or a combination of the two (which can vary at different levels according to the responsibilities of the bodies at those levels), are acceptable, provided the nature of the appointment process is likely to lead to acceptable selections.	

	Are electoral bodies at various levels subject to undue influence on their activities by the government or ruling party, exercised through control of the bodies by the selection of officials (president, vice president, and secretary) or other means, such as preventing opposition designees from fully participating in the work of the bodies?	It is difficult for the opposition legally to dispute actions by election body officials that are within their official powers. Similarly, it is difficult to dispute legally limitations on the full participation of opposition members in the work of electoral bodies. Nonetheless, the opposition should regularly raise these issues, both internally and externally, to bring pressure to bear on the authorities, and opposition parties can complain/appeal in significant cases, in order to set the stage for a possible final appeal concerning the results of the election (see below).

Election Boundary Delimitation

Election Districts (Consti-tuencies)	Are election districts established by law, or is that task delegated to the electoral or other administrative authorities?	If the constituencies are established by law, appeals against them may not be subject to the special rules governing electoral appeals, so it may not be possible to challenge the delineation of constituencies during the electoral process. For this reason, the law delineating the constituencies should be enacted well in advance – if at all possible, a year before the election. Appeals against the delineation of constituencies by legislation should be brought as soon as possible after their adoption, so that the appeals can be resolved if possible prior to the establishment of the districts for an election.

	It is desirable that the legislature or relevant administrative authorities base their action delimiting constituencies on recommendations of a commission or other independent body with professional competence and balanced representation.	
Are the constituencies approximately equal in the ratio of the number of voters (or citizen residents) to representatives to be elected from each?	The range of number of voters (residents) in different constituencies should not exceed a reasonable amount (say, 10 percent) from the arithmetic mean. Special circumstances could justify a greater deviation, but if the districts are delineated by electoral or other administrative authorities, such circumstances should be explained.	Venice Commission guidelines
Do the authorities (electoral or other) have power/responsibility to further demarcate the boundaries of the election districts?	The principles identified above should apply to such actions to the extent possible. As an administrative action related to the electoral process, it should be possible to pursue an electoral appeal against the further demarcation of constituencies.	

Voting Districts (Precincts)	Voters are commonly assigned to polling stations according to what voting district (precinct) in which they reside. Voter lists are typically organized by precinct, allowing for easy separation of the VL into "extracts" for use at polling stations. Precincts are delineated by electoral or other administrative authorities. Are there principles and procedures established through law that regulate this action, which can also provide a basis for appealing any unfairness?	The delimitation of precincts and location of polling stations can disadvantage voters and/or candidates by making it more or less convenient to reach the polls. In the absence of specific principles and procedures for delimiting precincts, it is difficult to appeal their adoption. The applicable rules should limit the number of voters included in a precinct and the distance and/or time and effort voters in the precinct would require to travel to the polls. The procedures should indicate which authorities are responsible for delimiting precincts, and how they should make such decisions.

Parties, Candidates, and Campaigning

Registration, Regulation, and Appeal	Are the requirements for registering candidates simple, straightforward, and nondiscriminatory?	Registration of candidates should be subject to minimum administrative requirements, limited to personal identification, necessary qualifications for office, statement of intent, and (if applicable) a certain level of public support.
	Are independent candidacies permitted, and are any additional requirements for candidacy by independents (including individuals and organizations other than political parties) reasonably related to their purpose?	Independent candidacies may be made subject to additional requirements intended to establish their public appeal (such as submission of a reasonable number of signatures by supporters) and perhaps minimum electoral prospects (as evidenced by willingness to post a nominal surety bond).

	Can candidacies be denied based on purported violation of the constitution or disrespect for law and order?	Denial of candidacies on these grounds must be based on an unreasonable risk of violence through incitement (such as through ethnic hatred or war propaganda) or use of nonpeaceful means.	
	Is the registration or denial of registration of candidates fully appealable in court?	As actions of election administration, both registration and nonregistration must be judicially appealable by anyone with standing, including other election contestants.	IPC Declaration; UNHRC opinions in Sinitsin v. Belarus and Ignatane v. Latvia cases

The Campaign

Campaign Dispute Resolution

Role of Courts	Is resolution of disputes concerning campaign violations assigned to the courts?	If so, the legislative framework, including not only the election laws but other relevant statutes, including administrative, civil, and judicial laws and procedural codes are clear and consistent concerning the nature of the action, the specific procedures (including time limits) to be followed, and the available remedies.	

Supervisory Bodies	Is a supervisory role assigned —by law, regulation, or agreement among election contestants—to special bodies, to which concerns relating to practices during the campaign can be referred for consideration and possibly action?	Such bodies should follow adequate procedures, which include due process protections for election contestants and others. (These protections include public notice, published meeting agendas, notification of interested parties, ability to intervene if appropriate, and the rights to present evidence and legal arguments and examine witnesses.) The precise role of such bodies must be carefully described so that a judicial appeal is available concerning their decisions. In particular, the law should be clear whether the body's action is purely advisory or has administrative force. (In the former case, the court on review would consider the matter anew [de novo], but in the latter, the court would only review the reasonableness of the body's original decision.)

Common Campaign Violations

"Vote Buying"	Especially in regions (e.g., Africa, Asia, Eurasia, and some parts of Eastern Europe) in which this practice is prevalent, is vote buying clearly defined and prohibited by law?	Vote buying is constituted of the promising, offering, or giving of money, goods, services, or other positive inducements to voters and/or others in relation to an election (during the run-up, after an election is announced, or during the campaign) by a political party, candidate, or others (agents) in a way that could be expected to influence how voters exercise their voting right.

	Is the prohibition on vote buying enforceable, or is enforcement impeded by lack of clarity concerning the elements of the offense or inability to obtain relevant evidence?	Each of the elements of this violation is often difficult to prove – in particular, promising inducements, agents of a party or candidate, and influencing voters. The best practice could be to create strict liability for any such action during the campaign period, regardless of whether the inducements are given to voters or more generally to their communities; by anyone regardless of a formal agency relationship to an election contestant; regardless of the actual influence on the voting. For activities prior to the campaign, the violation could be defined in a more general way, requiring further evidence concerning the circumstances.
Abuse of Official Position	Do the law and regulations address the concept of abuse of official position and provide a framework for identifying and reacting to it in appropriate instances?	Abuse of official position includes a range of activities by officials, such as: mixing official business and campaigning; misusing advantages of incumbency, such as official transportation and resources (see also misuse of administrative resources, below); channeling state funds into electoral districts in a way that could influence the vote there; engaging in campaign-style "official" visits to electoral districts and showing an extraordinary level of official interest in activities there (such as funding or commissioning public facilities); and conducting official business in a way that is unbalanced and politically opportunistic.

	Is there an observable increase in activities associated with abuse of official position during the pre-election or campaign period?	Officials of the state and local administration should be held to account for use of their office for political purposes, except when they are shown to be carrying out regularly authorized programs or projects, or (for certain senior officials) are required to use designated state support such as for security and transportation. As a best practice, officials should clearly differentiate their public from political activities, such as by refraining from using their official premises for campaign purposes and publicly clarifying the purposes of their official travel.
Misuse of Administrative Resources	Is misuse of administrative resources clearly defined in law and regulations, so that officials of the state or local administration cannot take unfair advantage of their access to such resources for political purposes?	The violation of misusing administrative resources is constituted of the following elements: use of official funds, facilities, equipment, services, or supplies by those who have official access to them, and which are not available to others, or which are not made available to other campaigns on an open and equal basis, for campaign purposes, or to provide support or assistance to an election campaign, without reimbursement of the full value of such resources.
	Does the law contain adequate specificity concerning the nature of the resources and access to them to identify instances of misuse, and/or is this accomplished through regulation or judicial determination on a case-by-case basis?	It is important that "equal" access to state or local administrative resources should include effective access. It is not enough for officials to be required to compensate for operating costs for equipment or facilities that are not equally available for use by other election contestants. Without explicit statutory standards, it would be difficult for election participants to sustain a successful judicial action.

Campaign Finance Regulation

Elements	Does the law provide the basic elements for campaign finance regulation?	Campaign finance regulation should include as a minimum specific limitations on the amount of contributions and permissible sources, on disclosure and reporting contributions and expenditures during the electoral period, and for publication of such information in a timely manner.
	Does the law make clear that nonmonetary ("in-kind") contributions to a campaign are included, based on their fair market value, and that contributions by third parties are covered despite whether they are provided under an agreement to do so?	Absence of effective coverage (through disclosure/reporting requirements as well as auditing) prevents effective application of campaign finance limitations and regulations.
	Is postelection auditing of financial reports by campaigners conducted, and does the audit potentially include external, or "forensic," techniques?	The accuracy of financial disclosures cannot be assessed without a pro forma audit, and if there is internal or external information that the information is incomplete or incorrect, the reviewing body should conduct an investigation, including checking submitted information against other records and sources.

Voter Education and Training of Election Officials

Education and Training	Do civic and voter education programs make voters aware of their rights to complain/appeal about their voter registration and support other complaints and appeals through testimony and other means?	In accordance with international human rights principles under which the right to petition for redress is an essential civil/political right in itself, civic and voter education programs should include electoral complaints and appeals, such as by voters about their registration.

	Do training programs for election administrators include sufficient information on how to properly handle election complaints and appeals?	Stress should be given in training programs for election administrators about their responsibility for the proper treatment of complaints and appeals, including the obligation to accept a properly submitted complaint/appeal and resolve it through a decision of the relevant election commission.	D. Finn, 2009
	Are training programs for election administrators and judges concerning electoral appeals accessible to the legal community, representatives of political parties and civil society, and the media?	It is important for judges to be fully aware of the law regarding electoral appeals, but it is essential that all the parties in the dispute resolution process operate on the basis of the same understandings, and there should be no "secret" judicial doctrines of a procedural or substantive nature.	

Observers

Observers	Are qualified NGOs accredited to field observers at polling stations and other electoral facilities, subject only to the requirement of maintaining good order there?	Registered NGOs that are qualified (through their charter and activities on human rights and/or elections) to sponsor election observers should be accredited to do so, unless there are well-founded reasons to doubt their objectivity or reasons for applying.	Declaration of Principles for International Observation, 2005
	In examining accreditation requests, may election administrators differentiate among nominally qualified organizations?	Electoral laws often do not permit administrators to differentiate among applicants, except at the field level to prevent overcrowding. Nonetheless, in the long run it may be possible to differentiate among such organizations based on their record of integrity and performance.	

	Should election contestants and administrators have the power to propose excluding observers who are not operating according to their code of conduct?	Normally, representatives of election contestants and other persons authorized to be present during the voting and other election operations may complain about the activities of observers as well as others present, and the relevant electoral body is obliged to consider their complaint. If the abuses reflect a pattern of activity by the organization more generally, a higher-level electoral body could withdraw the accreditation of its observers. The latter bodies could also receive appeals from actions about particular observers.

Media

Media	Is there a competent body, with adequate professional input and technical capacity, to consider complaints about compliance with media regulations during an election?	A specialized body, such as a media council, is best able to evaluate the specific issues related to media compliance – e.g., with respect to fairness, objectivity, and equal or equivalent treatment of campaigners. Such a body, if established on a permanent basis, would be in position to implement effective sanctions after the election. It should also have a number of realistic remedies for media violations, not just the extreme (and seldom applied) remedies of suspension or de-licensing during an election.

Voting and Counting

Voting and Counting	Are those persons authorized to be present during the voting and/or counting, and entitled to complain about irregularities or violations, clearly identified?	Typically, all those present (including members of the polling committee) during the voting and counting are entitled to submit a complaint, but often national observers are not entitled to pursue an appeal based on their complaint. (Consideration might be given to permitting them to do so, especially if such appeals by voters or groups of voters are not permitted.)	Declaration of Principles for International Observation, 2005
	Are all those authorized to be present permitted to do so, and do the conditions enable them to follow each step of the voting/counting process?	Authorized persons may be excluded only on grounds of overcrowding or disorderly conduct, and operations should be organized in a way that enables candidate/party representatives and observers to monitor the entire process.	Id.
	Is the officer presiding at the polling and/or counting required to accept complaints from persons who are authorized to submit them, and enter them into the logbook?	It is desirable to provide that, in cases in which the presiding officer does not accept and enter a complaint submitted by an authorized person, the complaint can be made instead to the next higher-level election body within a reasonable period of time.	Id.
	Are all authorized persons (except international observers) able to receive a certified copy of the results at the end of the counting?	In addition to helping verify the results, certified original copies are required as evidence in support of an appeal concerning the reported results.	Id.

	As a transparency measure, is the polling committee required to post the protocol of results at the polling facility at the end of the count?	Posted protocols by themselves increase public confidence in the reported results, and in connection with other methods (such as central publication of the protocols) can be used in connection with parallel vote tabulation and other techniques to cross-check and verify the count.	Id.
Appeals	In pursuing postelection appeals based on violations at polling stations, do appellants routinely seek as a remedy the annulment of results from the polling committee – a remedy that is generally granted only in a handful of cases?	Due to the general unwillingness of appeal bodies (including the courts) to grant the remedy of annulment of results, appellants may wish to consider instead requesting examination by higher-level election bodies or the courts of the election materials returned from the polling committees to attempt to determine the nature and effect of the alleged violation. If the higher-level election body or court, after being presented with sufficient cause, proceeds to authorize an examination of the records or a full recount, it might be possible to devise alternative remedies such as correction or adjustment of the results if the violation is established and its magnitude can be assessed.	

Tabulation

Intermediate Tabulation	Does the law provide for authorized persons, including observers, to attend the receipt of election materials (including protocols of the count) from polling stations, and discussion/correction of any inconsistencies?	The first-level body to consolidate (tabulate) the results from polling stations is a very busy place on election night. Numerous operations, including the receipt of forms and materials, analysis and if necessary correction of the protocols, discussion with presiding officers and among commission members, and entry of the data and completion of the tabulation forms, go on, often simultaneously. Nevertheless, there should be an open atmosphere, and authorized persons should have the opportunity to view the proceedings as fully as possible.	
	Do the law and regulations provide for all authorized persons to receive a certified copy of the completed tabulation form?	Official copies of the completed tabulation are important in verifying results in the district, as well as for evidence in the event of an appeal.	Id.
Final Tabulation	Are there adequate opportunity and conditions for authorized persons to attend the operations and proceedings of the central electoral authority related to the final tabulation of the results?	While working sessions of the central electoral authority – called to consider the tabulated results received from the intermediate level, as well as to resolve issues related to the accuracy of protocols of the original count – could be held privately (e.g., without media access), they should be open for monitoring by the representatives of political parties, independent candidacies, and national observers.	Id.

	Does the law or regulation require publishing (preferably Internet posting) of original as well as corrected protocols of the count, showing all handwritten entries and signatures/stamps?	International standards have long called for posting of original results of the count as received from the polling stations. Now the best practice is to post copies of the original and (if applicable) corrected protocols on the Internet, as scanned documents.
Appeals	In pursuing appeals from consolidation of the vote by intermediate and central electoral bodies, do appellants mainly seek annulment of results – either specific results from polling stations included in the tabulation protocol or the overall protocol (based on errors in the component results)?	Appellants at this stage might be better served by seeking examination or election materials and possible recount of the votes to be ordered by the courts, and either conducted by the relevant electoral bodies, or carried out specially under judicial supervision. Examination of original election materials and recounts of votes could lead to major changes in the reported results and would have less risk of disrupting an entire election, an action that most judges would prefer to avoid. It would be desirable to have specific statutory procedures for examination of election materials and recounts by intermediate electoral bodies. If possible, requests for such procedures to be initiated should be governed by liberal standards requiring a modicum of evidence and support by a less-than-majority of the membership of the electoral body receiving the request.

Results

Civil Law	Do the courts effectively communicate, and appellants against the results of elections understand, that the scope of judicial consideration in such cases is limited to reviewing the determinations of election administration and the lower courts of review on the application of the law to the facts found at the lower level, and that it does not include a new (de novo) consideration of factual matters?	For potential appellants in cases challenging the results of an election, this means that each factual complaint should be the basis of a previous appeal to election administration and the courts, for, while the higher court may review the factual determinations of the lower court, it may not take up new or additional factual claims.
	Does the court of final appeal in such cases have the power under law to appoint a special master or commission to review complex factual issues that have been properly brought before it?	It is desirable to establish such a mechanism as a means of working through complex claims concerning irregularities during an election and their effect on the results in time to bring the election to a timely conclusion. In situations in which there is a high degree of political tension, it might also be desirable to provide for international participation in such a mechanism on an advisory basis.

Common Law	Are the relevant procedural provisions in law (under the election law or other codes) clear concerning the responsibilities of appellants in seeing to it that proper notice is given and exceptions taken at the administrative and lower judicial level?	In many Commonwealth jurisdictions, elections may not be challenged except before a special election tribunal at the end of the election process. Even in these jurisdictions, however, care should be taken by appellants to file ongoing notices of their objections to the electoral proceedings; such objections can also advise the authorities of issues that may require attention. Even in jurisdictions where an explicit limitation against earlier election challenges does not apply, it is advisable to require clearly, through legislation and complaint/appeal regulations, that potential appellants record their exceptions to the process on a continuous basis. Such a measure would tend to avoid the courts accepting "interlocutory" appeals during the course of the election process.

Special Dispute Resolution

Transitional Dispute Resolution	How should election complaints/appeals be handled in transitional elections or following a failed election?	Special means of addressing election complaints and appeals are often required in post-conflict or other "transitional" situations with a high level of political tension and the potential for violence. Special approaches are also required after nontransitional situations in which the outcome of the election is not accepted.

Special Appeal Bodies	How should electoral complaints/appeals be handled in a post-conflict or other transitional situation in which electoral and dispute resolution institutions are damaged or weak?	In such situations it is often necessary to create autonomous electoral complaint/appeal mechanisms to handle complaints independently, or accept appeals from election administration.
International Mediation	How should conflict among the institutions of failed states be avoided during an electoral process?	Through peace agreements, leading to elections, it is desirable to provide for international mediation or other intervention in case conduct of the election is threatened by conflict among the institutions of the state.
Postelection Intervention	How should the international community respond to a serious political or humanitarian crisis following a failed election?	International intervention in such situations may be institutional or ad hoc, depending on the authorization and sponsorship of the activity. The mixed record of such interventions in Africa recently indicates that stronger regional and global frameworks for postelection response are needed.

APPENDIX A: References

Treaties and Other Legal Texts

Global

United Nations, International Covenant on Civil and Political Rights (ICCPR) and Optional Protocol (No. 1, allowing individuals to submit complaints to the Human Rights Committee), adopted by the U.N. General Assembly on Dec. 16, 1966, and entered into force March 23, 1976

Regional

Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention"), adopted Nov. 4, 1950, and entered into force Sept. 3, 1953, E.T.S. 005

American Convention on Human Rights (adopted November 22, 1969), entered into force July 18, 1978, 1144 U.N.T.S. 123, O.A.S. Treaty Series No. 36

African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986

African Union, African Charter on Democracy, Elections and Governance (adopted in Addis Ababa, Jan. 30, 2007), not entered into force

ECOWAS, Protocol on Democracy and Good Governance (Protocol to the ECOWAS Treaty supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security. Adopted Dakar, Senegal (Dec. 21, 2001); ECOWAS Protocol A/SP1/12/01.

Declarations, Resolutions, and Interpretations

Global

United Nations, Universal Declaration of Human Rights, U.N. General Assembly Res. 217 A (III) (Dec. 10, 1948)

U.N., Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. General Assembly Res. 53/144 (March 8, 1999), U.N. Doc. A/RES/53/144

U.N. Human Rights Committee, General Comment No. 25 of the United Nations Human Rights Committee on Article 25 of the International Covenant on Civil and Political Rights (July 12, 1996), U.N. Doc. CCPR/C/21/Rev.1/Add.7, General Comment No. 25 (General Comments)

U.N. Human Rights Committee, General Comment No. 31 [80]: Nature of the General Legal Obligation Imposed On States Parties to the Covenant (May 29, 2004), U.N. Doc. CCPR/C/21/REV.1/ADD.13 (General Comments)

U.N. Human Rights Committee, General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial (August 23, 2007), U.N. Doc. CCPR/C/GC/32

U.N. Commission on Human Rights, Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections; Framework for Future Efforts, Res. No. 1989/51 (March 7, 1989), Annex (Official Record of the Economic and Social Council, 1989, Supplement No. 2, U.N. Doc. No. E/1989/20, Chap. II, Sect. A

U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities, Draft General Principles on Freedom and Non-Discrimination in the Matter of Political Rights (Annex to Res. I [XIV], Fourteenth Session, 1962), U.N. Doc. E/CE.4/830-E/CN.4/Sub.2/218, para. 159

Regional

Organization for Security and Cooperation in Europe (OSCE), Second Conference on the Human Dimension of the CSCE (Copenhagen, June 5 – July 29, 1990), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE ("Copenhagen Document")

OSCE, Charter of Paris for a New Europe (Concluding Document of the CSCE Summit, Nov. 21, 1990)

OSCE, Concluding Document of Vienna: The Third Follow Up Meeting (Jan. 19, 1989)

European Commission for Democracy Through Law ("Venice Commission"), Council of Europe, (CoE/VC), Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report, adopted October 18-19, 2002, Opinion No. 190 (2002), CDL-AD 2002(23) (Strasbourg, Oct. 30, 2002)

Organization of American States (OAS), General Assembly, Inter-American Democratic Charter (Lima, September 22, 2001)

Reports

National Democratic Institute for International Affairs (NDI), Promoting Legal Frameworks for Democratic Elections: An NDI Guide for Developing Election Laws and Law Commentaries, by Patrick Merloe (Washington, 2008)

OSCE/ODIHR, Existing Commitments for Democratic Elections in OSCE Participating States; Daniel Finn, chief author (Warsaw, October 2003)

OSCE/ODIHR, Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System, OSCE Office for Democratic Institutions and Human Rights, by Denis Petit (Warsaw, 2000)

U.N. Center for Human Rights, Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections, Professional Training Series No. 2 (Geneva, 1994)

Other

CoE/VC & OSCE/ODIHR, "Joint Opinion on the Draft Law on Voters Lists of Croatia," H. Torfason & D. Finn, contributors, Venice Commission Op. No. 419/2007, CDL-AD(2007)030 (Strasbourg, July 16, 2007)

Independent Review Commission on the General Elections Held in Kenya on Dec. 27, 2007 (IREC), Report of the Independent Review Commission (Nairobi, Sept. 17, 2008)

EU Election Observation Mission (EUEOM) Final Report: Cambodia – Members of the National Assembly Elections, July 27, 2003 (Brussels, 2003)

EUEOM, Nicaragua Presidential and Parliamentary Elections 2006, Preliminary Statement (Managua, Nov. 6, 2006)

The Carter Center, Observing the 2006 Nicaragua Elections (May 2007)

EU Election Observation Mission (EUEOM), Republic of Sierra Leone, Presidential and Parliamentary Elections 2007, Preliminary Statement (Aug. 13, 2007)

EUEOM, Republic of Sierra Leone, Second Round of the Presidential Elections 2007, Preliminary Statement (Sept. 10, 2007

EUEOM, West Bank and Gaza 2005, Preliminary Statement (January 2005)

EUEOM, West Bank and Gaza 2006, Statement of Preliminary Conclusions and Findings (Jerusalem, Jan. 26, 2006)

OSCE/ODIHR Election Assessment Mission Report, Romania: Parliamentary and Presidential Elections, Nov. 28 and Dec. 12, 2004 (Warsaw, Feb. 14, 2005)

OSCE/ODIHR Election Observation Mission Report, Republic of Armenia: Parliamentary Elections, May 12, 2007 (Warsaw, Sept. 10, 2007)

OSCE/ODIHR Limited Election Observation Mission Report, Republic of Croatia: Parliamentary Elections, Nov. 25, 2007 (Warsaw, April 30, 2008)

OSCE/ODIHR Election Observation Mission Report, The Former Yugoslav Republic of Macedonia, Early Parliamentary Elections, June 1, 2008 (Warsaw, Aug. 20, 2008)

OSCE/ODIHR Election Observation Mission Report, Georgia: Parliamentary Elections, May 21, 2008 (Warsaw, Sept. 9, 2008)

Kingdom of Cambodia, Law on Elections of the National Assembly (LEMNA), as amended (December 2006)

Republic of Liberia, Constitution (1986), New Election Law (1986), and Electoral Reform Law (2004)

Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties (Accra, Aug. 18, 2003) (ACPA)

Federal Republic of Nigeria, An Act to Regulate the Conduct of Federal, State and Local Government Elections and to Repeal the Electoral Act 2001; and for Connected Purposes (Electoral Act, 2002)

United Kingdom, Northern Ireland Assembly (Elections) Order, Schedule 1, The Representation of the People Act 1983

Finn, D., OSCE Expert, "Complaints and Appeals," in Council of Europe (Tbilisi Office) and OSCE Mission to Georgia book, Georgia, Presidential and Parliamentary Elections 2008: Lessons Learned (forthcoming)

Finn, D., OSCE Expert, Electoral Dispute Resolution in Georgia: The Extraordinary Presidential Election and Beyond, Report to the OSCE Mission to Georgia (submitted to Georgian government, unpublished; April 4, 2008)

Finn, D., Consultant, Legislative Issues Related to the Presidential and Parliamentary Elections in Afghanistan, paper presented at a UNDP Lessons-Learned Workshop (Kabul, May 27, 2007)

Lagos, E. & Rudy, T.D., "In Defense of Democracy," 35 Inter-American Law Review, 2:283-309 (June 2004)

International Foundation for Election Systems (IFES), Romania: Technical Assistance to the Central Election Bureau, by Daniel Finn (Washington, November 1996), 33 pp. & 60 pp. annexes

APPENDIX B: Excerpts from Treaties and Other Legal Texts

Global

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
(Adopted Dec. 16, 1966, entered into force March 23, 1976)

Article 25

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.

Article 2.3.

Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 14.1

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons or morals, public order *(ordre publique)* or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where he interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Article 5

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: ….

a. 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;
b. Other civil rights, in particular … (viii.) the right to freedom of opinion and expression.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

Article 7

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.

Regional

EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS
(Adopted Nov. 4, 1950, entered into force Sept. 3, 1953)

Article 13. Right to an Effective Remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

PROTOCOL No. 1 TO THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Article 3

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure free expression of the opinion of the people in the choice of the legislature.

AMERICAN CONVENTION ON HUMAN RIGHTS
(Entered into force July 18, 1978)

Article 23. Right to Participate in Government

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.

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS
(Adopted at an OAU Meeting in Banjul, 1982, entered into force 1986)

Article 7.

1. Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force …

Article 13.

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.

Article 26.

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE
(Adopted 2007, not in force)

Democratic Elections

Article 17

State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union's Declaration on the Principles Governing Democratic Elections in Africa.

To this end, State Parties shall:
1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
2. Establish and strengthen national mechanisms that redress election related disputes in a timely manner.
3. Ensure fair and equitable access by contesting parties and candidates to state controlled media during elections.
4. Ensure that there is a binding code of conduct governing legally recognized political stakeholders, government and other political actors prior, during and after elections. The code shall include a commitment by political stakeholders to accept the results of the election or challenge them in through exclusively legal channels.

Article 18

1. State Parties may request the Commission, through the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund, to provide advisory services or assistance for strengthening and developing their electoral institutions and processes.
2. The Commission may at any time, in consultation with the State Party concerned, send special advisory missions to provide assistance to that State Party for strengthening its electoral institutions and processes.

Article 19

1. Each State Party shall inform the Commission of scheduled elections and invite it to send an electoral observer mission.

PROTOCOL ON DEMOCRACY AND GOOD GOVERNANCE

Protocol to the ECOWAS Treaty supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security

(Adopted in Dakar, Dec. 21, 2001)

CHAPTER I: PRINCIPLES

Article 1

The following shall be declared as constitutional principles shared by all member states:

h) The rights set out in the African Charter on Human and Peoples' Rights and other international instruments shall be guaranteed in each of the ECOWAS member states; each individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument on human rights, to ensure the protection of his/her rights. In the absence of a court of special jurisdiction, the present Supplementary Protocol shall be regarded as giving the necessary powers to common or civil law judicial bodies.

i) Political parties shall be formed and shall have the right to carry out their activities freely, within the limits of the law. Their formation and activities shall not be based on ethnic, religious, regional or racial considerations. They shall participate freely and without hindrance or discrimination in any electoral process. The freedom of the opposition shall be guaranteed. Each member state may adopt a system for financing political parties, in accordance with criteria set under the law.

j) The freedom of association and the right to meet and organise peaceful demonstrations shall also be guaranteed.

ELECTIONS

Article 2

1. No substantial modification shall be made to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of political actors.

2. All the elections shall be organised on the dates or at periods fixed by the Constitution or the electoral laws.

3. Member states shall take all appropriate measures to ensure that women have equal rights with men to vote and be voted for in elections, to participate in the formulation of government policies and the implementation thereof and to hold public offices and perform public functions at all levels of governance.

Article 3

The bodies responsible for organising the elections shall be independent or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies.

Article 4

1. Each ECOWAS member state shall ensure the establishment of a reliable registry of births and deaths. A central registry shall be established in each member state.

2. Member states shall cooperate in this area with a view to exchanging experiences and where necessary providing technical assistance to each other in the production of reliable voters' lists.

Article 5

The voters' lists shall be prepared in a transparent and reliable manner with the collaboration of the political parties and voters who may have access to them whenever the need arises.

Article 6

The preparation and conduct of elections and the announcement of results shall be done in a transparent manner.

Article 7

Adequate arrangements shall be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results.

Article 8

Member states shall use the services of civil society organisations involved in electoral matters to educate and enlighten the public on the need for peaceful elections devoid of all acts of violence.

Article 9

The party and/or candidate who loses the elections shall concede defeat to the political party and/or candidate finally declared the winner, following the guidelines and within the deadline stipulated by the law.

Article 10

All holders of power at all levels shall refrain from acts of intimidation or harassment against defeated candidates or their supporters.

ELECTION MONITORING AND ECOWAS ASSISTANCE

Article 12

1. At the request of any member state, ECOWAS may provide assistance in the conduct of any election.

2. Such assistance may take any form.

3. Also, ECOWAS may dispatch a monitoring team to the country concerned for the purpose of monitoring the elections.

4. The decision in this respect shall be taken by the Executive Secretary.

Article 13

1. As elections in a member state approach, the Executive Secretary shall dispatch a fact-finding Mission to the member state conducting an election.

2. This mission may be followed by an exploratory Mission aimed at:
   - Collecting all texts governing the elections concerned;
   - Gathering all information on the conditions under which the elections shall be conducted;
   - Collecting all pertinent information relating to the contesting candidates or political parties;
   - Meeting all candidates, political party leaders, government authorities and other competent bodies;
   - Assessing the status of preparations for the elections;
   - Gathering any other useful information that may provide a clear picture of the situation.

Article 15

1. The Observer/Supervisory Mission, with the documents collected by the exploratory Mission and the report prepared by the Mission, shall arrive in the member state concerned at least forty-eight hours prior to the conduct of the elections.

2. The Observer/Supervisory Mission may be preceded by ECOWAS staff who shall prepare the meetings to be held between the Mission and the national authorities.

3. The Mission shall be expected to hold consultations with the relevant authorities of the host government for an exchange of views and in order to determine the mode of deployment in the host member state.

4. It may establish cooperation links with NGO or any other observer team while maintaining its autonomy.

5. The members of the Mission shall show restraint and refrain from making any individual statement. Any statement shall be made collectively and on behalf of the Mission by the team leader or a spokesperson appointed for this purpose.

Article 16

1. The Mission shall remain in the country throughout the election period and until the election results are announced.

2. The Mission shall also submit a report to the Executive Secretary.

3. The Report shall comprise:
   - The Mission's own observations;
   - Statements by witnesses;
   - Its assessment of the conduct of the elections from the point of view of the national laws governing the elections and the universal principles in electoral matters;
   - Its recommendations for the improvement of the conduct of future elections and monitoring Missions.

Article 18

The report shall be forwarded by the Executive Secretary, together with his own observations, if necessary, to the Mediation and Security Council for recommendations to be made to the country concerned and/or to all member states, and for measures to be taken, where necessary.

MODALITIES FOR IMPLEMENTATION AND SANCTIONS

Article 45

1. In the event that democracy is abruptly brought to an end by any means or where there is massive violation of human rights in a member state, ECOWAS may impose sanctions on the state concerned.

2. The sanctions which shall be decided by the authority, may take the following forms, in increasing order of severity:

   - Refusal to support the candidates presented by the member state concerned for elective posts in international organisations;
   - Refusal to organise ECOWAS meetings in the member state concerned;
   - Suspension of the member state concerned from all ECOWAS decision-making bodies. During the period of the suspension the member state shall be obliged to pay its dues for the period.

3. During the period of suspension, ECOWAS shall continue to monitor, encourage and support the efforts being made by the suspended member state to return to normalcy and constitutional order.
4. On the recommendation of the Mediation and Security Council, a decision may be taken at the appropriate time to proceed as stipulated in article 45 of the Protocol of 10 December 1999 *[relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security]*.

APPENDIX C: Excerpts from International Declarations, Resolutions and Interpretations

Global

UNIVERSAL DECLARATION OF HUMAN RIGHTS
(Adopted by the U.N. General Assembly, Dec. 10, 1948)

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 21

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 held by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

DECLARATION ON THE RIGHT AND RESPONSIBILITY OF INDIVIDUALS, GROUPS AND ORGANS OF SOCIETY TO PROMOTE AND PROTECT UNIVERSALLY RECOGNIZED HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

U.N. General Assembly Res. 53/144 (March 8, 1999)

Article 1

Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.

Article 2

1. Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms, *inter alia*, by adopting such steps as may be necessary to create all conditions necessary in the social, economic, political and other fields, as well as the legal guarantees required to ensure that all persons under its jurisdiction, individually and in association with others, are able to enjoy all those rights and freedoms in practice.

2. Each State shall adopt such legislative, administrative and other steps as may be necessary to ensure that the rights and freedoms referred to in the present Declaration are effectively guaranteed.

Article 5

For the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels:

(*a*) To meet or assemble peacefully;
(*b*) To form, join and participate in non-governmental organizations, associations or groups;
(*c*) To communicate with non-governmental or intergovernmental organizations.

Article 8

1. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.

2. This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

Article 9

1. In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

2. To this end, everyone whose rights or freedoms are allegedly violated has the right, either in person or through legally authorized representation, to complain to and have that complaint promptly reviewed in a public hearing before an independent, impartial and competent judicial or other authority established by law and to obtain from such an authority a decision, in accordance with law, providing redress, including any compensation due, where there has been a violation of that person's rights or freedoms, as well as enforcement of the eventual decision and award, all without undue delay.

3. To the same end, everyone has the right, individually and in association with others, *inter alia*:

(*a*) To complain about the policies and actions of individual officials and governmental bodies with regard to violations of human rights and fundamental freedoms, by petition or other appropriate means, to competent domestic judicial, administrative or legislative authorities or any other competent authority provided for by the legal system of the State, which should render their decision on the complaint without undue delay;

(*b*) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

(*c*) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms.

4. To the same end, and in accordance with applicable international instruments and procedures, everyone has the right, individually and in association with others, to unhindered access to and communication with international bodies with general or special competence to receive and consider communications on matters of human rights and fundamental freedoms.

5. The State shall conduct a prompt and impartial investigation or ensure that an inquiry takes place whenever there is reasonable ground to believe that a violation of human rights and fundamental freedoms has occurred in any territory under its jurisdiction.

Article 8

1. Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, to participation in the government of his or her country and in the conduct of public affairs.

2. This includes, *inter alia*, the right, individually and in association with others, to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

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U.N. COMMISSION ON HUMAN RIGHTS RESOLUTION, ENHANCING THE EFFECTIVENESS OF THE PRINCIPLE OF PERIODIC AND GENUINE ELECTIONS; FRAMEWORK FOR FUTURE EFFORTS
(March 7, 1989, Annex)

III. Operational Aspects: National Institutions.

National institutions should ensure universal and equal suffrage, as well as impartial administration. There is particular need for independent supervision, appropriate voter registration, reliable balloting procedures and methods for preventing electoral fraud and resolving disputes**.**

GENERAL COMMENT No. 25 OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE ON ARTICLE 25 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
"THE RIGHT TO PARTICIPATE IN PUBLIC AFFAIRS, VOTING RIGHTS AND THE RIGHT TO EQUAL ACCESS TO PUBLIC SERVICE"
(Adopted July 12, 1996)

1. Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies

at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.

2. … By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol.

3. In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of "every citizen". … No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. … State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.

4. Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria…. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable….

5. The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels. The allocation of powers and the means by which individual citizens exercise the right to participate in the conduct of public affairs protected by article 25 should be established by the constitution and other laws.

6. …Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in article 2, paragraph 1, and no unreasonable restrictions should be imposed.

7. Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b).

8. Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

9. Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections 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. The rights and obligations provided for in paragraph (b) should be guaranteed by law.

10. The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions. …

11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as

well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

12. Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement …

13. State reports should describe the rules governing the right to vote, and the … factors which impede citizens from exercising the right to vote[,] and the positive measures which have been adopted to overcome these factors.

14. … States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

15. The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation….

16. Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.

17. The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election.

18. State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. ... The legal grounds and procedures for the removal of elected office holders should [also] be described.

19. 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 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 ... The results of genuine elections should be respected and implemented.

20. An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies 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. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their

agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.

21. Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.

22. State reports should indicate what measures they have adopted to guarantee genuine, free and periodic elections and how their electoral system or systems guarantee and give effect to the free expression of the will of the electors. … Reports should also describe the laws and procedures which ensure that the right to vote can in fact be freely exercised by all citizens and indicate how the secrecy, security and validity of the voting process are guaranteed by law. The practical implementation of these guarantees in the period covered by the report should be explained.

23. Subparagraph (c) of article 25 deals with the right and the opportunity of citizens to have access on general terms of equality to public service positions. To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens.

Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1.

24. State reports should describe … how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent.

25. In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.

26. The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.

27. Having regard to the provision of article 5, paragraph 1, of the Covenant, any rights recognized and protected by article 25 may not be interpreted as implying a right to act or as validating any act aimed at the destruction or limitation of the rights and freedoms protected by the Covenant to a greater extent than what is provided for in the present Covenant.

UNITED NATIONS HUMAN RIGHTS COMMITTEE
GENERAL COMMENT NO. 31 [80]:
NATURE OF THE GENERAL LEGAL OBLIGATION
IMPOSED ON STATES PARTIES TO THE COVENANT

U.N. DOC. CCPR/C/21/REV.1/ADD.13. (GENERAL COMMENTS)
MAY 29, 2004

3. Article 2 defines the scope of the legal obligations undertaken by States Parties to the Covenant. A general obligation is imposed on States Parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to their jurisdiction (see paragraph 10 …). Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, States Parties are required to give effect to the obligations under the Covenant in good faith.

4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level - national, regional or local - are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Although article 2, paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

5. The article 2, paragraph 1, obligation to respect and ensure the rights recognized by ~~in~~ the Covenant has immediate effect for all States parties. Article 2, paragraph 2, provides the overarching framework within which the rights specified in the Covenant are to be promoted and protected. The Committee has as a consequence previously indicated in its General Comment 24 that reservations to article 2, *[sic]* would be incompatible with the Covenant when considered in the light of its objects and purposes.

6. The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.

7. Article 2 requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations. The Committee believes that it is important to raise levels of awareness about the Covenant not only among public officials and State agents but also among the population at large.

8. The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against

acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities. States are reminded of the interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3. The Covenant itself envisages in some articles certain areas where there are positive obligations on States Parties to address the activities of private persons or entities. For example, the privacy-related guarantees of article 17 must be protected by law. It is also implicit in article 7 that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. In fields affecting basic aspects of ordinary life such as work or housing, individuals are to be protected from discrimination within the meaning of article 26.

9. The beneficiaries of the rights recognized by the Covenant are individuals. Although, with the exception of article 1, the Covenant does not mention the rights of legal persons or similar entities or collectivities, many of the rights recognized by the Covenant, such as the freedom to manifest one's religion or belief (article 18), the freedom of association (article 22) or the rights of members of minorities (article 27), may be enjoyed in community with others. The fact that the competence of the Committee to receive and consider communications is restricted to those submitted by or on behalf of individuals (article 1 of the Optional Protocol) does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights.

13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant's substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts, by incorporation of the Covenant into national law. The Committee takes the view, however, that Covenant guarantees may receive enhanced protection in those States where the Covenant is automatically or through specific incorporation part of the domestic legal order. The Committee invites those States Parties in which the Covenant does not form part of the domestic legal order to consider incorporation of the Covenant to render it part of domestic law to facilitate full realization of Covenant rights as required by article 2.

14. The requirement under article 2, paragraph 2, to take steps to give effect to the Covenant rights is unqualified and of immediate effect. A failure to comply with this obligation cannot be justified by reference to political, social, cultural or economic considerations within the State.

15. Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have

been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

17. In general, the purposes of the Covenant would be defeated without an obligation integral to article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, it has been a frequent practice of the Committee in cases under the Optional Protocol to include in its Views the need for measures, beyond a victim-specific remedy, to be taken to avoid recurrence of the type of violation in question. Such measures may require changes in the State Party's laws or practices.

18. Where the investigations referred to in paragraph 15 reveal violations of certain Covenant rights, States Parties must ensure that those responsible are brought to justice. As with failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant. These obligations arise notably in respect of those violations recognized as criminal under either domestic or international law, such as torture and similar cruel, inhuman and degrading treatment (article 7), summary and arbitrary killing (article 6) and enforced disappearance (articles 7 and 9 and, frequently, 6). Indeed, the problem of impunity for these violations, a matter of sustained concern by the Committee, may well be an important contributing element in the recurrence of the violations. When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity (see Rome Statute of the International Criminal Court, article 7).

Accordingly, where public officials or State agents have committed violations of the Covenant rights referred to in this paragraph, the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties (see General Comment 20 (44)) and prior legal immunities and indemnities. Furthermore, no official status justifies persons who may be accused of responsibility for such violations being held immune from legal responsibility. Other impediments to the establishment of legal responsibility should also be removed, such as the defence of obedience to superior orders or unreasonably short periods of statutory limitation in cases where such limitations are applicable. States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.

19. The Committee further takes the view that the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.

20. Even when the legal systems of States parties are formally endowed with the appropriate remedy, violations of Covenant rights still take place. This is presumably attributable to the failure of the remedies to function effectively in practice. Accordingly, States parties are requested to provide information on the obstacles to the effectiveness of existing remedies in their periodic reports.

U.N. HUMAN RIGHTS COMMITTEE
GENERAL COMMENT NO. 32 –
ARTICLE 14: RIGHT TO EQUALITY BEFORE COURTS AND TRIBUNALS AND TO A FAIR TRIAL

Aug. 23, 2007, U.N. Doc. CCPR/C/GC/32

I. GENERAL REMARKS

2. The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Article 14 of the Covenant aims at ensuring the

proper administration of justice, and to this end guarantees a series of specific rights.

3. Article 14 is of a particularly complex nature, combining various guarantees with different scopes of application. The first sentence of paragraph 1 sets out a general guarantee of equality before courts and tribunals that applies regardless of the nature of proceedings before such bodies. The second sentence of the same paragraph entitles individuals to a fair and public hearing by a competent, independent and impartial tribunal established by law, if they face any criminal charges or if their rights and obligations are determined in a suit at law. In such proceedings the media and the public may be excluded from the hearing only in the cases specified in the third sentence of paragraph 1.

* * * * *

4. Article 14 contains guarantees that States parties must respect, regardless of their legal traditions and their domestic law. While they should report on how these guarantees are interpreted in relation to their respective legal systems, the Committee notes that it cannot be left to the sole discretion of domestic law to determine the essential content of Covenant guarantees.

5. While reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would be incompatible with the object and purpose of the Covenant.

6. While article 14 is not included in the list of non-derogable rights of article 4, paragraph 2 of the Covenant, States derogating from normal procedures required under article 14 in circumstances of a public emergency should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. The guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. * * * * * Deviating from fundamental principles of fair trial … is prohibited at all times.

II. EQUALITY BEFORE COURTS AND TRIBUNALS

7. The first sentence of article 14, paragraph 1 guarantees in general terms the right to equality before courts and tribunals. This guarantee not only applies to courts and tribunals addressed in the second sentence of this paragraph of article 14, but must also be respected whenever domestic law entrusts a judicial body with a judicial task.

8. The right to equality before courts and tribunals, in general terms, guarantees, in addition to the principles mentioned in the second sentence of Article 14, paragraph 1, those of equal access and equality of arms, and ensures that the parties to the proceedings in question are treated without any discrimination.

9. Article 14 encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. * * * * * A situation in which an individual's attempts to access the competent courts or tribunals are systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from bringing suit against any other persons such as by reason of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

10. The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way. While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings in paragraph 3 (d), States are encouraged to provide free legal aid in other cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so. * * * * *

11. Similarly, the imposition of fees on the parties to proceedings that would de facto prevent their access to justice might give rise to issues under article 14, paragraph 1. In particular, a rigid duty under law to award costs to a winning party without consideration of the implications thereof or without providing legal aid may have a deterrent effect on the ability of persons to pursue the vindication of their rights under the Covenant in proceedings available

to them.

12. The right of equal access to a court, embodied in article 14, paragraph 1, concerns access to first instance procedures and does not address the issue of the right to appeal or other remedies.

13. The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds**,** not entailing actual disadvantage or other unfairness to the defendant. There is no equality of arms if, for instance**,** only the prosecutor, but not the defendant, is allowed to appeal a certain decision. The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party. In exceptional cases, it also might require that the free assistance of an interpreter be provided where otherwise an indigent party could not participate in the proceedings on equal terms or witnesses produced by it be examined.

14. Equality before courts and tribunals also requires that similar cases are dealt with in similar proceedings. If, for example, exceptional criminal procedures or specially constituted courts or tribunals apply in the determination of certain categories of cases, objective and reasonable grounds must be provided to justify the distinction.

III. FAIR AND PUBLIC HEARING BY A COMPETENT, INDEPENDENT AND IMPARTIAL TRIBUNAL

15. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is guaranteed, according to the second sentence of article 14, paragraph 1, in cases regarding the determination of criminal charges against individuals or of their rights and obligations in a suit at law. Criminal charges … may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.

16. The concept of determination of rights and obligations "in a suit at law" (*de caractère civill*) is more complex * * * * *. The Committee notes that the concept of a "suit at law" or its equivalents in other language texts is based on the nature of the right in question rather than on the status of one of the parties or the particular forum provided by domestic legal systems for the determination of particular rights. The concept encompasses (a) judicial procedures aimed at determining rights and obligations * * * * * in the area of private law, as well as (b) equivalent notions in the area of administrative law … In addition, it may (c) cover other procedures which, however, must be assessed on a case by case basis in the light of the nature of the right in question.

17. On the other hand, the right to access a court or tribunal as provided for by article 14, paragraph 1, second sentence, does not apply where domestic law does not grant any entitlement to the person concerned. * * * * * Although there is no right of access to a court or tribunal as provided for by article 14, paragraph 1, second sentence, in [such] cases, other procedural guarantees may still apply.

18. The notion of a "tribunal" in article 14, paragraph 1 designates a body, regardless of its denomination, that is established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature. * * * * * Similarly, whenever rights and obligations in a suit at law are determined, this must be done at least at one stage of the proceedings by a tribunal within the meaning of this sentence. The failure of a State party to establish a competent tribunal to determine such rights and obligations or to allow access to such a tribunal in specific cases would amount to a violation of article 14 if such limitations are not based on domestic legislation, are not necessary to pursue legitimate aims such as the proper administration of justice, or are based on exceptions from jurisdiction deriving from international law such, for example**,** as immunities, or if the access left to an individual would be limited to an extent that would undermine the very essence of the right.

19. The requirement of competence, independence and impartiality of a tribunal in the sense of article 14, paragraph 1, is an absolute right that is not subject to any exception. The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from

political interference by the executive branch and legislature. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.31 It is necessary to protect judges against conflicts of interest and intimidation**.** In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law.

21. The requirement of impartiality has two aspects. First, judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial. For instance, a trial substantially affected by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be impartial.

22. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. * * * * *

25. The notion of fair trial includes the guarantee of a fair and public hearing. Fairness of proceedings entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. A hearing is not fair if, for instance, the defendant in criminal proceedings is faced with the expression of a hostile attitude from the public or support for one party in the courtroom that is tolerated by the court, thereby impinging on the right to defence, or is exposed to other manifestations of hostility with similar effects. Expressions of racist attitudes by a jury47 that are tolerated by the tribunal, or a racially biased jury selection are other instances which adversely affect the fairness of the procedure.

26. Article 14 guarantees procedural equality and fairness only and cannot be interpreted as ensuring the absence of error on the part of the competent tribunal.48 It is generally for the courts of States parties to the Covenant to review facts and evidence, or the application of domestic legislation, in a particular case, unless it can be shown that such evaluation or application was clearly arbitrary or amounted to a manifest error or denial of justice, or that the court otherwise violated its obligation of independence and impartiality. * * * * *

27. An important aspect of the fairness of a hearing is its expeditiousness. … [D]elays in civil proceedings that cannot be justified by the complexity of the case or the behavior of the parties detract from the principle of a fair hearing enshrined in paragraph 1 of this provision. Where such delays are caused by a lack of resources and chronic under-funding, to the extent possible supplementary budgetary resources should be allocated for the administration of justice.

28. All trials in criminal matters or related to a suit at law must in principle be conducted orally and publicly. The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Courts must make information regarding the time and venue of the oral hearings available to the public and provide for adequate facilities for the attendance of interested members of the public, within reasonable limits, taking into account, inter alia, the potential interest in the case and the duration of the oral hearing. The requirement of a public hearing does not necessarily apply to all appellate proceedings which may take place on the basis of written presentations, or to pre-trial decisions made by prosecutors and other public authorities.

29. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. Apart from such exceptional circumstances, a hearing must be open to the general public, including members of the media, and must not, for instance, be limited to a particular category of persons. Even in cases in which the public is excluded from the trial, the judgment, including the essential findings, evidence and legal reasoning must be made public, except where the interest of juvenile persons otherwise requires, or the proceedings concern matrimonial disputes or the guardianship of children.

VII. REVIEW BY A HIGHER TRIBUNAL

46. Article 14, paragraph 5 [on right of appeal from criminal conviction] does not apply to procedures determining rights and obligations in a suit at law or any other procedure not being part of a criminal appeal process, such as constitutional motions.

X. RELATIONSHIP OF ARTICLE 14 WITH OTHER PROVISIONS OF THE COVENANT

58. As a set of procedural guarantees, article 14 of the Covenant often plays an important role in the implementation of the more substantive guarantees of the Covenant that must be taken into account in the context of determining criminal charges and rights and obligations of a person in a suit at law. In procedural terms, the relationship with the right to an effective remedy provided for by article 2, paragraph 3 of the Covenant is relevant. In general, this provision needs to be respected whenever any guarantee of article 14 has been violated. However, as regards the right to have one's conviction and sentence reviewed by a higher tribunal, article 14, paragraph 5 of the Covenant is a *lex specialis* in relation to article 2, paragraph 3 when invoking the right to access a tribunal at the appeals level.

64. As regards the right to have access to public service on general terms of equality as provided for in article 25 (c) of the Covenant, a dismissal of judges in violation of this provision may amount to a violation of this guarantee, read in conjunction with article 14, paragraph 1providing for the independence of the judiciary.

65. Procedural laws or their application that make distinctions based on any of the criteria listed in article 2, paragraph 1 or article 26, or disregard the equal right of men and women, in accordance with article 3, to the enjoyment of the guarantees set forth in article 14 of the Covenant, not only violate the requirement of paragraph 1 of this provision that "all persons shall be equal before the courts and tribunals," but may also amount to discrimination.

[Footnotes omitted.]

INTER-PARLIAMENTARY COUNCIL (COUNCIL OF THE INTER-PARLIAMENTARY UNION) DECLARATION ON CRITERIA FOR FREE AND FAIR ELECTIONS (Paris, March 26, 1994)

2 –Voting and elections rights

(4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

4 – Candidature, Party and Campaign Rights and Responsibilities

(6) Every individual and every political party has the right to the protection of the law and to a remedy for violation of political and electoral rights.
(8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.

5 – The rights and responsibilities of States

(9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the Courts.

DRAFT GENERAL PRINCIPLES ON FREEDOM AND NON-DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS
(Annex to Res. I [XIV] of the U.N. Sub-commission on Prevention of Discrimination and Protection of Minorities, Fourteenth Session, 1962)

VIII. Genuine Character of Elections and Other Public Consultations

(d) The conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be supervised by authorities whose independence and impartiality are ensured and whose decisions are subject to appeal to the judicial authorities or other independent and impartial bodies.

XIX. Recourse to independent tribunals

Any denial or violation of these rights and freedoms shall entitle the aggrieved person or persons to recourse to independent and impartial tribunals.

Regional

DOCUMENT OF THE COPENHAGEN MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE (JUNE 29, 1990)

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1) free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives; * * * * *
(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;
(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;
(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured; * * * *

(6) The participating States declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government. The participating States will accordingly respect the right of their citizens to take part in the governing of their country, either directly or through representatives freely chosen by them through fair electoral processes. * * * * *

(7) To ensure that the will of the people serves as the basis of the authority of government,
the participating States will

(7.1) - hold free elections at reasonable intervals, as established by law;
(7.2) - permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;
(7.3) - guarantee universal and equal suffrage to adult citizens;
(7.4) - ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;
(7.5) - respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;

(7.6) - respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;
(7.7) - ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;
(7.8) - provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;
(7.9) - ensure that the candidates who obtain the necessary number of votes required by the law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

(8) The participating States consider that the presence of observers both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.

[CSCE] CONCLUDING DOCUMENT OF VIENNA: THE THIRD FOLLOW-UP MEETING (JAN. 19, 1989)

(13.9) - ensure that effective remedies as well as full information about them are available to those who claim that their human rights and fundamental freedoms have been violated; they will, *inter alia,* effectively apply the following remedies:
- the right of the individual to appeal to executive, legislative, judicial or administrative organs;
- the right to a fair and public hearing within a reasonable time before an independent and impartial tribunal, including the right to present legal arguments and to be represented by legal counsel of one's choice;
- the right to be promptly and officially informed of the decision taken on any appeal, including the legal grounds on which this decision was based. This information will be provided as a rule in writing and, in any event, in a way that will enable the individual to make effective use of further available remedies.

DOCUMENT OF THE MOSCOW MEETING OF THE CONFERENCE ON THE HUMAN DIMENSION OF THE CSCE (OCT. 3, 1991)

(18.2) Everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity.
(18.3) To the same end, there will be effective means of redress against administrative regulations for individuals affected thereby.
(18.4) The participating States will endeavour to provide for judicial review of such regulations and decisions.
(19) The participating States
(19.1) - will respect the internationally recognized standards that relate to the independence of judges and legal practitioners and the impartial operation of the public judicial service including, inter alia, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights;
(19.2) - will, in implementing the relevant standards and commitments, ensure that the independence of the judiciary is guaranteed and enshrined in the constitution or the law of the country and is respected in practice, paying particular attention to the Basic Principles on the Independence of the Judiciary * * * * *

AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN
(Adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948)

Right to vote and to participate in government.

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

INTER-AMERICAN DEMOCRATIC CHARTER

(Adopted by OAS General Assembly, Lima, Sept. 11, 2001)

DEMOCRACY AND THE INTER-AMERICAN SYSTEM

Article 1.

The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. * * * * *

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.

STRENGTHENING AND PRESERVATION OF DEMOCRATIC INSTITUTIONS

Article 17

When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system.

Article 18

When situations arise in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and, where necessary, may adopt decisions for the preservation of the democratic system and its strengthening.

Article 19

Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.

DEMOCRACY AND ELECTORAL OBSERVATION MISSIONS

Article 23

Member states are responsible for organizing, conducting, and ensuring free and fair electoral processes.

Member states, in the exercise of their sovereignty, may request that the Organization of American States provide advisory services or assistance for strengthening and developing their electoral institutions and processes, including sending preliminary missions for that purpose.

Article 24

The electoral observation missions shall be carried out at the request of the member state concerned. To that end, the government of that state and the Secretary General shall enter into an agreement establishing the scope and coverage of the electoral observation mission in question. The member state shall guarantee conditions of security, free access to information, and full cooperation with the electoral observation mission.

Electoral observation missions shall be carried out in accordance with the principles and norms of the OAS. The Organization shall ensure that these missions are effective and independent and shall provide them with the necessary resources for that purpose. They shall be conducted in an objective, impartial, and transparent manner and with the appropriate technical expertise.

Electoral observation missions shall present a report on their activities in a timely manner to the Permanent Council, through the General Secretariat.

Article 25

The electoral observation missions shall advise the Permanent Council, through the General Secretariat, if the necessary conditions for free and fair elections do not exist.

The Organization may, with the consent of the state concerned, send special missions with a view to creating or improving said conditions.

OAU/AU DECLARATION ON THE PRINCIPLES GOVERNING DEMOCRATIC ELECTIONS IN AFRICA - AHG/Decl. 1 (XXXVIII), 2002

Agree and endorse the following Principles Governing Democratic Elections in Africa:

II. PRINCIPLES OF DEMOCRATIC ELECTIONS

1. Democratic elections are the basis of the authority of any representative government;
2. Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development;
3. The holding of democratic elections is an important dimension in conflict prevention, management and resolution;
4. Democratic elections should be conducted:
a. freely and fairly;
b. under democratic constitutions and in compliance with supportive legal instruments;
c. under a system of separation of powers that ensures in particular, the independence of the judiciary;
d. at regular intervals, as provided for in National Constitutions;
e. by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics;

III. RESPONSIBILITIES OF THE MEMBER STATES

We commit our Governments to:

a. take necessary measures to ensure the scrupulous implementation of the above principles, in accordance with the constitutional processes of our respective countries;

b. establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters, compilation of voters' registers, etc would be addressed;
c. establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
d. safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes;
e. promote civic and voters' education on the democratic principles and values in close cooperation with the civil society groups and other relevant stakeholders;
f. take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security;
g. ensure the availability of adequate logistics and resources for carrying out democratic elections, as well as ensure that adequate provision of funding for all registered political parties to enable them organise their work, including participation in electoral process;
h. ensure that adequate security is provided to all parties participating in elections;
i. ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/other observers/monitors;
j. encourage the participation of African women in all aspects of the electoral process in accordance with the national laws.

IV. ELECTIONS: RIGHTS AND OBLIGATIONS

1. We reaffirm the following rights and obligations under which democratic elections are conducted:
2. Every citizen shall have the right to participate freely in the government of his or her country, either directly or through freely elected representatives in accordance with the provisions of the law.
3. Every citizen has the right to fully participate in the electoral processes of the country, including the right to vote or be voted for, according to the laws of the country and as guaranteed by the Constitution, without any kind of discrimination.
4. Every citizen shall have the right to free association and assembly in accordance with the law.
5. Every citizen shall have the freedom to establish or to be a member of a political party or Organization in accordance with the law.
6. Individuals or political parties shall have the right to freedom of movement, to campaign and to express political opinions with full access to the media and information within the limits of the laws of the land.
7. Individual or political parties shall have the right to appeal and to obtain timely hearing against all proven electoral malpractices to the competent judicial authorities in accordance with the electoral laws of the country.
8. Candidates or political parties shall have the right to be represented at polling and counting stations by duly designated agents or representatives.
9. No individual or political party shall engage in any act that may lead to violence or deprive others of their constitutional rights and freedoms. Hence all stakeholders should refrain from, among others, using abusive language and/or incitement to hate or defamatory allegations and provocative language. These acts should be sanctioned by designated electoral authorities.
10. All stakeholders in electoral contests shall publicly renounce the practice of granting favours, to the voting public for the purpose of influencing the outcome of elections.
11. In covering the electoral process, the media should maintain impartiality and refrain from broadcasting and publishing abusive language, incitement to hate, and other forms of provocative language that may lead to violence.
12. Every candidate and political party shall respect the impartiality of the public media by undertaking to refrain from any act which might constrain or limit their electoral adversaries from using the facilities and resources of the public media to air their campaign messages.
13. Every individual and political party participating in elections shall recognize the authority of the Electoral Commission or any statutory body empowered to oversee the electoral process and accordingly render full cooperation to such a Commission/Body in order to facilitate their duties.
14. Every citizen and political party shall accept the results of elections proclaimed to have been free and fair by the competent national bodies as provided for in the competent Electoral Authorities or, challenge the result appropriately according to the law.

V. ELECTION OBSERVATION AND MONITORING BY THE OAU

We request the OAU to be fully engaged in the strengthening of the democratization process, particularly by observing and monitoring elections in our Member States, according to the following guidelines:
1. The observation and monitoring of elections shall be undertaken subject to a memorandum of understanding between the OAU General Secretariat and the host country in accordance with the principles enshrined in this Declaration and the laws of the host country.
2. In performing their obligations, the election observers or monitors shall be guided by detailed guidelines to be prepared by the General Secretariat drawing inspiration from the essential thrust of this declaration, the specific mandates and terms of reference determined by the particular case in question as well as the wider legal framework of the country staging elections. * * * * *

VI. ROLE AND MANDATE OF THE GENERAL SECRETARIAT

Further request the OAU Secretary General to take all necessary measures to ensure the implementation of this Declaration by undertaking, in particular, the following activities:

a. Strengthen its role in the observation and monitoring of elections within the legal framework of the host country, in accordance with the memorandum of understanding reached with that country;
b. Mobilize extra-budgetary funds to augment the General Secretariat resource base so as to facilitate the implementation of this Declaration;
c. Undertake a feasibility study on the establishment of a Democratization and Electoral Assistance Fund, to facilitate a successful implementation of this Declaration.
d. Undertake a feasibility study on the establishment within the OAU General Secretariat of a Democratization and Election Monitoring Unit that will also discharge issues on good governance;
e. Compile and maintain a roster of African Experts in the field of election observation and monitoring and democratization in general in order to deploy competent and professional observers and to avails itself of their services whenever necessary. Member States on their part are requested to assist by making the names of their experts available to the General Secretariat;
f. Work out better standards of procedures, preparations and treatment for personnel selected to serve on OAU observer missions.
g. Promote cooperation and work in partnership with African Organizations and International Organizations, as well as national institutions, nongovernmental Organizations and civil society groups involved in the elected monitoring and observation work.
h. Publish and make the General Secretariat Reports on the observation/monitoring of elections and other related activities open to all Member States and the public at large, as a means of consolidating electoral and democratic processes on the continent.

SOUTHERN AFRICA DEVELOPMENT COMMUNITY
PRINCIPLES AND GUIDELINES GOVERNING
DEMOCRATIC ELECTIONS
(Adopted at the SADC Summit, Mauritius, August 2004)

2. PRINCIPLES FOR CONDUCTING DEMOCRATIC ELECTIONS

2.1 SADC Member States shall adhere to the following principles in the conduct of democratic elections:
2.1.1 Full participation of the citizens in the political process;
2.1.2 Freedom of association;
2.1.3 Political tolerance;
2.1.4 Regular intervals for elections as provided for by the respective National Constitutions;
2.1.5 Equal opportunity for all political parties to access the state media;
2.1.6 Equal opportunity to exercise the right to vote and be voted for;
2.1.7 Independence of the Judiciary and impartiality of the electoral institutions; and
2.1.8 Voter education.

2.1.9 Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.
2.1.10 Challenge of the election results as provided for in the law of the land.

3. MANDATE AND CONSTITUTION OF THE SADC OBSERVERS MISSION

3.1 SADC Electoral Observation Missions (SEOM) have an observation role. The mandate of the Mission shall be based on the Treaty and the Protocol on Politics, Defence and Security Cooperation. * * * * *

4. GUIDELINES FOR THE OBSERVATION OF ELECTIONS

4.1 SADC Member States shall be guided by the following guidelines to determine the nature and scope of election observation:
4.1.1 Constitutional and legal guarantees of freedom and rights of the citizens;
4.1.2 Conducive environment for free, fair and peaceful elections;
4.1.3 Non-discrimination in the voters' registration;
4.1.4 Existence of updated and accessible voters roll;
4.1.5 Timely announcement of the election date;
4.1.6 Where applicable, funding of political parties must be transparent and based on agreed threshold in accordance with the laws of the land;
4.1.7 Polling Stations should be in neutral places;
4.1.8 Counting of the votes at polling stations * * * * *

7. RESPONSIBILITIES OF THE MEMBER STATE HOLDING ELECTIONS

7.1 Take necessary measures to ensure the scrupulous implementation of the above principles, in accordance with the constitutional processes of the country;
7.2 Establish where none exist, appropriate institutions where issues such as codes of conduct, citizenship, residency, age requirements for eligible voters and compilation of voters' registers, would be addressed;
7.3 Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections;
7.4 Safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders, during electoral processes as provided for under 2.1.5 above;
7.5 Take all necessary measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practices throughout the whole electoral process, in order to maintain peace and security;
7.6 Ensure the availability of adequate logistics and resources for carrying out democratic elections;
7.7 Ensure that adequate security is provided to all parties participating in elections;
7.8 Ensure the transparency and integrity of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and by accrediting national and/other observers/monitors;
7.9 Encourage the participation of women, disabled and youth in all aspects of the electoral process in accordance with the national laws;
7.10 Issuing invitation by the relevant Electoral institutions of the country in election to SADC 90 (ninety) days before the voting day in order to allow an adequate preparation for the deployment of the Electoral Observation Mission;
7.11 Ensure freedom of movement of the members of the SEOM within the host country;
7.12 Accreditation of the members of the SEOM as election observers on a non-discriminatory basis;
7.13 Allow the members of the SEOM to communicate freely with all competing political parties, candidates, other political associations and organisations, and civil society organizations;
7.14 Allow the members of the SEOM to communicate freely with voters except when the electoral law reasonably prescribes such communication in order to protect the secrecy of the vote;
7.15 Allow the members of the SEOM an unhindered access to and communicate freely with the media;
7.16 Allow the members of the SEOM to communicate with and have unimpeded access to the National Election Commission or appropriate electoral authority and all other election administrators;

7.17 Allow the members of the SEOM free access to all legislation and regulations governing the electoral process and environment;
7.18 Allow the members of the SEOM free access to all electoral registers or voters' roll;
7.19 Ensure that the members of the SEOM have an unimpeded and unrestricted access to all polling stations and counting centres.

APPENDIX D: Guidelines

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION)
CODE OF GOOD PRACTICE IN ELECTORAL MATTERS
GUIDELINES AND EXPLANATORY REPORT (2002)

[Guideline] 3.3. UUAn effective system of appeal

a. The appeal body in electoral matters should be either an electoral commission or a court. For elections to Parliament, an appeal to Parliament may be provided for in first instance. In any case, final appeal to a court must be possible.

b. The procedure must be simple and devoid of formalism, in particular concerning the admissibility of appeals.

c. The appeal procedure and, in particular, the powers and responsibilities of the various bodies should be clearly regulated by law, so as to avoid conflicts of jurisdiction (whether positive or negative). Neither the appellants nor the authorities should be able to choose the appeal body.

d. The appeal body must have authority in particular over such matters as the right to vote – including electoral registers – and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.

e. The appeal body must have authority to annul elections where irregularities may have affected the outcome. It must be possible to annul the entire election or merely the results for one constituency or one polling station. In the event of annulment, a new election must be called in the area concerned.

f. All candidates and all voters registered in the constituency concerned must be entitled to appeal. A reasonable quorum may be imposed for appeals by voters on the results of elections.

g. Time-limits for lodging and deciding appeals must be short (three to five days for each at first instance).

h. The applicant's right to a hearing involving both parties must be protected.

i. Where the appeal body is a higher electoral commission, it must be able *ex officio* to rectify or set aside decisions taken by lower electoral commissions.

[Explanatory note] 3.3. An effective system of appeal

92. If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

93. There are two possible solutions:

- appeals may be heard by the ordinary courts, a special court or the constitutional court;

- appeals may be heard by an electoral commission. There is much to be said for this latter system in that the commissions are highly specialised whereas the courts tend to be less experience with regard to electoral issues. As

a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.

94. Appeal to parliament, as the judge of its own election, is sometimes provided for but could result in political decisions. It is acceptable as a first instance in places where it is long established, but a judicial appeal should then be possible.

95. Appeal proceedings should be as brief as possible, in any case concerning decisions to be taken before the election. On this point, two pitfalls must be avoided: first, that appeal proceedings retard the electoral process, and second, that, due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections. In addition, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible, to guarantee the exercise of rights of defence and a reflected decision. A time limit of three to five days at first instance (both for lodging appeals and making rulings) seems reasonable for decisions to be taken before the elections. It is, however, permissible to grant a little more time to Supreme and Constitutional Courts for their rulings.

96. The procedure must also be simple, and providing voters with special appeal forms helps to make it so. It is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.

97. It is also vital that the appeal procedure, and especially the powers and responsibilities of the various bodies involved in it, should be clearly regulated by law, so as to avoid any positive or negative conflicts of jurisdiction. Neither the appellants nor the authorities should be able to choose the appeal body. The risk that successive bodies will refuse to give a decision is seriously increased where it is theoretically possible to appeal to either the courts or an electoral commission, or where the powers of different courts – e.g. the ordinary courts and the constitutional court – are not clearly differentiated.

Example:

Central Election Commission → Supreme Court

↑

Regional commission → Appeal Court

↑

Constituency Election commission

↑

Polling station (on election day)

98. Disputes relating to the electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of or in co-operation with the electoral commissions, can be dealt with by courts of first instance.

99. Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.

100. The appeal procedure should be of a judicial nature, in the sense that the right of the appellants to proceedings in which both parties are heard should be safeguarded.

101. The *powers* of appeal bodies are important too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e. affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e. annulment should not necessarily affect the whole country or constituency – indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes – annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.

102. Where higher-level commissions are appeal bodies, they should be able to rectify or annul *ex officio* the decisions of lower electoral commissions.

NDI, *Promoting Legal Frameworks for Democratic Elections,* 2008

COMPLAINT MECHANISMS

Goals: Ensure due process, equality before the law, equal protection of the law and effective remedies and promote public confidence in the impartiality and competence of administrative and judicial tribunals reviewing electoral complaints and challenges.

Criteria or Indicators - The Legal Framework:

Sets clear complaint procedures for all elements of the election process that address who has standing to file complaints or other legal actions, what administrative body or court has jurisdiction concerning the complaint or other legal action, what administrative law or judicial procedures apply, including rules for burdens of proof, presenting evidence and witnesses, the timelines for filing complaints or other legal actions, processing and ruling on them and for any appeals processes;

Provides for timely resolution of electoral related complaints and other legal actions;

Provides redress for electoral related complaints, including effective remedies and accountability for violators of electoral rights; and

Includes transparency mechanisms that promote public confidence in the process.

Questions to Consider:

Do the law and regulations set clear procedures for the filing of electoral complaints, challenges or other legal actions concerning all elements of the election process? (E.g., delimitation of electoral districts, party legal recognition, ballot qualification, voter registration, provisions for campaign financing, access to and treatment by the news media, campaigning activities, voting, counting and tabulation processes and determination of election outcomes?)

Do the laws and regulations provide that such legal actions will be determined by a competent judicial, administrative or legislative body (e.g., legislative bodies often address delimitation of election districts) and that all matters concerning fundamental rights will be provided judicial review?

Do the procedures set forth in the law and regulations address who has standing to file in each type of complaint, which body has jurisdiction, what administrative law or court procedures apply, including filing requirements, burdens of proof, rules of evidence and timelines for processing the legal action and for appeals procedures?

Are such matters also addressed in the administrative law code, civil code and/or criminal code?

a. If so, are the provisions consistent?

b. If they are inconsistent, which law controls?
c. Are the provisions consistent with constitutional requirements?
d. Do the provisions correspond to international principles concerning due process of law, equality before the law and equal protection of the law?

Do the provisions of the law and regulations provide effective remedies for each type of electoral complaint, challenge or other legal action?

a. Does the remedy correct the harm and prevent further harm in the matter addressed, including timeliness of the remedy?

Do the law and regulations provide for effective enforcement of remedies?

a. What body is charged with enforcement, and does it have adequate powers and resources to enforce the remedy?

Do the law and regulations address whether only individuals responsible for violations of the election law and regulations can be held accountable, or can leaders of political parties, candidates, leaders of groups that support or oppose referenda and other ballot initiatives, editors and publishers of news media, leaders of domestic nonpartisan election monitoring organizations be held liable for actions of their personnel and/or activists?

a. If liability can pass beyond individual actors, what penalties may be applied?
b. Are they consistent with constitutional requirements?
c. Are they consistent with international principles for freedom of association, freedom of expression, and requirements for due process of law?

Are there special administrative bodies within the EMB or other government agencies to process electoral complaints?

a. If so, how are persons appointed to the bodies?
b. Are there adequate safeguards to ensure an impartial and competent resolution of the complaints?

Are there particular courts charged with processing electoral related cases?

a. If so, how are the judges appointed or selected?
b. Are there adequate safeguards to ensure impartial and competent resolutions of the complaints?

Does the EMB have the power to independently investigate and take action concerning violations of the election law and regulations?

a. If so, what body within the EMB has such power, and do its procedures correspond to international principles for due process of law?

Does the EMB have a process by which citizens and electoral contestants can file complaints concerning actions by electoral officials or other governmental officials that violate electoral related rights?

a. If so, do the procedures provide administrative penalties for those officials who are determined to be responsible?
b. Are due process rights of such officials protected by the procedures?

Does the EMB have an internal process by which it can identify actions by electoral officials or other governmental officials that violate electoral related rights?

a. If so, do the procedures provide administrative penalties for those officials who are determined to be responsible?
b. Are due process rights of such officials protected by the procedures?

Do the law and regulations provide clear procedures for appeals of decisions by administrative, judicial or legislative bodies concerning electoral related complaints?

a. Do the procedures clearly set requirements for where appeals are to be filed, the timing for filing appeals and for processing them, the bases on which appeals bodies may reverse prior rulings, and procedures for further appeals, if any, for each type of complaint concerning all elements of the electoral process?

Must electoral complaint proceedings be open to the complainant and the public?

Must decisions on electoral complaints and appeals provide reasons for the decisions?
   a. Must decisions on electoral complaints and appeals be in writing?
   b. Must decisions be published?

Are written complaints and answers to them part of a public record?

Do the law and regulations clearly specify under which conditions a recount or re-election may be ordered?
   a. What body has jurisdiction concerning recounts and re-elections?
   b. Are clear procedures set forth concerning standing, burdens of proof, rules of evidence and timelines for processing such legal challenges?
   c. Do the law and regulations specify clear procedures for conducting recounts and re-elections when they are ordered?
   d. Do the procedures for recounts and re-elections provide for the presence of representatives of political parties, candidates and groups supporting or opposing referenda and/or other ballot initiatives affected by recounts or re-elections, and do they provide for nonpartisan election monitors, media and international observers?

Do the constitution, law and regulations provide the specific conditions under which an election may be cancelled or postponed, in whole or in part?
   a. What body has the power to order the cancellation or postponement?
   b. Is there a procedure to appeal or review that decision?
   c. Do the provisions correspond to international principles concerning states of emergency and concerning interruptions of democratic processes?

Do the law and regulations define electoral related crimes?
   a. If so, are the provisions consistent with the criminal code?
   b. If there are inconsistencies, which law controls?
   c. What body is responsible for prosecuting electoral related crimes?
   d. Do the procedures safeguard due process rights of persons accused in such proceedings?

Do the law or regulations provide for mediation or arbitration or other non-judicial means of dispute resolution?
   a. If so, how is the process initiated?
   b. Who or what body presides over the process?
   c. What types of matters can the process consider?
   d. What types of dispute resolution steps can the process provide?
   e. Is a public record of the proceedings provided?

Is there a voluntary code of conduct for the political parties, candidates and other electoral contestants?
   a. Does the code of conduct provide a mechanism for electoral contestants to raise grievances concerning violations of the code, the law and regulations and/or other matters?
   b. If yes, how is the grievance mechanism triggered, and who facilitates or presides over it?
   c. Does the grievance mechanism have character of facilitated dialogue, mediation or other means for resolving disputes or grievances?
   d. Is a public record of the process provided?

OSCE/ODIHR
Existing Commitments for Democratic Elections In OSCE Participating States, 2003

10. Complaints and Appeals

10.3 Election contestants must have the ability to submit complaints concerning all aspects of election operations, to have their complaints heard by the competent administrative or judicial body, and to appeal to the relevant court.

Voters shall have the ability to complain and appeal concerning a violation of their suffrage rights, including voter registration.

10.4 Election complaints and appeals should be subject to an expedited process of consideration that permits them to be resolved in a timely and effective manner. The complaints and appeals process should not permit repetitive appeals that could prevent timely announcement of the results.

10.5 All aspects of the consideration of complaints by election bodies and appeals to the courts must be transparent. The results and reasons for decisions on complaints and appeals must be formally adopted, issued in written form, and announced publicly. The public record of election complaints and appeals should include sufficient detail about the complaint, its consideration, and resolution to provide a full understanding of the circumstances and issues involved.

(References to sources omitted.)

OSCE/ODIHR, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System,* 2000

Generic Guidelines for Election Dispute Resolution

A. General principles

1. Every individual and every political party has the right to the protection of the law and to a remedy for violations of their political and electoral rights.
2. Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to address their grievance within a competent jurisdiction.
3. Where a violation has been found, the competent authority within the appropriate jurisdiction should provide for redress in a prompt manner within the timeframe of the electoral process.
4. The effectiveness, impartiality and independence of the judiciary, including the office of the prosecutor, and that of electoral bodies, is a pre-condition for the fair, effective and impartial handling of election-related disputes in conformity with the commonly accepted international standards on elections and the rule of law.
5. The decisions made by independent and impartial authorities which are responsible for supervising the conduct of elections and other public consultations, including the preparation and periodic revision of the electoral roll, shall be subject to appeal with an independent and impartial judicial authority.
6. The electoral law shall secure a clear demarcation of the respective jurisdictions of the courts and the electoral bodies so as to exclude the possibility of courts or electoral bodies being served with repeated or concurrent complaints on the same matters.

B. Hierarchical appellate procedure

7. The electoral law should set out a clear hierarchical appellate procedure for the handling of election-related complaints and appeals, in accordance with the framework legislation governing the judiciary and civil proceedings.
8. The electoral law should provide for at least one appeal procedure to ensure that a higher court or electoral body reviews all cases. The law should clarify which decisions are final. When a decision is reviewable, it should be stated which court or electoral body it may be appealed to.
9. No pre-requisite for a review by an electoral body should be required prior to the admissibility of a challenge in court and a court challenge should always be available.
10. For all types of election disputes, the decisions of the higher electoral body should be reviewable by the highest body of the judiciary whose ruling should then be final.

11. If the law allows the decisions of the highest electoral body to be reviewed by lower level courts, this should be stated as an exception to the general rule and be strictly defined in the law. The court to which such decisions may be appealed should be unambiguously identified in the law.

12. The electoral law should stipulate which decisions are final and binding. The highest body of the judiciary or the constitutional court should not be entitled or compelled to release an election-related case to a lower level court.

C. Accessibility and transparency

13. The complaints procedure should be transparent and easily understandable. Appropriate forms should be readily available for filing complaints and appeals in the language(s) used in the country. Election officials should be acquainted with the rules and procedures for filing complaints as well as with the standards governing election disputes and relating to the scope of their involvement in these matters. Finally, civic education campaigns should include basic information on the complaints procedure.
14. The relevant authorities should take the necessary policy and institutional steps to ensure that those with election-related responsibilities are trained on election dispute rules and procedures in accordance with the election law of the country and international standards.
15. The complaints procedure should be free of unnecessary obstacles, especially as regards the cost of bringing an action to court. Wherever possible the complaints procedure should be accessible without charge to the complainant. Where costs are unavoidable, they should be kept to a minimum so as not to deter citizens from bringing a complaint.
16. An effective, fair and transparent complaints procedure requires that potential complainants be informed of the means by which the complaint should be made, which body it will be considered by and the time frame for its resolution. In addition, complainants should be aware of the type and amount of evidence needed to sustain their allegations with sufficient factual and legal materials.
17. Decisions taken by the electoral bodies, in particular those related to voter and candidate registration, should as a rule indicate the remedies available. [Ftn: This principle is in line with the broader principle set out in paragraph 5.10 of the Document of the Copenhagen Meeting of the CSCE, 29 June 1990.]
18. Mechanisms for resolving election disputes should be governed by a coherent body of legal norms, preferably in a distinct chapter or section of the law. The terms, wording and legal scope of the election dispute provisions on the different subject matters should be mutually uniform so as to secure their consistency and completeness. The language used throughout the law should be clear and consistent so as to eliminate arbitrary interpretation.

D. Promptness of the proceedings: time limits and deadlines

19. Considering that the conduct of an election requires prompt decisions and actions within a pre-determined timeframe, the procedures governing election disputes should differ from those provided for general civil disputes. This could be reflected in shorter deadlines and a single appeal process, which can be justified so long as sufficient time is provided to file complaints and appeals.
20. When setting time limits a balance should be struck between imperatives relating to the administration of justice in a timely manner within the electoral timeframe and the right to challenge decisions, actions or omissions of the electoral bodies in the fulfillment of their mandate.
21. In particular, time-limits should allow courts and electoral bodies sufficient time to process, review and make decisions upon the complaints and appeals submitted to them. The fact that some complaints or appeals, especially those related to election funding or campaigning, may require further investigation should also be taken into consideration.
22. For each phase or facet of the electoral process, the electoral law should expressly and systematically set deadlines after which applications, objections, complaints and appeals may no longer be admitted by courts and electoral bodies alike. Specific time-limits may be prescribed for complaints and appeals on the voter registers or the validation of candidates. [Ftn: This principle is in line with the broader principle set out in paragraph 5.10 of the Document of the Copenhagen Meeting of the CSCE, 29 June 1990.]
23. For each phase or facet of the electoral process (such as voter registration or the validity of the candidatures), the electoral law should expressly and systematically set deadlines for filing complaints and appeals by which either the courts or the electoral bodies must reach a decision. Specific time-limits departing from the general rules may be prescribed for complaints and appeals pertaining to the voter registers or the validation of candidates.
24. In the case of violations of an allegedly criminal nature, particular care should be taken to conduct an objective and impartial investigation by the responsible authorities in the most expedient manner possible.

E. Voter registration

25. All citizens should be entitled to file complaints and appeals on the accuracy of the register of voters.
26. The electoral law should set a deadline after which applications, objections or complaints to the voter register may no longer be admissible. The law should not permit the accuracy of the voter register to be challenged right up to the eve of an election. This would ensure that electoral bodies and the judiciary are not diverted from urgent complaints and appeals related to the voting and counting process and drawn into resolving disputes that could have been addressed earlier.
27. The electoral law should set out an exclusive venue for filing complaints and appeals regarding the accuracy of the voter register or, where applicable, the electoral cards. The complaints procedure should be designed so that courts are not unnecessarily burdened with minor disputes.

F. Validity of candidatures

28. A deadline should be set by the electoral law, after which the validity of candidatures may no longer be challenged. The time-frame for the verification process of the candidatures should be adjusted accordingly.
29. The electoral law should establish the procedure for the verification of signatures collected in support of candidates.

G. Election results

30. The electoral law should provide a mechanism for the invalidation of election results. In both parliamentary and presidential elections, the decision to partially or fully invalidate election results should be assigned to the highest electoral body. This decision should be reviewable by the highest body of the judiciary or the Constitutional Court.
31. The electoral law should specify whether the entities vested with the power to invalidate the election results can take action without being presented with a formal complaint and whether their decisions should be made on a polling-station-by-polling-station basis. It should be clear from the law whether a general invalidation mechanism applies or a restricted one, depending upon the fulfillment of special conditions as regards evidentiary matters and the admissibility of complaints and appeals.
32. Both the preliminary and the final results should be subject to challenges. Therefore the electoral law should differentiate between the procedures, deadlines and time-limits applicable to each phase. The principles below are based on this assumption.
33. Where lower level electoral bodies are mandated to publish the preliminary results of the election, they should not be entitled to declare the results void but should be able to make non-binding recommendations to that purpose to the highest electoral body.
34. The final results should not be published before all challenges of the preliminary results have been decided upon by the highest body of the judiciary or the constitutional court.
35. Challenges pertaining to the preliminary results of the election within the mandate of lower level electoral bodies should be filed with the highest electoral body so as to secure a coherent and hierarchical procedure. The time-limit for filing and deciding upon such challenges should not exceed one month, so as to enable the publication of the final election results no later than this deadline (taking into account the deadline for publication of the preliminary results).
36. All complaints pertaining to the overall final results or the declaration of election results to be partially or fully void should be filed with the highest body of the judiciary, the Constitutional Court or with the court where the highest electoral body is located. In the latter case, the ruling delivered by the court may be further appealed to the highest body of the judiciary.
37. In accordance with the procedural time limits prescribed by law for publication of the preliminary and final results and for filing and deciding upon related challenges, all complaints and appeals should be determined once and for all within a maximum of two months.
38. The electoral law should clearly state the grounds upon which the election results may be partially or fully invalidated. A mere reference to the constitution should not be held as providing a sufficient basis for adjudicating such cases. Also, the law should specify the amount and type of evidence required for a review of the results. In the absence of clear and unambiguous standards of evidence, the determination of what evidence would satisfy these standards could vary on a scale that may undermine the whole process.

39. Where a polling-station-by-polling-station resolution mechanism applies, the invalidation of voting in a particular polling station should be considered by means of an evaluation of the way the alleged irregularities or violations have affected the outcome of the election.

H. Admissibility of complaints and appeals

40. The electoral law should lay down the grounds upon which complaints and appeals are admissible. Any complainant should be duly notified in writing of the decision as to whether his/her petition was considered admissible or not, with reasons given.
41. Grounds for appeal should be strictly defined in the law, preferably for each phase involving an election dispute mechanism, so that courts and electoral bodies are not burdened with irrelevant or frivolous challenges.
42. The parties authorized to bring election-related complaints or appeals before a court or an electoral body should be strictly identified by the electoral law.
43. Time-limits and procedures governing the admissibility of complaints and appeals should be designed so as to preserve the right of aggrieved parties to seek redress.

I. Enforcement

44. Bodies with jurisdiction over election disputes should be vested with the power to enforce their decisions within a reasonable time. Electoral legislation and/or framework legislation governing the administration of justice should expressly indicate the legal consequences associated with the decisions taken by the various bodies which have jurisdiction over election disputes. It should also specify unambiguously the legal sanctions which can be imposed and enforced, including fines, imprisonment, suspension or disqualification of a candidate.

J. Consistency in the interpretation and application of election dispute provisions

45. Election laws should expressly bestow upon the highest body of the electoral administration the authority to pass regulations or instructions aimed at securing a uniform interpretation and application of the election law by electoral bodies.
46. The highest body of the judiciary should ensure that all election-related legislation, including framework legislation (such as Civil and Penal Codes, as well as Criminal and Civil Procedure Codes) which is generally considered as having primacy over other legislation, is not flawed with discrepancies, loopholes or gaps.
47. The highest body of the judiciary should also take the necessary steps to ensure the constitution of a coherent set of governing judicial precedents and that judges be acquainted with these precedents and the reasoning behind them.
48. Well in advance of the elections, the highest entity within the hierarchy of the election commissions and the highest body of the judiciary responsible for issuing final and legally binding decisions on election-related cases, should jointly develop instructions, guidelines or resolutions on the various matters involved in election disputes. Where a dual complaint and appeals process applies, both institutions should clarify their respective areas of competence and those of the lower level courts and election commissions. They may also play a crucial role in fostering reforms of the electoral legal framework or judicial practices and standards in the consideration of election-related cases. Conflicts between the institutions or mutual misunderstandings may seriously undermine the uniform interpretation and application of election laws and regulations at lower levels and could threaten the certainty of the law as well as confidence in the electoral process.

K. Electoral offences, irregularities and violations of the electoral law

49. The electoral law should enumerate in a separate paragraph or article the categories of irregularities and infractions together with their possible consequences for the electoral process. A mere reference to violation of the law or the constitution should be avoided.
50. The electoral law should further specify the standards by which the impact of these irregularities or violations upon the electoral process should be determined.
51. Electoral offences which entail a criminal prosecution should be the subject of a separate chapter in the criminal code and preferably be referred to in the election law. Due attention should be given to the consistency of the provisions in the election law and in the criminal code and criminal procedural code so as to avoid any confusion over the legal consequences associated with them.

L. Prosecution

52. Cases which give rise to criminal prosecution should be conducted through the venues and following the rules and standards prescribed in the law governing criminal proceedings. This does not preclude the determination by either the courts or the election commissions of the impact of alleged violations on the electoral process.
53. The laws should clearly set forth the standards for the institution of criminal proceedings in election-related cases. Specifically, the laws should indicate the standards to be used by prosecutors in deciding whether there is sufficient evidence to prosecute. These standards should be established by the election law and/or by criminal legislation. All laws and other legally binding statutes, which govern this particular issue, should be unambiguously cross-referenced so as to ensure uniformity and consistency.
54. The laws should provide for a clear delineation of prosecutorial discretion. In particular, the terminology used to define this discretion should be strictly determined by law. Where the law limits this discretion, the limitations should not be left unspecified. The grounds for not prosecuting an electoral offence should be clearly stated and not merely referred to as the interests of the state or society. The provisions which set out limitations on prosecutorial discretion should not conflict with other provisions. Finally, the law should provide standards for the exercise of prosecutorial discretion.